



Report

**Investigatory powers and procedural safeguards:
Improving OLAF's legislative framework through
a comparison with other EU law enforcement authorities
(ECN/ESMA/ECB)**

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1. INTRODUCTION

M. Luchtman

1.1 INTRODUCTION – GOALS AND SET-UP OF THIS PROJECT

The *Office de Lutte Anti-Fraude* (OLAF) is a key player in the EU's anti-fraud policy. It is the authority entrusted with the task of carrying out administrative investigations to combat illegal activity which adversely affects the EU's financial interests, as well as investigating serious misconduct by EU officials, other staff and/or members of EU institutions. OLAF has both operational as well as non-operational tasks. This project focuses on OLAF's operational framework with respect to investigative actions. It addresses 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 does so by comparing the OLAF framework with other bodies of EU law with similar law enforcement tasks. Such a comparison will enable an analysis to be made of the similarities and differences in the respective legislative frameworks of these bodies, also as far as the interaction with their national partners is concerned.¹

The problematic position of OLAF in the area of the gathering of information is well documented. Shortly after the Commission published a communication thereon,² and in parallel to the introduction of the new Regulation 883/2013, Ecorys also published a study on how to strengthen the framework for the protection of the EU's financial interests.³ Those studies, together with a number of scientific publications,⁴ identified a number of problems.

First of all, it appears that there is no coherent framework for cooperation between OLAF and its national partners, also because the exact tasks and competences of the national authorities differ per Member State.⁵ OLAF operates on the basis of a patchwork of powers, depending on the various national jurisdictions, but also on the basis of the different PIF policy areas (VAT,

1 See also Kuhl in K. Ligeti & V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (2017), Oxford: Hart.

2 Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293.

3 Ecorys, *Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests*, JUST/A4/2011/EVAL/01 (2013), Brussels.

4 Cf. J.F.H. Inghelram, *Legal and institutional aspects of the European Anti-Fraud Office (OLAF)* (2011), Groningen: Europa Law Publishers; Katalin Ligeti and Michele Simonato, 'Multidisciplinary Investigations into Offences Against the Financial Interests of the EU,' in F. Galli & A. Weyembergh (eds.), *Editions de l'Université de Bruxelles 2014*; M. Luchtman & M. Wasmeier, in M. Scholten & M. Luchtman, *Law Enforcement by EU Authorities: Political and judicial accountability in shared enforcement* (2017), Cheltenham: Edward Elgar Publishing [forthcoming].

5 Ecorys 2013, p. 19-20; Ligeti & Simonato 2014.

customs duties; agriculture, structural funds, human aid, etc.).⁶ This seriously hampers OLAF in the performance of its operational mandate. The scope of its powers are unclear and fragmented across territorial and functional lines; instruments for enforcing cooperation are limited or even absent, particularly in the context of external investigations.

In addition to this, the standards for protecting fundamental rights are different between the administrative and judicial proceedings in which OLAF is often involved. Here, too, we see differentiations per Member State. OLAF's position is particularly complicated, because it operates at the interface of criminal and administrative law.⁷ In fact, many provisions in its institutional framework have been designed to facilitate the smooth interaction between these fields of law. The practical results are, however, very different. The Ecorys study notes, for instance, that '[d]efence rights in administrative proceedings are less specified than in criminal proceedings and the competent agencies are given more flexibility to preserve these rights. The small amount of attention paid to procedural guarantees in administrative investigations is characteristic not only for the national, but also for the supranational level. Moreover, these unclear rules on procedural safeguards in administrative investigations may affect the use of information and the admissibility of evidence gathered by the authorities involved in a fraud case.'⁸

Although OLAF is a vital part of the EU's strategy to protect its financial interests, the aforementioned sources reveal that a level playing field for conducting investigations is lacking. This situation pertains to the investigative powers and the way that they can be enforced in cases of non-cooperation, but also to the applicable safeguards and remedies for individuals. OLAF, therefore, while entrusted with the task of conducting administrative investigations at the European level, operates on the basis of a framework that often refers back to national law when it comes to its investigative powers and safeguards. That inherently means that in order to assess the full scope and competences of OLAF's investigatory powers and procedural safeguards, an analysis of the interaction between EU and national law is essential.

1.2 THIS PROJECT'S GOALS AND COMPARATIVE APPROACH

1.2.1 Goals

This project was born out of the idea of comparing OLAF's legal framework with other authorities which also possess such a European mandate and to see if they face similar problems and, if so, how they deal with them. The number of such European actors with enforcement tasks is increasing as we speak.⁹ The comparison in this project includes the area of financial services (banking law, and more particularly cooperation within the Single Supervisory Mechanism/SSM: ECB, and the supervision of credit rating agencies/trade repositories: ESMA), as well as EU competition law (European Commission/DG Comp). These authorities are comparable to OLAF for the following reasons:

⁶ Ecorys 2013.

⁷ Luchtman & Wasmeier 2017.

⁸ Ecorys 2013, p. 36; see also O.J.D.M.L. Jansen & P.M. Langbroek (eds.), *Defence rights during administrative investigations. A comparative study into defence rights during administrative investigations against EU fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland* (2007), Antwerp: Intersentia; S. Gleß and H.E. Zeitler, 'Fair Trial Rights and the European Community's Fight Against Fraud', (2001) *European Law Review*, no. 2, pp. 219-237.

⁹ For a comprehensive analysis, see M. Scholten and M. Luchtman, *Law Enforcement by EU Authorities: Political and Judicial Accountability in Shared Enforcement* (2017), Cheltenham: EE [forthcoming].

- 1) they are administrative authorities that are attributed tasks in relation to the identification and investigation of infringements of EU law and, therefore, have clear ties to punitive law enforcement (administrative and/or criminal law);
- 2) these authorities are capable of operating all over the European Union, yet
- 3) they operate on the basis of a framework that comprises both the EU and the national legal orders, both with respect to the investigative powers and the procedural safeguards.

Of course, there are also differences between these authorities and OLAF. Two differences must be mentioned right from the beginning. First of all, ECB and ESMA have quite a different relationship with the actors under their investigation than DG Comp and certainly OLAF. As financial supervisory authorities, their core task is the supervision of branches of the financial markets. The monitoring of the operations of the supervised entities is a day-to-day task. As a consequence, the entities they supervise are well known to them (because they need ECB or ESMA authorizations to become active) and constantly provide information to these authorities' 'going concern'. This has two implications: that the information flows freely from the supervised entity to the EU regulator, and that the entities have a direct interest in cooperation (because if they do not, they will face serious consequences). The situation is different for DG Comp and certainly OLAF. The latter has no tasks in the area of market supervision.¹⁰ The (legal) persons under investigation are not necessarily known. Moreover, there is generally no incentive to cooperate. Rather, the contrary appears to be true.

A second difference could be that OLAF operates in a field that is, by definition, closely related to criminal justice in a strict sense (fraud and corruption by both legal and natural persons). That implies that the office – though operating under an administrative law signature – constantly needs to keep an eye on the interaction with the criminal justice systems of the Member States. That, too, may be a reason to cast doubt on the 'comparability' of the authorities in this project.

Although these factors certainly need to be taken into account, they do not make a comparison less suitable or valuable. The fact remains, after all, that ECB, ESMA and DG Comp are also entrusted with tasks in the sphere of law enforcement, a concept which is defined for the purposes of this report as the investigating and sanctioning of (alleged) violations of substantive norms of EU law.¹¹ The sanctioning stage includes the punitive sanctioning of an administrative and criminal law nature. As is apparent from the case law of the Court of Justice and the European Court of Human Rights, the right to a fair trial (the criminal law limb of that right) applies to both types of proceedings. This means that also ECB, ESMA and certainly DG Comp have to deal with the interaction between administrative and criminal law means of enforcement. Moreover, although particularly ECB and ESMA have been attributed exclusive supervisory and enforcement tasks, the national dimension of their legal framework cannot be easily overlooked. These authorities, like DG Comp and OLAF, need their national partners for a variety of reasons, including knowledge of local habits and customs, practical support and, last but not least, the availability of coercive powers – i.e. the power to open doors, if necessary – in cases of non-cooperation. Moreover, there is the possibility of EU investigations running parallel to or before

¹⁰ This also applies to DG Comp; see, however, Art. 17 Reg. 1/2003.

¹¹ J. Vervaele, 'Shared Governance and Enforcement of European Law: From Comitology to a Multi-level Agency Structure?' in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (1999), Oxford: Hart Publishing, p. 131.

national criminal proceedings *sensu stricto*. Also to that extent, they may face problems that are similar to those of OLAF.

The analysis of the identified EU enforcement authorities will therefore offer explanations for the following sub-research questions that are so relevant to OLAF:

- I. What powers do these authorities have at their disposal (and, possibly, explain why some authorities have less or more powers than the others), and at which level (EU or national);
- II. How are fundamental rights and procedural safeguards integrated into these systems and, if so, at which level (EU or national);
- III. How has judicial control been organized;
- IV. Whether and how the design of these powers anticipates a possible subsequent use in criminal proceedings, and
- V. Whether and how pending criminal investigations hamper the functioning of the investigations by the EU authorities.

Because the interaction with the legal orders of the Member States is tremendously important, this project also analyses how the EU legal framework of the respective EU authorities interacts with the national laws of six national jurisdictions in light of the research questions. The analyses offered by the six national reports will reveal potential differences in how the EU rules have been implemented at the national level, even though the gathered information may subsequently be used in another Member State (for instance as evidence). On the basis of an optimal geographical spread and diverging national approaches to the interaction between criminal and administrative law, the following Member States have been selected: the Netherlands, the United Kingdom, Germany, France, Italy, and Poland.

1.2.2 What this project will do

The methods employed in this project are of a legal comparative nature in a double sense. They include the interactions between the EU legal order and six national legal orders in four different EU policy areas. The four policy areas are consequently compared. The focus is on the gathering of information during the investigative stage and, more in particular, on the following four types of investigative measures:

1. The interviewing of persons (which includes oral/written questioning) and production orders;
2. The monitoring of banking accounts (live/real time);
3. The right to enter premises ('droit de visite'), including searches, seizure, sealing, taking samples and forensic images;
4. Access to traffic data and recordings of telecommunications.

Any analysis of the investigatory powers also needs to take into account the relevant rule of law standards, including fundamental rights standards, such as the right to privacy, to an effective remedy and to a fair trial. This is why the following safeguards – which are of particular importance during the initial stages of proceedings – have been included in the overall design, but only to the extent that they determine the normative framework for the aforementioned investigative acts:

- a) The privilege against self-incrimination, as far as is relevant for the interviewing of persons and the production orders. The aim is to identify if and how the privilege has been incorporated into the normative framework for interviews and production orders in the setting of (national assistance to) EU authorities' investigations (possible 'Miranda warnings', the right to remain silent, the right to refuse the production of documents).¹² In addition, the goal is to identify to what extent (the possibility of) criminal proceedings at the national level in parallel with the investigations by the four EU authorities affect the duty to cooperate in the investigations by the EU authorities. This project does not deal with the scope of the privilege as such, nor with how and when it is breached. Neither does this project deal with, for instance, the later drawing of inferences from the defendant remaining silent during investigations.
- b) The right to have access to a lawyer, but only in relation to the questioning of persons and the 'droit de visite'. This project is interested in how this safeguard has been incorporated in the design of investigative measures, particularly questioning and entering premises. The focus is not on what happens when this framework is disregarded, which may for instance lead to the exclusion of evidence, etc.
- c) In addition to the foregoing two safeguards, it was discussed during the first meeting in Utrecht in April 2016 whether or not it would be possible to exclude legal professional privilege/LPP (lawyers) and professional secrecy (journalists, banks, accountants, tax advisers) from the scope of this project. This project also pays attention to these safeguards where they are relevant to the administrative law investigations of the EU authorities.

1.2.3 What this project will not do

It is important to stress what this project will not do. Its focus is on the gathering of information by EU authorities and on the cooperation between the EU and national authorities in doing so. That means that this project does not deal with the sharing of information that is already available to the national partners with the EU authorities,¹³ or the follow-up by national authorities, including – particularly – the use as evidence in criminal proceedings.

The four authorities have in common that they all operate under an administrative law framework and, in principle, have the power to perform investigations on the joint territories of the participating Member States. Their national counterparts will normally also operate under an administrative law framework (banking authorities, competition authorities, members of the AFCOS network). Yet, as said, these tasks can also have effects on criminal justice (in a wide sense), because 1) the EU authorities have the power to impose punitive sanctions, or 2) because their investigations are relevant to punitive law enforcement (criminal or administrative) at the national level.

In light of this, it is necessary to point out that this project does not deal with the relationship between OLAF and the future European Public Prosecutor's Office, nor with the national criminal law dimension *sensu stricto* of the four policy areas of this study (PIF, banking regulations, credit rating agencies and TRs, and competition law). Rather, the project team has analysed how the national partners of the EU authorities assist the latter in their tasks (in terms of powers,

¹² Some of the four authorities have the power to impose punitive sanctions. Others, for instance OLAF, have included these safeguards in their framework (cf. Art. 9 Reg. 883/2013).

¹³ This topic is the subject of another project, funded under Hercule III, by Utrecht University, and is currently up and running in 2017-2018 (led by Dr. M. Simonato, Prof. Dr. M. Luchtman and Prof. Dr. J. Vervaele).

safeguards, judicial protection). But only where administrative investigations interfere with criminal proceedings, or *vice versa*, that is of concern to this project.

Finally, it is worth mentioning that, as Regulation 883/2013 is currently being revised, there was no need to make specific recommendations for the existing OLAF framework. Some general strategies have nonetheless been indicated at the end of this report.

1.3 THIS PROJECT'S DESIGN AND WORK PACKAGES

It is apparent from the above that, in order to realize the core ambition of improving OLAF's investigatory framework, input is needed on the following issues:

- An analysis of the legislative framework of the EU bodies at the EU level, in terms of the investigatory powers, safeguards and remedies (chapter 2);
- An analysis of how the EU legal frameworks are integrated into and interact with the six national legal orders (investigatory powers, safeguards and remedies; chapters 3-8);
- A transversal report on judicial protection (chapter 9);
- A comparison of the four different types of EU frameworks, and their interaction with the national legal orders (investigatory powers, safeguards and remedies; chapter 10);
- The formulation of the overall findings and possible strategies for improving OLAF's framework, both in terms of effective law enforcement and legal protection (chapter 11).

As the powers of OLAF, DG Comp, ECB and ESMA (interviews & production orders, on-site inspections, traffic data) often refer back to national law and therefore urge the need for swift cooperation with national authorities, the purpose of the national reports is to identify the partners of the EU authorities at the national level and their tasks and, consequently, to analyze, in light of the research questions above, the investigative powers that they have and the ways in which the defence rights can be implemented (if at all). The national reports should thus be able to offer a comparison at the national level of how the national authorities are able to cooperate with their EU counterparts in the exercise of their investigative tasks. The sub-questions to be answered by the national reports are:

1. What powers do the national partners of the four EU authorities have at their disposal (and, possibly, why they were denied others);
2. How are fundamental rights and procedural safeguards integrated into these systems and, if so, at which level (national or European?);
3. How has judicial control been effectuated;
4. To which extent do parallel punitive proceedings have an influence on cooperation duties?

The issue of judicial protection is key to all areas. This is why a separate report is dedicated to this topic. The purpose of the transversal report on judicial protection is to make a comparison of how judicial protection is organized in cases of the aforementioned investigative acts at the EU level. It deals with the procedural issues, but also with the applicable fundamental rights framework.

The overall comparative report, based on the national and transversal reports, provides a comparison of how the interaction between national and EU law works, by comparing this

interaction in six legal orders in light of the available powers, the applicable safeguards and the available remedies. It will identify the (gaps in the) level playing field in the four different areas of EU law.

A final analysis and summary of our main findings is included at the end of this report. This part of the report also includes an analysis of the possible strategies to overcome deficiencies in OLAF's legal framework.

Regarding the collection of the relevant data, all chapters of this report contain a legal analysis of the relevant sources (EU/national legislation, case law, doctrine) in light of the central research questions and based on the format that was developed and refined during the two expert meetings in Utrecht in April and November 2016. As the focus of the project is also on the law in action, all rapporteurs have interviewed representatives of the relevant actors, at the EU and national level (the four EU authorities and their national partners). A list of the persons interviewed has been included in Annex II to this report. Some of the respondents only wanted to cooperate on the basis of anonymity.

This project started on 8 March 2016. It has been carried out by an international team of experts. The reports on the EU framework, the legal order of the Netherlands, as well as the comparative analysis and overall conclusions have been prepared by the staff of Utrecht University.¹⁴ The national reports on Germany, Italy, France and Poland have been prepared by experts from those legal orders.¹⁵ The transversal report was written by experts from the University of Luxembourg.¹⁶ The overall composition of the project team is included in Annex III.

In order to enhance the internal consistency of the project, the project team convened in Utrecht on two occasions. The first meeting, on 14-15 April 2016, was dedicated to the design of the templates for the EU, national and transversal reports.¹⁷ On the basis of the discussions during those two days, a final template (Annex I) was designed which was consequently used by all rapporteurs for the preparation of a first draft of their reports.

On 10-11 November 2016, a second meeting of the entire project team was organized. That meeting was used to discuss the provisional results of the national reports, the EU report and the report on judicial protection. Representatives of ECB,¹⁸ ESMA¹⁹ and DG Comp²⁰ were present during the meeting and provided input on the law in action from the perspective of their organizations. On the basis of this meeting, the reports were finalized. The final versions of the reports were consequently used by the authors of the comparative analysis to write the comparative report and overall conclusions.²¹ The work of the project team was concluded on 17-04-2017.

14 Chapter 2 (Dr. M. Scholten & Dr. M. Simonato); chapter 4 (Ms. J. Graat, LL.M.); chapters 10 and 11 (Prof. Dr. M. Luchtman & Prof. Dr. J. Vervaele).

15 Respectively by Prof. Dr. M. Böse and Dr. A. Schneider (German report – chapter 3), Prof. S. Allegrezza (Italian report – chapter 5), Prof. Dr. P. Alldridge (UK report – chapter 6), Dr. C. Nowak and Dr. M. Błachucki (Polish report – chapter 7), and Prof. Dr. J. Tricot (French report – chapter 8).

16 Prof. Dr. K. Ligeti and Dr. G. Robinson (chapter 9).

17 Representatives of OLAF during the meeting were Ms. C. Ullrich and Ms. M. Janda.

18 Mr. J. Viguer Pont.

19 Mr. C. Mayock.

20 Mr. J. Klein.

21 Prof. Dr. M. Luchtman and Prof. Dr. J. Vervaele (chapters 10 and 11).

2. EU REPORT

M. Scholten & M. Simonato

2.1 OVERVIEW OF TASKS AND ARCHITECTURE OF EU AUTHORITIES (DG COMPETITION, ECB, ESMA AND OLAF)

2.1.1 Tasks of the four EU authorities: a general overview

2.1.1.1 DG Comp

The mandate of the EU Commission (DG COMP) covers the four traditional pillars of competition law: cartels and other agreements, abuse of a dominant position, mergers, and state aid. The most relevant investigative powers are provided in the field of antitrust, i.e. the agreements between undertakings (Art. 101 TFEU) and the abuse of a dominant position (Art. 102 TFEU). Art. 103 TFEU is the legal basis for enforcement rules. These rules are provided by Regulation 1/2003 (which replaced Regulation 17/62); they are further implemented by Commission Regulation 773/2004 (the ‘Implementing Regulation’, consolidated version of August 2015). Clarifications are provided by the Commission notice on best practices for the conduct of proceedings of 2011 (Best practices); as well as by the Explanatory note of the Commission on inspection pursuant to Art. 20(4) of September 2015 (Explanatory note).

DG COMP also has sanctioning powers in relation to these areas. The procedure before the Commission can be outlined as follows:

- (1) *Investigations*. DG COMP conducts an investigation either (a) into a particular type of agreement; or (b) into a particular sector of the economy (‘sector inquiries’).¹
- (2) *Statement of objections*. When DG COMP believes that an infringement has occurred, it informs the parties in writing of the objections against them;
- (3) *Access to the file*. The parties have the (limited) right to access the Commission’s file;
- (4) *Written submissions*. The parties can make written submissions;
- (5) *Hearing*. It is not automatic, but must be requested; since 1982 hearings are conducted by a hearing officer ‘in full independence’;²
- (6) *Commission’s decision*. DG COMP makes a decision and imposes ‘*behavioural or structural remedies*’ which are proportionate to the infringement committed and are necessary to bring the infringement effectively to an end;
- (7) *Fines*. DG COMP may also impose fines in cases of intentional or negligent infringements. Art. 23(5) of Reg. 1/2003 clearly states that fines ‘shall not be of a criminal law nature’;

1 The most recent sector inquiry regards e-commerce: <http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html>.

2 See the 2004 Implementing regulation and the Decision of the President of the EU Commission 2011/695/EU of 13 October 2011.

(8) *Judicial Review*. Judicial reviews can be sought before the General Court and the CJEU.

It is worth mentioning that the CJEU was asked whether the whole enforcement system is compatible with the Charter of Fundamental Rights of the European Union (CFREU), since DG COMP acts as ‘investigator, prosecutor, judge and jury’ and it might raise concerns as to the requirement of the independent tribunal. The CJEU answered that it is compatible, provided that the General Court exercises a full review of the Commission’s decisions.³

In general, DG COMP cannot use force or coercion. However, enforcement is ensured by the possibility to impose fines for a failure to cooperate with investigative measures. Therefore, not only does DG COMP have the power to impose substantive fines for violations of Arts. 101 and 102 TFEU, but it can also subject undertakings to procedural sanctions in order to ensure the possibility to conduct the investigations provided by Reg. 1/2003. Furthermore, DG COMP can also take temporary ‘interim measures’⁴ when there is a *prima facie* finding of an infringement, and the risk of serious and irreparable damage to competition requires urgent action. Reg. 1/2003 does not define the content of such measures, and the COM has rarely used this power, especially because the requirement of ‘irreparability’ is very difficult to meet in practice. In principle, however, the Commission is not confined to only imposing negative measures to desist from certain action, but may also include a positive order to perform some act.⁵ From the EU case law, it may be concluded that the interim measures are not acceptable when they concern a different subject matter and thus exceed the scope of the main procedure.⁶

2.1.1.2 ECB

As of November 2014, the ECB has become exclusively competent for the financial supervision of ‘significant’ credit institutions, representing almost 85% of total banking assets in the euro area. The legal framework governing this new so-called Single Supervisory Mechanism includes SSM Council Regulation 1024/2013, SSM Framework Regulation 468/2014 issued by the ECB, the Decision of the ECB concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) and Council Regulation (EU) No. 2532/98 concerning the powers of the European Central Bank to impose sanctions.

The SSM Regulation, implemented in accordance with Article 127 (6) TFEU, confers supervisory and investigatory powers upon the ECB. The ECB has the tasks of authorizing credit institutions and withdrawing their authorizations, assessing notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, conducting the daily supervision of significant credit institutions, and investigating alleged violations of relevant EU law (Article 4 SSM Regulation). The division of supervisory tasks (defined in Article 4 SSM Regulation) between the EU and national levels is made on the basis of the significance of a credit institution, i.e., its size, its importance for the economy of the Union or any Member State,⁷ and the significance of its cross-border activities (Article 6 (4) SSM Regulation). The ECB takes the decision as to when a supervised group is considered to be significant or not (Article

3 See e.g. Case C-67/13, *Groupment des Cartes Bancaires*, [2014] ECLI:EU:C:2014:2204.

4 Art. 8 Regulation (EC) No. 1/2003

5 See L. Ortiz Blanco (ed.), *EU Competition procedure* (2013), p. 622.

6 See in particular Case T-23/90, *Peugeot v Commission*, [1991], ECR II-653, ECLI:EU:T:1991:45. See also L. Ortiz Blanco (ed.), *op. cit.*, p. 623.

7 The three biggest banks of each MS are supervised by the ECB irrespective of their total assets unless justified by particular circumstances (Art. 6 (4) Regulation (EU) No. 1024/2013 (SSM)).

39 (1) SSM Framework Regulation). As a result, as of the time of writing, the ECB directly supervises approximately 120 groups representing approximately 1,200 supervised entities (out of 4,700 in total). National competent authorities conduct the direct supervision of less significant institutions, subject to the oversight and instructions of the ECB, which they shall follow (Article 6 (3) SSM Regulation). The ECB may take over the supervision over less significant institutions (Articles 67-69 SSM Framework Regulation). If the ECB does not do this, these ‘less significant banks’ fall under the authority of the national competent authorities.

Supervision by the ECB entails daily monitoring by Joint Supervisory Teams (JSTs), appointed for each supervised group/entity, and regular/planned on-site inspections, organised by the Centralised On-site Inspections Division. JSTs consist of the ECB’s staff and the NCA’s staff from those MSs where the supervised entity in question is situated. JSTs set out annual plans, in which they outline the necessity to have on-site inspections of specific banks with a specific purpose. The purpose can be connected to a particular issue or be a general inspection. In the framework of EU law, the Centralised On-site Inspections Division exercises such planned inspections at the request of JSTs. If the JTS suspects a violation, it requests a special body of the ECB, i.e., the Enforcement and Sanctions Division, to conduct an investigation into that alleged breach of EU law, which may lead to the imposition of sanctions by the Governing Council (prepared by the Supervisory Board). The Supervisory Board (comprising the Chair and Vice-Chair, four representatives of the ECB, and one representative of the NCAs in each participating Member State) is the highest organ in the ECB for the purposes of planning and executing the SSM tasks. It proposes draft decisions for adoption by the ECB’s Governing Council (the six members of the Executive Board appointed by the European Council and the governors of the national central banks of the 19 euro area countries). This is done on the basis of the so-called ‘non-objection’ procedure, which means that the Supervisory Board is not a decision-making body. The ultimate decision-making body is the Governing Council. In case of a disagreement the Regulation also provides for a ‘mediation panel’ (Article 25 of the SSM Regulation).

All in all,

- (1) Investigations. The ECB can conduct investigations and on-site inspections as a matter of daily supervision (by JSTs and the Centralised On-site Inspections Division) and when a breach of EU law is suspected (in this case by the Enforcement and Sanctions Division, in the legislation referred to as the ‘Investigating Unit’).
- (2) Statement of objections. On completion of an investigation and before a proposal for a complete draft decision is prepared and submitted to the Supervisory Board, the investigating unit shall notify the supervised entity concerned in writing of the findings under the investigation carried out and of any objections raised thereto. The Investigating Unit shall inform the supervised entity concerned of its right to make submissions in writing to the Investigating Unit on the factual results and the objections raised against the entity as set out therein, including the individual provisions which have been allegedly infringed, and it shall set a reasonable time limit for the receipt of such submissions (Article 126 SSM Framework Regulation).
- (3) Access to the file. The parties shall have the right to access the file subject to the legitimate interests of legal and natural persons other than the relevant party, in the protection of their business secrets (Article 32 SSM Framework Regulation). The right of access to the file shall

not extend to confidential information, including internal documents of the ECB and NCAs and correspondence between the ECB and an NCA or between NCAs.

- (4) Written submissions. The parties can make written submissions (Article 126 (2) SSM Framework Regulation).
- (5) Hearing. It is not automatic, but the Investigating Unit may invite the entity to a hearing upon completion of its investigation (Articles 31 and 126 (3) SSM Framework Regulation).
- (6) ECB's decision. The Supervisory Board takes the decision, thereby closing the case and imposing the level of the penalty.
- (7) Fines. The ECB can impose administrative pecuniary penalties for violations of relevant EU and national laws and impose sanctions for non-compliance with its decisions.

Judicial Review. Judicial reviews can be sought before the CJEU and the Administrative Board of Review.

2.1.1.3 ESMA

ESMA's objectives include establishing a sound, effective and consistent level of financial regulation and supervision and preventing regulatory arbitration and promoting equal conditions of competition (Article 1 of Regulation 1095/2010). The legal framework includes its founding Regulation 1095/2010 (the 'ESMA Regulation') as well as other EU instruments:

- Regulation (EU) No. 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies (CRAs), also known as the CRAR,
- Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (TRs), also known as EMIR,
- Commission Delegated Regulation No. 946/2012 supplementing the rules on credit rating agencies, including more specific provisions on the right of defence,
- Commission Delegated Regulation No. 667/2014 supplementing the rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority including rules on the right of defence.

These regulations give ESMA the ultimate responsibility to deal with the registration, authorization, supervision of and enforcement vis-à-vis credit rating agencies (CRAs) and trade repositories (TRs). By the way, these financial entities were not previously regulated at the national level; the TRs did not exist before they became regulated by the mentioned legal acts.⁸

More specifically, the Supervision Department of ESMA has individual persons ('supervisors') monitoring the daily operations of registered ESMA CRAs and TRs. ESMA has its own investigation and sanctioning powers. It has the power to request information (a simple request or by a decision), conduct general investigations by supervisors on an ongoing basis and investigations into alleged breaches of EU law by independent investigation officers (IIOs), and impose supervisory measures and administrative fines for breaches of relevant EU laws (Articles 23(e)(5) CRAR and 64 (5) EMIR). ESMA can also withdraw authorisations. The sharing of enforcement tasks does not really exist. ESMA can, however, ask to provide assistance in or delegate tasks to national competent authorities (NCAs) carrying out specific supervisory

⁸ From an informal discussion with officials from AFM (October 2016).

(Articles 30 CRAR and 74 EMIR) and investigatory tasks and on-site inspections (Articles 23d (6) CRAR and 63 (6) EMIR). Thus far, this has not happened in light of investigations into a suspected breach of EU law⁹ and it is unlikely to occur due to the expertise existing at ESMA in relation to the supervision of CRAs and TRs and not at the national level.¹⁰

All in all,

- (1) Investigations. ESMA can conduct investigations as a matter of daily supervision (by the internal departments mentioned above) and when it suspects a breach of EU law (by an Independent Investigation Officer (IIO)).
- (2) Statement of objections. Upon the completion of an investigation, the IIO shall provide the opportunity for the party under investigation to be heard and to comment on the findings (Articles 23e CRAR and 64 EMIR).
- (3) Access to the file. The persons subject to an investigation shall be entitled to have access to the file, subject to the legitimate interests of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information affecting third parties (Articles 23e (4) and 36 c (2) CRAR and 64 (4) and 67 EMIR).
- (4) Written submissions. Although it is not explicitly stated ('the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated' (Articles 23e (4) CRAR) and 64 (3) EMIR)), the parties may have the opportunity to make written submissions. The Commission's Delegated Regulations specify the possibility to submit written comments.
- (5) Hearing. Although it is not explicitly stated ('the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated' (Articles 23e (4) CRAR) and 64 (3) EMIR)), the parties may have a hearing. The Commission's Delegated Regulations specify the possibility for the IIO/ESMA to invite the party under investigation to an oral hearing (Article 2(4)). However, this choice is ESMA's /IIO's prerogative (unlike in the area of competition law, although that area may apply to ESMA stemming from CFR, etc.): 'it may occur that some elements of the written submissions that the trade repository made to the investigation officer or to ESMA are not sufficiently clear or detailed, and that they need to be further explained by the trade repository. Should the investigation officer or ESMA consider that this is the case, the trade repository or the persons subject to investigation may be invited to attend an oral hearing to clarify those elements' (Recital 3, Commission Regulation 667/2014; Recital 5 of Commission Regulation 946/2012 regulates this for CRAs).
- (6) ESMA's decision. The ESMA's Board of Supervisors can take one or more decisions to impose one or more supervisory measures listed in Articles 24 CRAR and 73 EMIR and a fine as listed in Articles 36a CRAR and 65 EMIR.
- (7) Fines. See also point 6. One or more supervisory measures, such as the withdrawal of an authorization and public notices, shall be imposed when the investigation has shown that the supervised entity has committed one of the infringements listed in the respective annexes. Fines shall be imposed when the investigation shows that the supervised entity has, *intentionally or negligently*, committed one of the infringements listed in the respective annexes. ESMA has no discretion regarding fines. The basic amounts and adjustments because of mitigating/

⁹ From an informal discussion with an official from ESMA (October 2016).

¹⁰ From an informal discussions with officials from AFM and ESMA (October 2016).

aggravating factors are set out in the regulations (see Article 36a CRAR and Annex IV CRAR, and Article 65 EMIR and Annex II EMIR).

- (8) Judicial Review. Judicial review of ESMA's decisions can be sought before the Board of Appeal established for the three European Supervisory Authorities and the CJEU.

2.1.1.4 OLAF

OLAF is competent to exercise the powers of investigation conferred upon the Commission by the relevant Union acts, 'in order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union'. This means that OLAF investigations may 'horizontally' cover all areas of EU activity if the EU budget is allegedly affected by illegal activities, in particular all EU expenditures and most of its revenues (e.g. customs duties, agricultural duties, etc.). It is worth mentioning that the scope of OLAF's competence concerns not only the revenue and expenditure of the EU institutions, but also the budget of EU bodies and agencies.

The complex legal framework concerning OLAF investigations is composed of horizontal regulations (Regulation No. 883/2013; Regulation No. 2988/95 supplemented by Regulation No. 2185/96) and sectoral regulations concerning specific EU policy areas (e.g. on customs, CAP, structural funds, etc.).

OLAF carries out 'internal' and 'external' investigations. Internal investigations are conducted within institutions, bodies, offices and agencies of the EU, notably when alleged fraud involves EU officials. External investigations are conducted when a suspicion of fraud concerns economic operators and evidence may be found outside EU premises. Such a distinction is often artificial, since evidence of suspected fraud may be gathered both within and outside EU institutions. In this case, 'Articles 3 and 4 apply respectively',¹¹ therefore at least the legal consequences are clear: both measures can be adopted in the same case; while for internal investigations there is a uniform set of powers defined by EU law,¹² for external investigations there are several references to national law (see below). If the case requires both internal and external investigations, the Director-General 'may, where necessary, assign a case to an investigation unit other than the responsible one or to a special investigation team established for that purpose'.¹³

The EU legal framework highlights the administrative nature of OLAF's investigations. This means that they do not affect national competence regarding the prosecution of criminal offences. Furthermore, OLAF does not have sanctioning powers: OLAF's investigations conclude with a report that is sent to the national authorities, which are not compelled to take any action. This report indicates the facts established and the precise allegations, as well as recommendations on the appropriate follow-up to be undertaken at the national level.¹⁴ The EU legal framework provides that the final report constitutes admissible evidence in administrative or judicial proceedings in the Member States in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.¹⁵

¹¹ Art. 7(4) Regulation (EU) No. 883/2013.

¹² Actually some differences in investigative powers can be observed also in internal investigations: Art. 4(1) Regulation (EU) No. 883/2013 provides that internal investigations are conducted in accordance with the conditions set out in the Regulation 'and in the decisions adopted by the respective institution, body, office or agency'. Such decisions are adopted on the basis of the interinstitutional agreement. Interviewees reported that they can differ in some minor aspects relating to OLAF's access to their premises.

¹³ Art. 6(3) GPI.

¹⁴ Art. 11 Regulation (EU) No. 883/2013.

¹⁵ Art. 11(2) Regulation (EU) No. 883/2013.

2.1.2 Cooperation with national authorities

2.1.2.1 DG Comp

Both the EU Commission and the Member States have enforcement powers at their disposal and they can exercise them on the same facts. The investigating authorities are part of the European Competition Network (ECN), a ‘network of public authorities’. It is not a new legal entity or organisation, but provides a framework where the Commission and national competition authorities (NCAs) discuss the sharing of work in order to determine the allocation of cases. The ECN as such does not have specific powers. The powers are exerted by either national authorities or the Commission, which basically may act in two ways:

- (a) DG COMP may request national competition authorities to undertake inspections on its behalf using ‘their powers in accordance with their national law’;¹⁶ in this case, EU officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned (this authority has only been used on two occasions, because inspections carried out by national authorities are considered to be unsuitable for cases involving inspections in more than one Member State).¹⁷
- (b) Compared with other policy areas, the COM also has direct enforcement powers, in the sense that it does not have to rely on the assistance of NCAs: DG COMP can directly conduct investigations on its own, and such investigative powers are defined by EU law. EU staff conduct investigations by producing either a written authorisation or a decision (issued by the Commission), depending on the investigative measure. In some cases, depending on the investigative measure, NCAs may be requested to provide assistance to DG COMP (when NCAs assist DG COMP in conducting an inspection they have the same investigative powers provided by EU law for DG COMP). On the other hand, there are obligations for DG COMP to inform NCAs and to consult them in the execution of certain investigative measures (i) in order to facilitate coordination with investigations on the national level; (ii) in order to enable NCAs to provide for effective assistance.

The powers of DG Comp cover the following investigative measures: the interviewing of persons and the issuing of production orders, and the right to enter premises.

2.1.2.2 ECB

The ECB has, in principle, all investigative and sanctioning powers of its own: the investigative unit shall have all the powers granted to the ECB under the SSM Regulation (Article 125 SSM Framework Regulation). According to the SSM Regulation, the ECB has the power to request information (Article 10), to conduct necessary investigations, including examining books and records and interviewing (Article 11), to make on-site inspections (Article 12), to impose administrative pecuniary penalties for violations of EU law but also sanctions for ‘breaches of its decisions’ (Article 18(7) SSM Regulation). Furthermore, the ECB has all the powers which NCAs shall have under relevant Union law (Article 9 (1) SSM Regulation) and the ECB may also instruct NCAs to use a ‘purely’ national power (Article 9(1) SSM Regulation). Finally, ‘where, in carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA to refer the matter to the

¹⁶ Art. 22(2) Regulation (EC) No. 1/2003.

¹⁷ M. Böse, ‘The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases’, in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), vol. 1, pp. 838, 848.

appropriate authorities for investigation and possible criminal prosecution, in accordance with national law' (Article 136 SSM Framework Regulation).

Furthermore, as regards the following investigative measures:

- The interviewing of persons and the issuing of production orders

Under Article 11 SSM Regulation (on general investigations), the ECB has the right to obtain written or oral explanations from supervised entities and officials and their parties which may perform certain outsourced tasks for the supervised entities. Since this provision concerns investigations and investigations must be instigated by a ECB decision, non-compliance with the ECB's decision can lead to sanctions in accordance with Regulation No. 2532/98 (Article 18 (7) SSM Regulation).

According to Article 11 SSM Regulation, when a person obstructs the conduct of the investigation, the national competent authority of the participating Member State where the relevant premises are located shall afford, in compliance with national law, the necessary assistance including, in the cases referred to in Articles 12 and 13, facilitating access by the ECB to the business premises of the legal persons referred to in Article 10(1), so that the aforementioned rights can be exercised.

- Monitoring of bank accounts (real time)

The ECB does not have this power; in fact it may not need this power.¹⁸

- Right to enter premises

Powers of on-site inspection (with or without prior announcement) are defined by Article 12 SSM Regulation. This power exists only in relation to the inspection of business premises and land belonging to legal persons or other undertakings included in the supervision under Article 4 (1) SSM Regulation. Recourse to national law is necessary if an undertaking refuses to allow an inspection to take place: 'where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Where that power is not available to the national competent authority concerned, it shall use its powers to request the necessary assistance of other national authorities'.

- Access to traffic data and recorded communications

The ECB does not explicitly have this power. But the ECB can request information 'that is necessary in order to carry out the tasks conferred on it by this Regulation, including information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes' (Article 10 SSM Regulation). And the ECB shall have the right to 'examine the books

¹⁸ From an informal discussion with a member of a JST (October 2016).

and records of the persons referred to in Article 10(1) and take copies or extracts from such books and records' (Article 11 SSM Regulation).

It is worth highlighting, as regards the procedural safeguards:

- The right of access to a lawyer

Not specifically regulated in the SSM legislative framework.

- Professional privilege and professional secrecy

Recital 48 of the SSM Regulation states that 'legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)'.

SSM Regulation Article 10 (on a general request for information) states that 'professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.'

- Right to remain silent

Not explicitly regulated in the SSM legislative framework.

2.1.2.3 ESMA

ESMA has, in principle, all investigative and sanctioning powers of its own: it may request information by a simple request or by decision (Articles 23b CRAR and 61 EMIR), conduct investigations, including the powers to summon witnesses and ask for oral and written explanations concerning facts and documents (Articles 23c CRAR and 62 EMIR), conduct on-site inspections (Articles 23d CRAR and 63 EMIR), and impose a supervisory measure, such as issuing public notices and imposing fines (Articles 24+36a CRAR and 73 EMIR). The 'sharing' of tasks with national authorities concerns only the possibility for ESMA to ask competent national authorities to carry out specific supervisory and investigatory tasks and on-site inspections on its behalf.¹⁹ No conditions are prescribed as to when ESMA must or may make such a request. The delegation of a supervisory task in light of an investigation into an alleged breach of EU law has not so far occurred. In any case, these articles apply to two types of ESMA investigations – 'general investigations' and investigations by IIOs. The latter applies in cases when 'ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements.' In this case, 'ESMA shall appoint an independent investigating officer within

¹⁹ In light of the focus of the project on the investigation by IIOs, the delegation of power by ESMA to an NCA is not discussed here. This possibility exists in accordance with Arts. 30 Regulation (EU) No. 462/2013 (CRAR) and 74 Regulation (EU) No. 648/2012 (EMIR). These articles allow ESMA to delegate specific supervisory tasks where necessary for the proper performance of a *supervisory* task. In this light, we can conclude that ESMA cannot delegate an investigation task performed by the IIO to an NCA. The latter can also be supported by the fact that ESMA must appoint an IIO within ESMA (Arts. 23e (1) Regulation (EU) No. 462/2013 (CRAR) and 64 (1) Regulation (EU) No. 648/2012 (EMIR)).

ESMA to investigate the matter' (Articles 23e CRAR and 64 EMIR). The IIO has the same powers as ESMA during general investigations, so the possibility to make a request to a national competent authority seems to apply to him, too (Articles 23e (2) CRAR and 64 (2) EMIR)).

National competent authorities can also be triggered when ESMA finds that a person is resisting an inspection. 'The competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection' (Articles 23d (7) CRAR and 63 (7) EMIR).

Finally, 'ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of *res judicata* as the result of criminal proceedings under national law' (Articles 23e (8) CRAR and 64 (8) EMIR).

Furthermore, as regards the following investigative measures:

- Interviewing and production orders

ESMA has the power to request information by a simple request or by a decision (Articles 23b CRAR and 61 EMIR) and to 'summon and ask any person referred to in <...> or their representatives or staff for oral or written explanations on facts or documents related to the subject matter and purpose of the inspection and to record the answers; interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation; request records of telephone and data traffic' (Articles 23c CRAR and 62 EMIR).

The officials and other persons authorised by ESMA for the purposes of the investigations shall exercise their powers upon the production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 61(1) are not provided or are incomplete, and the fines, where the answers to questions asked to persons referred to in Article 61(1) are incorrect or misleading (Articles 62 EMIR; 23c CRAR regulates this for CRAs).

- Monitoring of bank accounts (real time)

ESMA does not have this power.

- Right to enter premises

Powers of on-site inspection (with or without prior announcement) are defined by Articles 23d CRAR and 63 EMIR. This power exists only in relation to the inspection of business premises or land belonging to legal persons. Recourse to national law is necessary if an undertaking refuses to allow an inspection to take place: ‘where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection’.

– Access to traffic data and recorded communications

ESMA has the power to request records of telephone and data traffic (Articles 23c (1 (e)) CRAR and 62 (1(e)) EMIR). ‘If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure’ (Articles 23e (5) CRAR and 62 (5) EMIR).

As regards the following procedural safeguards, respective regulations regulate these in the following way (a general overview):

– Right of access to a lawyer

Both CRAR and EMIR mention the possibility for lawyers, who are duly authorised to act, to supply information on behalf of their clients (Articles 23b (4) CRAR and 61 (4) EMIR); there is no obligation to provide access to a lawyer, although CRAR and EMIR do state that ‘the rights of defence of the persons concerned shall be fully respected during investigations under this Article’ (Articles 23e (3) CRAR and 64 (3) EMIR). The Commission Regulations mention the possibility to be assisted by lawyers or other qualified persons admitted by the investigating officer when the parties under the completed investigations are invited to an oral hearing (Article 2(4)).

– Legal professional privilege and other professional secrecy

Both CRAR (Article 23a) and EMIR (Article 60) state that ‘the powers conferred on ESMA or any official of or other person authorised by ESMA by Articles <...> [articles on the request of information and on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege.’

– Right to remain silent

Not explicitly regulated in relevant EU secondary law (CRA and EMIR legislative frameworks).²⁰

²⁰ Several officials from ESMA (during conversations in October 2016) are of the opinion that a number of judgements, including Case 374/87, *Orkem v. Commission*; Case T-112/98, *Mannesmannröhren-Werke AG v Commission*; T-297/11, *Buzzi Unicem SpA, contre Commission européenne*, which set out the scope of the right to silence, will be applicable.

2.1.2.4 OLAF

Basically three ways of conducting OLAF's tasks can be identified:

- (a) OLAF can provide assistance to Member States 'in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud' ('*coordination cases*').²¹
- (b) OLAF can ask national authorities to conduct an investigation on suspected fraud or irregularities, and can participate in such investigations ('*mixed inspections*'). Since investigations are opened and conducted at the national level, national law applies; OLAF staff act as seconded experts or joint investigators, with the same powers as the national authorities. An example is provided by Art. 18(4) of Regulation No. 515/1997 on mutual assistance in customs and agricultural matters,²² whereby '[w]here the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall at the earliest opportunity carry out an enquiry, at which Commission officials may be present under the conditions laid down in Articles 9 (2) and 11 of this Regulation'; such provisions clarify that investigative measures are adopted by national authorities; however, the Commission's staff shall have access to the same premises and the same documents through the national partners.²³
- (c) OLAF conducts proper autonomous investigations (the following sections of the report will focus on these types of investigations). Various investigative activities can be performed by OLAF investigation units; the most relevant, which require the authorisation of the Director-General, are: interviews with persons concerned and witnesses, the inspection of EU premises (in internal investigations) and on-the-spot checks of economic operators (in external investigations). During the inspection of EU premises and on-the-spot checks digital forensic operations may be carried out.²⁴

As regards external investigations, OLAF can conduct on-the-spot checks according to Regulation No. 2988/95 and Regulation No. 2185/96. These regulations do not lay down an exhaustive EU law procedure, but refer to sectoral regulations²⁵ and to national law.²⁶ This entails that the extent of OLAF's powers may vary from one country to another. According to these regulations, checks and inspections shall be prepared and conducted in close cooperation with the Member States concerned; Member States' authorities may participate therein and normally they do so, at least at the beginning of the inspection; however, on-the-spot checks are carried out under OLAF's authority. In this case, the national law dimension is relevant:

21 Art. 1(2) Regulation (EU) No. 883/2013.

22 Council Regulation (EC) No. 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 [1997], OJ L 82/1.

23 See Art. 9(2) of Regulation (EC) No. 515/97. This approach is different to the one adopted by Regulation (Euratom, EC) No. 2185/96 on external checks and by sectoral regulations, for example by Art. 37 of Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005], OJ L 209/1, or by Art. 72 of the Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 [2006], OJ L 210/25: in these cases the Commission (OLAF) conducts on-the-spot checks and informs national authorities, while personnel from the Member State concerned may take part in such checks.

24 See the Guidelines on Digital Forensic Procedures for OLAF Staff, 15 February 2016.

25 Art. 9(2) Regulation (EC, EURATOM) No. 2988/95.

26 Art. 8 Regulation (EC, EURATOM) No. 2988/95.

- (i) as regards the investigative powers as such. OLAF staff shall act, ‘subject to the Union law applicable’, in compliance with the rules and practices of the Member State concerned and with the procedural safeguards provided in the Regulation. OLAF should be granted access to information and documents under the same conditions as the competent authorities of the Member States concerned.²⁷ OLAF staff exercise these powers in the Member States on the production of the written authorisation showing their identity and capacity. The Director-General issues such authorisation indicating the subject matter and the purpose of the investigation, the legal bases for conducting the investigation and the investigative powers stemming from these bases;²⁸
- (ii) as regards the assistance from Member States in order to use coercive powers, since OLAF cannot use force or coercion,²⁹ Regulation 883/2013 specifies that Member States ‘shall give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively.’ It is worth mentioning that OLAF has experienced difficulties in identifying the national authority which is competent to provide assistance to its staff. For this reason, Regulation 883/2013 provides that Member States shall ‘designate a service (‘the anti-fraud coordination service’) to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office’ (AFCOS).³⁰

2.1.3 Opening of investigations

2.1.3.1 DG Comp

DG COMP may initiate proceedings either following a ‘complaint’ or by acting on its own initiative.³¹ There is no specific time or moment for the initiation of proceedings, nor does the initiation have any effect on DG COMP’s powers of investigation, which can be used both before and after initiation.³² However, proceedings must be formally initiated no later than the issuing of the statement of objections to the undertakings concerned (or the publication of the Article 24(7) notice prior to a decision on making commitments binding, or a declaration of non-applicability).³³ It is worth mentioning that the primary significance of the initiation of proceedings is that it ousts the jurisdiction of NCAs; furthermore, it interrupts the limitation period for the imposition of fines and penalties.

When the Commission decides to initiate proceedings, it ‘may’ publicise the initiation ‘in any appropriate way’ (unless this harms the investigations).³⁴ This is normally done through publication on the website of DG COMP and a press release.³⁵

27 Art. 7(1) Regulation (EC) No. 2186/96.

28 Art. 7(2) Regulation (EU) No. 883/2013.

29 Art. 3(3) Regulation (EU) No. 883/2013.

30 Art. 3(4) Regulation (EU) No. 883/2013.

31 It is not necessary to start an investigation to reject a complaint.

32 Art. 2(3) (EC) No. Regulation 773/2004.

33 N. Khan, *Kerse & Kahn on EU Antitrust Procedure* (2012), p. 99: ‘The Commission has recently moved from a policy of initiating proceedings only on the issue of the statement of objections to initiating proceedings at an earlier stage in most cases’.

34 Art. 2(2) Regulation (EC) No. 773/2004.

35 N. Khan, *op. cit.* 101.

2.1.3.2 ECB

The Enforcement and Sanctions Division opens an investigation into an alleged violation when there has been a referral by the JST (Article 124 SSM Framework Regulation). This Division can make requests to the supervised entity concerned under the powers granted to the ECB pursuant to the SSM Regulation (the powers mentioned in the previous section). In this request, the Division shall specify the subject matter and the purpose of the investigation (Article 125 (2) SSM Framework Regulation). This Division enjoys the same powers as those that are outlined for ‘daily’ supervision (requests for information and making on-site inspections).

2.1.3.3 ESMA

On a daily basis, ESMA supervisors perform monitoring with the purpose of ensuring that CRAs and TRs comply with the requirements under the CRA Regulation and EMIR. They may, for instance, request information, examine records and documentation, summon persons and conduct interviews, and inspect CRAs’ or TRs’ business premises. If the supervisory teams, as part of their investigations in a given case, find serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I or III of EMIR and the CRA Regulation respectively, this department informs the Executive Director (‘ESMA’ in the Regulation). The latter ‘shall’ appoint a person within ESMA as an independent investigation officer to further investigate the matter (Articles 23e(1) CRAR and 64(1) EMIR); thus far, the investigation officer has been a member of the Legal, Cooperation and Enforcement Department of ESMA. He/she is not involved or has not been involved directly or indirectly in the supervision or the registration process of the trade repository or credit rating agency concerned in order to ensure his complete independence. He/she performs his/her functions independently from ESMA’s Board of Supervisors.

2.1.3.4 OLAF

According to Art. 5 Regulation 883/2013 the decision to open an investigation is made by the OLAF Director-General on his own initiative, or following a request by Member States or other EU bodies. The ‘Investigation Selection and Review Unit’ analyses information of possible investigative interest and provides an opinion to the Director-General on whether an investigation or coordination case should be opened or whether the case should be dismissed.³⁶ Such a decision takes the following into consideration:

- (a) whether ‘there is sufficient suspicion’ of an illicit activity affecting the EU’s financial interests. This is in line with the CJEU case law whereby the threshold of sufficient suspicion is a safeguard against a disproportionate use of investigative powers.³⁷ The suspicion may ‘also be based on information provided by any third party or anonymous information’;
- (b) whether the investigation falls within the policy priorities and the annual management plan established by the Director-General;³⁸

³⁶ Art. 1 2013 Guidelines on Investigation Procedures for OLAF Staff.

³⁷ See Case C-15/00, *Commission v European Investment Bank*, [2003] ECR I-07281, in particular para 164; Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-07147, in particular para. 141. See also the Report No. 3/2014 from the Supervisory Committee of OLAF to the European Parliament, the Council, the Commission and the Court of Auditors.

³⁸ It is worth mentioning that the OLAF Supervisory Committee, in its Activity Report 2015, observed that ‘OLAF refrained from defining a true ‘investigation policy’ and only indicated undocumented criteria, without any impact assessment or evaluation of the implementation of previous Investigation Policy Priorities (IPPs),

- (c) whether it is ‘necessary and proportionate’ to open an investigation at OLAF. With regard to an internal investigation, Art. 5(1) specifies that the decision should consider whether disciplinary authorities within the institutions are better placed to conduct the investigation. With regard to an external investigation, the Director-General should consider whether it is more appropriate to limit the role of OLAF to coordination, without conducting autonomous investigations.

It is worth mentioning that if ‘the investigation unit envisages conducting an investigative activity outside the existing scope of the investigation, it shall submit a request to extend the scope of the investigation to the Investigation and Selection Unit’, which verifies the legality and necessity of the proposed extension of its scope and provides an opinion for the Director-General on the basis of which he makes a decision.³⁹ This is also used when an external investigation also requires internal investigative activities, and vice versa.

2.1.4 Threshold for opening an investigation

2.1.4.1 DG Comp

Some tasks similar to ‘market supervision’ in competition law are identifiable in the ‘sector inquiries’, which are investigations that DG COMP carries out into sectors of the economy when it believes that a market is not working as well as it should, and also believes that breaches of competition rules might be a contributing factor. The threshold which must be met in order for the Commission to commence a sector inquiry is relatively low: the Commission only requires a ‘suggestion’ that competition may be restricted or distorted. There is generally no public consultation on the decision to launch an inquiry; however, the Commission will normally announce its formal decision to initiate an inquiry, which details why the Commission considers that the inquiry is necessary and the legal basis for that inquiry. Art. 17 of Regulation 1/2003 provides the Commission with extensive information-gathering powers, including the ability to conduct dawn raids. It does not, however, provide the Commission with powers to adopt measures aimed at remedying the situation under investigation. Nevertheless, it may prompt the Commission to initiate changes to the regulations and may trigger the launching of investigations against specific undertakings. It is not specified what is the threshold to open an investigation; this is not surprising given the blurred line between pre-investigative and investigative phases (see above).

2.1.4.2 ECB

JSTs supervise their entities on a daily basis. When they have reason to suspect violations of relevant EU laws (when a JST ‘considers that there is reason to suspect one or more breaches’ of EU law), they shall refer the matter to the investigating unit, i.e., the Enforcement and Sanctions Division (Article 124 SSM Framework Regulation).⁴⁰ The Enforcement and Sanctions Division

performance indicators, and no systematic linkage with EU spending priorities and EU policy priorities in fighting against financial crimes’.

39 Art. 12(3) 2013 Guidelines on Investigation Procedures for OLAF Staff.

40 From an informational discussion with a member of a JST (October 2016), it became apparent that when the daily supervision reveals some inconsistencies, the JST and the supervised entity are likely to resolve it without sending the file to the ‘investigating unit’. The JST will give advice which the supervised entity will follow and thereby redress the inconsistency. Since reputation means a great deal to a bank, banks are therefore willing to cooperate with the supervisor. So far, this has been their practice. According to the member of the JST, the

investigates alleged breaches of directly applicable EU law, national law transposing EU directives or ECB decisions and regulations. It acts independently from the Supervisory Board members who adopt a final decision (Article 123 (3) SSM Framework Regulation). The Enforcement and Sanctions Division ‘may exercise the powers granted to the ECB under the SSM Regulation’ (Article 125 (1) SSM Framework Regulation).

2.1.4.3 ESMA

This is when supervisory teams, as part of their investigations in a given case, find serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I or III of EMIR and the CRAR respectively.

2.1.4.4 OLAF

OLAF does not have proper supervisory tasks. Its investigations start with the official decision which is made by the Director-General. However, before the initiation of the investigations, OLAF needs information to detect alleged fraud or other illegal activities, and to decide whether an official case has to be opened. The Decision establishing OLAF provides that it is also responsible for ‘ensuring the collection and analysis of information’.⁴¹ In this regard, the ‘Investigation Selection and Review Unit’ can, ‘*inter alia*’, receive and analyse information, collect information within the framework of operational meetings, take statements from any person able to provide relevant information, carry out fact-finding missions in Member States, and consult information in databases held by the EU institutions, bodies, offices or agencies.⁴²

2.1.5 Judicial control of the investigative measures

2.1.5.1 DG Comp

In some cases *ex-ante* judicial authorisation may be necessary; namely in the case of inspections of ‘other premises’,⁴³ and when an undertaking opposes the inspection (only if judicial authorisation is necessary according to national rules).⁴⁴

The *ex-ante* authorisation is issued only by national courts (their decisions are not subject to a review by CJEU). Article 20(8) (inspection of undertakings) and Art. 21(3) (inspection of other premises) of Regulation 1/2003 codifies the CJEU case law on the purpose and scope of the judicial control conducted by national courts: national courts cannot go beyond the examination to establish that the Commission’s decision is authentic and that the coercive measures are neither arbitrary nor excessive having regard to the subject matter of the inspection (with respect to the seriousness of the suspected infringement, the importance of the evidence sought and the likelihood that that evidence will be found). In other words, national courts assess proportionality/non-arbitrariness, but do not examine the lawfulness of the COM’s decision (in light of EU law) and its necessity (in light of the COM file): this is only reviewed by the EU courts, which have exclusive competence to consider whether acts of the COM are lawful or not.⁴⁵

threshold for sending the file to the investigating unit would be a very significant breach of the law or if the supervised entity would not follow the JST’s recommendations.

41 Art. 2(5)(b) Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) [1999], O.J. L 1360/20.

42 Art. 5 2013 Guidelines on Investigation Procedures for OLAF Staff.

43 Art. 21(3) Regulation (EC) No. 1/2003.

44 Art. 20(7) Regulation (EC) No. 1/2003.

45 Art. 265 TFEU (failure to act), Art. 263 TFEU (annulment) and Art. 261 TFEU (penalties).

The *ex-post* review of the DG COMP's investigative powers is only conducted by the EU courts (EGC and CJEU). Judicial review concerning the lawfulness of the adoption of an investigative measure⁴⁶ can be sought against formal decisions of DG COMP ordering the production of information,⁴⁷ inspections,⁴⁸ and inspections of other premises.⁴⁹ A review of the execution of an investigative measure (i.e. the manner in which it is carried out) can be sought as part of the appeal against the final decision on the substantive violation of competition law (in this case also the investigative measures not ordered by a formal decision – e.g. a simple request for information according to Art. 18(2) – can be reviewed before the EU courts).

A sort of internal (non-judicial) review mechanism is carried out by the 'hearing officer', which is attached to the Commission, but acts independently. Its functions and powers are provided by the Decision of the President of the EU Commission 2011/695/EU of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings. Although its main role is played after the statement of objections (namely, as regards the access to the file), the officer has some tasks also during the investigations (see Art. 4). In particular, they concern: (a) alleged violations of legal-professional privilege; (b) alleged violations of the privilege against self-incrimination; (c) the possibility to grant an extension of the time-limit to provide information; and (d) the right of undertakings to be informed about their procedural status, i.e. whether they are subject to an investigation and, if so, about the subject matter and purpose of the investigation (for further details, see below, 2.1.6 and 2.3.6).

2.1.5.2 ECB

For the purposes of on-site inspections of the business premises of legal persons and in cases where a person obstructs the inspection, the ECB is required, if national rules so oblige, to obtain an authorisation by a judicial authority according to national rules. In this case, 'the national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person who is subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information in the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU' (Article 13 SSM Regulation).

Any *decision* by the ECB can be submitted for review to the ECB's Administrative Board of Review established specifically for an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred upon it under Regulation (EU) No. 1024/2013 (ECB's Decision ECB/2014/16). Since launching investigations into alleged violations and making investigations and on-site inspections must be based on a *decision* of the ECB (Articles 11 and 12 of the SSM Regulation), these decisions can be submitted for review. The review can

46 Art. 263 TFEU and Art. 278 TFEU for suspension.

47 Art. 18(3) Regulation (EC) No. 1/2003.

48 Art. 20(4) Regulation (EC) No. 1/2003.

49 Art. 21(2) Regulation (EC) No. 1/2003.

be requested by ‘any natural or legal person to whom a decision of the ECB under Regulation (EU) No. 1024/2013 is addressed, or to whom such decision is of direct and individual concern’ (Article 7 of the ECB’s Decision). The scope of the internal administrative review shall cover the relevant decision’s procedural and substantive conformity with Regulation (EU) No. 1024/2013 and shall be limited to an examination of the grounds relied upon by the applicant as set out in the notice of review (Article 10 of the ECB’s Decision). The possibility to appeal before the Board (Article 24 SSM Regulation) is ‘without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties’ (Article 24 (11) SSM Regulation).

2.1.5.3 ESMA

The exercise of the power to request records of telephone or data traffic referred to in point (e) of Articles 23c(1) CRAR or 62(1) EMIR or any inspection powers regulated in Articles 23d CRAR or 63 EMIR requires a determination of whether the exercise of such powers (or the assistance provided by a national competent authority when a person opposes an inspection) requires authorisation from a judicial authority according to national rules. Where that is the case, such authorisation shall be applied for. The authorisation may also be applied for as a precautionary measure (Articles 23c(5) CRAR and 62(5) EMIR).

For both regulations, the national judicial authority shall verify that ESMA’s decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In controlling the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds that ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures⁵⁰ (Article 63(9) + 62(6) EMIR and Article 23d(9) + 23c(6) CRAR). It is the Court of Justice of the European Union which has the power to check the necessity of the inspection.

Furthermore, concerning judicial control at the EU level, any decision by ESMA can be appealed before the Board of Appeal (Article 60 ESMA Regulation), which is a joint body for ESMA and the other two EU financial supervisors (the European Banking Authority and the European Insurance and Occupational Pensions Authority) and reviewed by the CJEU (based on Articles 263 and 265 TFEU, Article 61 ESMA Regulation). This includes requests for information by a decision and decisions to submit to general investigations and on-site inspections. Such decisions have *to specify* the possibility to have the decision appealed before the Board of Appeal (*information requests*) and/or reviewed by the Court (*other decisions*) (Articles 23b(3) + 23c (3) + 23d(4) CRAR; 61 (3) + 62 (3) + 63 (4) EMIR). ‘Other acts could be the object of an ordinary action for annulment before the CJEU (with prior appeal to the BoA) if they can be considered to have binding legal effects for third parties.’⁵¹

50 From an informal discussion with an official from ESMA (October 2016), it became apparent that this phrase makes less sense (if at all) for the investigations performed by supervisors on a daily basis: ‘in case of supervisory investigations ‘suspected infringements’ cannot be a prerequisite for any such investigatory steps.’

51 From an informal discussion with an official from ESMA (October 2016).

2.1.5.4 OLAF

Judicial control – both *ex ante* and *ex post* – is mostly carried out by national courts. Prior judicial authorisation has to be requested when it is provided in that sense by national law in relation to a specific investigative measure.⁵² The *ex post* review is sought with regard to OLAF acts included in the national file once a criminal charge has been brought, or an administrative decision has been made.

In principle, the CJEU has exclusive competence to declare that an act taken by an EU institution is invalid. A suspect, therefore, could start an action for the annulment of Commission/OLAF acts (Art. 263 TFEU).⁵³ On several occasions, however, the CJEU has held that such actions are inadmissible, since OLAF investigations as such do not bring about a distinct change in the legal position of a person. They are considered to be akin to preparatory measures that do not compel national authorities to take specific action. Furthermore, the action for damages (Art. 268 and Art. 340 TFEU) is subject to strict conditions that make its exercise difficult in practice. As a consequence, the role of the CJEU with regard to OLAF's investigative powers seems to be limited to a preliminary ruling (Art. 267 TFEU).⁵⁴

It is worth mentioning that a sort of internal (non-judicial) *ex ante* review mechanism is conducted by the OLAF Investigation Selection and Review Unit: where an investigative measure requires the Director-General's authorisation, the competent investigation unit submits a request to the Investigation Selection and Review Unit, which verifies 'the legality, necessity and proportionality of the proposed investigative activity and (...) provide an opinion to the Director-General on the basis of which he makes a decision'.⁵⁵ On the other hand, an *ex post* internal (non-judicial) review mechanism on respect for fundamental rights is performed by the OLAF 'legal advice unit'. Persons involved in investigations can submit a complaint concerning the handling of their procedural guarantees by OLAF. The 'legal advice unit' reviews the complaint and reports its findings to the Director-General, who takes appropriate action within two months of the registration date of the complaint, unless a longer period is justified by the complexity of the matter. Furthermore, at the end of the investigations the Investigation Selection and Review Unit conducts a 'final review' of the final report, the proposed recommendations and the decision to close the investigations (i.e., not of a specific investigative measure); in particular, it checks 'whether the investigation unit has complied with the legal requirements including the rights and procedural guarantees of the persons concerned, data protection requirements and reviews the legality, necessity and proportionality of the investigative activities undertaken'.⁵⁶ Also in this case, the Investigation Selection and Review Unit provides a (non-binding) opinion to the Director-General. In addition, the activity of OLAF is monitored by the Supervisory Committee, which can only issue opinions that are not binding and do not interfere with the ongoing

52 See Art. 3(3) Regulation (EU) No. 883/2013.

53 Art. 266(4) TFEU.

54 See K. Ligeti and G. Robinson, 'Transversal Report on Judicial Protection'.

55 Art. 12(2) GIP. Interviewees did not report any case in which the authorisation for an investigative measure had been denied because it was not necessary or proportional.

56 See Art. 21 GIP. Indeed, according to Art. 17(3) Regulation (EU) No. 883/2013, the Director-General is obliged to 'put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Member States concerned (...)'. See Opinion of the OLAF Supervisory Committee No. 2/2015 of 15 December 2015 on the 'legality check and review in OLAF'.

investigations. A proposal for the establishment of an independent ‘Controller of procedural guarantees’ is currently the subject of negotiation.⁵⁷

2.2 ANALYSIS OF THE SPECIFIC POWERS

2.2.1 Interviewing of persons (oral/written questioning) and production orders

2.2.1.1 Scope of the power

DG Comp

The Commission has the power to issue production orders (‘request for information’)⁵⁸ not only to undertakings under investigation, but also to those that may have information, in order to obtain ‘all necessary information’.

The Commission also has the possibility of interviewing persons (oral interviews), but its powers are limited. It is necessary to distinguish between two situations, depending on whether the interviews are conducted (a) in the course of an inspection (see below), or (b) as an autonomous measure, i.e. without having initiated an inspection:

- (a) During the course of an inspection: in this case, although not expressly labelled as an investigative measure, the Commission has a kind of a authority to summon the persons concerned. It can, indeed, ask ‘any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers’.⁵⁹ Furthermore, the Commission can impose penalties if the answers are incorrect or misleading.⁶⁰
- (b) As an autonomous measure, outside the context of an inspection: in this case, although labelled as a ‘power to take statements’,⁶¹ the Commission does not have a real power, since it can interview natural and legal persons who may be in possession of useful information concerning an infringement, but only with their consent. In other words, there are no sanctions for refusing to be interviewed, nor for providing incorrect or misleading information during an interview. Art. 3 of Com. Reg. 773/2004 specifies that at the beginning of the interview, the Commission must ‘state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview’.

ECB

During the investigations, the power to interview persons and issue production orders includes the following elements:

1. the ECB has the power to obtain information by a simple request (Article 10 SSM Regulation) and to require documents, books and records, as well as to make copies of those materials, and to obtain explanations by means of a decision (Article 11 SSM Regulation (on general investigations));

⁵⁷ See COM (2014) 340 final.

⁵⁸ Art. 18 Regulation (EC) No. 1/2003.

⁵⁹ Art. 20(2)(e) Regulation (EC) No. 1/2003.

⁶⁰ Art. 20(3) Regulation (EC) No. 1/2003.

⁶¹ Art. 19 Regulation (EC) No. 1/2003.

2. the ECB has the right to obtain written and oral explanations from the supervised entities and relevant third parties which may perform outsourced tasks for the supervised person (Article 10 SSM Regulation provides a list of legal and natural persons to which Article 11 SSM refers);
3. those who are asked ‘shall supply the information requested. Professional secrecy provisions do not exempt those persons from the duty to supply that information’ (Article 10 SSM Regulation).

In light of the powers that the existing EU enforcement authorities have in this respect, the ECB does not seem to have been denied any powers in this respect.

ESMA

The IIO starts an investigation when there are ‘serious indications of the possible existence of facts liable to constitute one or more of the infringements’ of relevant EU law (Articles 23e CRAR and 64 EMIR). In order to exercise his/her tasks, the IIO may exercise the powers to require information and to conduct investigations and on-site inspections in accordance with Articles 23 a-d of CRAR and Articles 62-63 (Articles 23e (2) CRAR and 62 (2) EMIR)). The IIO may have the authority to request information by a simple request and by a decision and issue production orders.

Compared with other EU entities, ESMA has not been denied any powers in this respect.

OLAF

As regards interviews, Reg. 883/2013 provides for the possibility of interviewing persons, both witnesses and the persons being investigated.⁶² OLAF can also take statements in the context of on-the-spot checks and inspections.⁶³ The 2013 Guidelines on investigation procedures specify that when interviewing the persons concerned and witnesses, members of the investigation unit need to have ‘the Director-General’s written act showing their identity and capacity, and the investigative activity they are authorised to carry out’.⁶⁴ An explicit duty to cooperate with OLAF staff is only provided for EU officials or other servants,⁶⁵ i.e. in the context of internal investigations (OLAF does not have a real power to summon other witnesses, but simply to invite them).⁶⁶ The EU legal framework provides for a period of notice between the invitation and the interview (if this involves outside on-the-spot checks); for some procedural rights (see below); for the possibility for the person interviewed to have access to the record in order to approve it or to add observations. Interviews may also be conducted by means of a video conference.⁶⁷ There is no sanctioning authority when incomplete or misleading answers are provided.

As regards production orders within internal investigations, Art. 4 of Regulation 883/2013 provides that OLAF may request oral and written information from officials, other servants, members of institutions or bodies, heads of offices or agencies, or staff members. On the other hand, as regards external investigations, the legal framework does not provide for OLAF powers to

62 Art. 9(2) Regulation (EU) No. 883/2013.

63 Art. 9(2) Regulation (EU) No. 883/2013.

64 Art. 11 2013 Guidelines on Investigation Procedures for OLAF Staff.

65 See Art. 4(7) Regulation (EU) No 883/2013; the Interinstitutional Agreement of 25 May 1999 [1999] OJ L 136/15; and Annex IX to the EU Staff Regulation.

66 Art. 16 2013 Guidelines on Investigation Procedures for OLAF Staff.

67 Art. 16 2013 Guidelines on Investigation Procedures for OLAF Staff.

send ‘autonomous’ requests for information/production orders to economic operators, but only to request information in the context of inspections and on-the-spot checks.⁶⁸ These powers depend on national law and on the assistance provided by national authorities. In practice, information is requested from economic operators even outside on-the-spot checks; however, no enforcement mechanisms are provided if incomplete or misleading information is provided.

2.2.1.2 Legal shape

DG Comp

Production orders (‘request for information’) can be issued by (a) a simple request or (b) by a decision:

- (a) In the first case, the Commission must state the legal basis and purpose of the request, specify what information is needed, fix the time-limit for providing it and explain the penalty for incorrect or misleading information; however, there is no obligation to comply with a simple request. Every case handler can issue a simple request for information.
- (b) If the request is made with a decision, the Commission must also state the legal basis for and the purpose of the request; specify what information is required and fix the time-limit within which it is to be provided; indicate that a penalty can be imposed for not supplying the required information; and that the undertaking may seek a judicial review of the decision (before the General Court). These production orders are often issued after the Commission has conducted inspections, in order to clarify some points. The adoption of a decision requires a longer internal procedure (it needs to be signed by the head of unit).

As regards interviews:

- (a) They are conducted in the course of an inspection: the power of summoning witness is exercised *de facto* during the inspection (the inspection may require a decision, see below), since it is included among the powers available during an inspection.
- (b) They are an autonomous measure: since they are voluntary measures, an official decision by the Commission is not needed.

ECB

It is a decision of the ECB (Article 11 (2) SSM). In the case of an investigation by the Enforcement and Sanctions Division, an initial decision is taken on allowing such an investigation to take place. ‘Such decision shall specify all of the following: (a) the legal basis for the decision and its purpose; (b) the intention to exercise the powers laid down in Article 11(1) of the SSM Regulation; (c) the fact that any obstruction of the investigation by the person being investigated constitutes a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation’ (Article 142 SSM Framework Regulation). The requests for information under Article 10 do not explicitly require a decision by the ECB.

Note the (language) difference with ESMA which has to specify the possibility of appealing against the decision to request information in its decision.

⁶⁸ Art. 5 Regulation (Euratom, EC) No. 2185/96.

ESMA

The legal shape is a decision by ESMA. In the case of an investigation by the IIO, it is the IIO who takes this decision.

There are two types of requests for information:

1. Concerning a simple request for information, ‘ESMA shall: (a) refer to this Article as the legal basis for the request; (b) state the purpose of the request; (c) specify what information is required; (d) set a time-limit within which the information is to be provided; (e) inform the person from whom the information is requested that there is no obligation to provide the information but that any reply to the request for information must not be incorrect or misleading; (f) indicate the fine provided for in Article 36a, in conjunction with point 7 of Section II of Annex III, where the answers to questions asked are incorrect or misleading’ (Articles 23b (2) CRAR and 61 (2) EMIR).
2. When requiring that information should be provided by decision, ‘ESMA shall: (a) refer to this Article as the legal basis for the request; (b) state the purpose of the request; (c) specify what information is required; (d) set a time-limit within which the information is to be provided; (e) indicate the periodic penalty payments provided for in Article 36b where the production of the required information is incomplete; (f) indicate the fine provided for in Article 36a, in conjunction with point 7 of Section II of Annex III, where the answers to questions asked are incorrect or misleading; and (g) indicate the right to appeal the decision before the Board of Appeal and to have the decision reviewed by the Court of Justice of the European Union in accordance with Articles 60 and 61 of Regulation (EU) No 1095/2010’ (Articles 23b (3) CRAR and 62 (3) EMIR).

Concerning production orders, the request to submit specific information and documents is an investigative power, which can be used upon a decision by an IIO to investigate a CRA/TR. Such a decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 36b, the legal remedies available under Regulation (EU) No. 1095/2010 and the right to have the decision reviewed by the Court of Justice of the European Union (Articles 23c (3) CRAR and 62 (3) EMIR).

OLAF

In order for OLAF staff to conduct interviews with witnesses or the persons concerned, a written authorisation by the OLAF Director-General suffices (for the previous legality check carried out by the ‘investigation selection and review unit’, see below). Such a written authorisation must show the staff’s identity and capacity, as well as the investigative activity they are authorised to carry out.

2.2.1.3 Threshold*DG Comp*

A specific threshold for requesting information is not provided by the EU legal framework.

ECB

The ECB can request all information and production orders to carry out the tasks conferred upon it by the SSM Regulation; in the case of investigations into alleged breaches of EU law, this is ‘for the purpose of investigating alleged breaches’ (Article 125 (1) SSM Framework Regulation).⁶⁹

ESMA

ESMA can request all information that is necessary in order to carry out its duties under the relevant regulations (CRAR and EMIR).

OLAF

In the EU legal framework there is no specific threshold for interviewing witnesses or the persons concerned that is different than the one already provided to open the investigation as such. The same applies to production orders in the context of internal investigations.⁷⁰ However, in order to obtain authorisation from the Director-General, the investigation unit submits the request to the Investigation Selection and Review Unit, which verifies the legality, necessity and proportionality of the proposed measure and provides an opinion to the Director-General (see above, 2.1.5.4).

2.2.1.4 Purpose limitation*DG Comp*

As regards requests for information, Art. 18 states that the Commission may require ‘all necessary information’. As regards the interviews conducted during the inspections, any explanations of facts related to the subject-matter and purpose of the inspection can be requested. In both cases, either issuing the production order or ordering the inspection during which interviews may be conducted (see also below on inspections), the Commission must specify the subject-matter and purpose of the investigative measure.

The Commission enjoys a margin of appreciation in defining the scope of the request for information, i.e. in determining what information is necessary.⁷¹ Nevertheless, the request must be proportionate; in this regard, the CJEU has determined that it is not sufficient to have a mere relationship between a document and the alleged infringement and that the relationship must be such that the Commission could reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place.⁷²

Recently, the CJEU has addressed the content of the obligation to state the purpose of the request for information. In *HeidelbergCement AG v. Commission*, the Court annulled a Commission decision because the statement of reasons in order to justify the request for information was ‘excessively succinct, vague and generic – and in some respects, ambiguous’. In other words, although ‘the Commission is not required to communicate to the addressee of a decision requesting information all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements’, ‘[s]ince the necessity of the information must

69 From an informational discussion with a member of a JST (October 2016), one could conclude that the threshold for launching an investigation by the Enforcement and Sanctions Division is high as the JST and the supervised authority are likely to settle inconsistencies. The JST will generally provide advice on how to redress possible inconsistencies and the supervised entity is likely to follow this advice as reputation is very important for banks.

70 Art. 4(2)(b) Regulation (EU) No. 883/2013.

71 See para. 33 of the Commission Notice on best practices 2011.

72 Case C-36/92, *SEP v Commission* [1994] ECR I-01911, ECLI:EU:C:1994:205.

be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision, otherwise it will be impossible to determine whether the information is necessary and the Court will be prevented from exercising judicial review'.⁷³

The burden of proving that the request is unjustified, however, is on the requested parties, who can challenge the decision before the Hearing Officer and, later, the CJEU. This seems to be quite difficult in practice.⁷⁴

ECB

No purpose limitation is provided. ESMA can ask for 'all information that is necessary in order to carry out its duties under' the relevant regulations (Articles 23 (b)(1) CRAR and 61 (1) EMIR).

ESMA

The purpose is to carry out duties under the CRAR and EMIR.

OLAF

No purpose limitation is provided by the EU legal framework as regards interviews. Furthermore, nothing is specified concerning the content of the written authorisation of the Director-General. The same applies to production orders in the context of internal investigations.⁷⁵ The production orders during external on-the-spot checks follow the requirements of those measures (see below).

2.2.1.5 Ex-ante judicial authorisation

DG Comp

No *ex ante* judicial authorisation is needed for oral interviews or requests for written information.

ECB

No judicial authorization is necessary for requests for information and production orders.

ESMA

No judicial authorization is necessary for requests for information and production orders.

OLAF

No *ex ante* judicial authorisation is needed for interviews, nor for production orders during internal investigations. For a request for information during external on-the-spot checks, see below.

2.2.1.6 Internal review mechanism

DG Comp

The Hearing Officer is granted some tasks also during the investigative phase (see above, particularly Art. 4 of the Decision of the President of the EU Commission 2011/695/EU of 13 October 2011). Although not a proper internal review mechanism (there are no powers to overrule the Commission's decision), the Hearing Officer may issue a reasoned opinion to the

⁷³ Case C-247/14, *HeidelbergCement AG v European Commission*, [2016].

⁷⁴ N. Khan, *op. cit.* 114.

⁷⁵ Art. 4(2)(b) Regulation (EU) No. 883/2013.

Commissioner when the requested parties claim that legal-professional privilege or the privilege against self-incrimination has been violated.

Furthermore, the Hearing Officer decides whether an extension of the time limit to submit information should be granted, taking into account the length and complexity of the request for information and the requirements of the investigation.

ECB

A production order in the course of an investigation is based upon a decision of the ECB to start such an investigation, although unlike the ESMA, the SSM Regulation does not prescribe an obligation for the ECB to inform the addressee of the possibility to appeal against the decision. A request for information according to Article 10 SSM does not require a decision by the ECB. However, if it is used in the course of an alleged breach of EU law, the ECB's decision to start that investigation would undoubtedly be present. However, the Administrative Board of Review conducts an internal administrative review of all decisions taken by the ECB (Article 24 SSM Regulation), not to mention the possibility of a review as regulated by Article 263 TFEU. The scope of the review by the Board is both procedural and substantive in conformity with the SSM Regulation on the ECB's decisions.

'A request for review pursuant to paragraph 5 shall not have suspensory effect. However, the Governing Council, on a proposal by the Administrative Board of Review may, if it considers that circumstances so require, suspend the application of the contested decision' (Article 24 (8) SSM).

'Any request for review shall be made in writing, including a statement of grounds, and shall be lodged at the ECB within one month of the date of notification of the decision to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be' (Article 24 (6) SSM).

Article 24 SSM governing the Administrative Board of Review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Article 24 (11) SSM).

ESMA

The Boards of Appeal for three ESAs review appeals against the decisions of ESMA (Article 60 ESMA Regulation), including that of the request for information (Articles 23b (3) CRAR and 61 (3) EMIR) and the launching of an investigation (production orders) (Articles 23c (3) CRAR and 62 (1) EMIR).

'The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision' (Article 60 (2) ESMA Regulation).

'If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded' (Article 60 (4) ESMA Regulation). 'The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That

body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned' (Article 60 (5) ESMA Regulation).

The appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision (Article 60 (3) ESMA Regulation).

'Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU' (Article 61 (3) ESMA Regulation).

OLAF

As an *ex ante* review mechanism, in order to obtain an authorisation from the Director-General, the investigation unit submits a request to the Investigation and Selection Review Unit, which verifies 'the legality, necessity and proportionality of the proposed investigative activity and [provides] an opinion to the Director-General on the basis of which he makes a decision'. As a sort of *ex post* review mechanism on respect for procedural guarantees, the 'legal advice unit' may receive complaints from the persons concerned, and it then provides a report for the Director-General who will take appropriate action within two months.

2.2.1.7 Enforcement of investigation powers

DG Comp

As regards requests for information, the assistance of national authorities is not needed at all. The powers are entirely provided by EU law, and the Commission may also impose fines (a) in the case of a simple request: if undertakings supply incorrect or misleading information; (b) in the case of requests by a decision: if undertakings supply incorrect, misleading, or incomplete information, or if they do not supply information within the required time-limit.

As regards interviews: (a) Conducted in the course of an inspection (Art. 20): see below under inspections; (b) Conducted as autonomous measures (Art. 19): since they are only voluntary interviews, there is no mechanism for enforcement.

ECB

The ECB has the necessary powers to request information and explanations. The third question is less relevant. The legal provisions regulate more the opposite situation, i.e., the presence of national authorities during relevant activities:

1. Article 10 (3) SSM Regulation – an obligation for the ECB to make any obtained information available to the national competent authorities;
2. Article 12 (1) SSM Regulation – an obligation to notify the national competent authority about a forthcoming on-site inspection;
3. The ECB shall be in charge of establishing an on-site inspection as well as its composition, together with the involvement of NCAs (Article 144 SSM Framework Regulation).

ESMA

ESMA has the necessary powers to request information and to issue production orders (as laid down in CRAR and EMIR). Once an investigation by the IIO is concluded, he/she sends his/her report to the Board. If the Board concludes that an infringement has taken place, it can take one or more of the supervisory measures and impose a fine (see section 1 (c) on the differences between the measures and the fines).

The third question is a moot one since it is the IIO appointed by ESMA who conducts the investigation. Note that ‘in good time before the investigation, ESMA shall inform the competent authority of the Member State where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the competent authority concerned shall, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the competent authority concerned may also attend the investigations upon request’ (Articles 23c (4) CRAR and 62 (4) EMIR).

OLAF

In this context, the assistance of national authorities is only necessary as regards the request for information in the course of external on-the-spot checks. OLAF staff are allowed to be present during on-the-spot checks. Enforcement mechanisms, in this case, are provided by national law (see below).

As regards a request for information during internal investigations, there is no real enforcement mechanism for a violation of the duty of EU officials to cooperate with OLAF (except the disciplinary sanctions provided in the EU Staff Regulation).

Interviews, since they are conducted on a voluntary basis, do not have enforcement mechanisms and can be conducted autonomously by OLAF.

2.2.1.8 Access to a lawyer*DG Comp*

Regulation 1/2003 does not provide for the right to have access to a lawyer following a production order/request for information. Art. 18(4) simply clarifies that lawyers are allowed to answer questions on behalf of their clients.

On the other hand, as regards voluntary interviews (Art. 19), the Commission’s Best Practices of 2011 provide that the Commission shall inform the interviewee of his/her right to consult a lawyer. From interviews with Commission officials, it emerges that legal counsel is normally admitted to the interviews.⁷⁶

As regards interviews during inspections, see below.

ECB

‘The parties subject to investigation may be represented and/or assisted by lawyers or other qualified persons at the hearing’ (Article 126 (3) SSM Framework Regulation).

⁷⁶ Confirmed by the Report of the ECN working group cooperation of 31 October 2012, ‘Investigative powers report’, p. 41.

ESMA

Not explicitly regulated. Articles 23 (b) (4) CRAR and 61 (4) EMIR mention the possibility to be represented by a lawyer and that lawyers duly authorised to act may supply information on behalf of their clients.

OLAF

Art. 9 Regulation 883/2013 provides that the interview with the person concerned shall be preceded by an invitation informing him of his ‘right to be assisted by a person of his choice’.

2.2.1.9 Privilege against self-incrimination*DG Comp*

A narrow version of the privilege against self-incrimination is recognised in EU competition law. On the one hand, it includes the right to silence but does not include a broader right not to cooperate with the Commission: there is no right to refuse to hand over (pre-existing) documents that may serve to prove the case.⁷⁷ In other words, the privilege only applies when undertakings are required to answer specific questions.⁷⁸

On the other hand, also a limited version of the right to remain silent is recognised: undertakings may only refuse to answer questions that would require them to admit the very infringement that the Commission is trying to prove. Recital 23 of Regulation 1/2003 states that ‘undertakings cannot be forced to admit that they have committed an infringement’; however, ‘they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement’.⁷⁹

ECB

Not regulated explicitly in the SSM legislative framework.

ESMA

Not regulated explicitly in the CRA and EMIR legislative frameworks.

OLAF

Art. 9(2) Reg. 883/2013 provides that any person interviewed ‘shall have the right to avoid self-incrimination’. The OLAF Investigation Unit should inform the person in question of such a right.⁸⁰ Furthermore, if ‘in the course of the interview, evidence emerges that a witness may be a person concerned, the interview shall be ended (...) That witness shall be informed forthwith of his rights as a person concerned and shall receive, upon request, a copy of the records of any statements made by him in the past. The Office may not use that person’s past statements against him without giving him first the opportunity to comment on those statements’.⁸¹ The 2013

77 Case C-347/87, *Triveneta Zuccheri SpA and others v Commission*, [1990] ECR I-01083, ECLI:EU:C:1990:129; Case C-27/88, *Solvay & Cie v Commission*, [1989] ECR 989 -03355, ECLI:EU:C:1989:388; Case C-374/87, *Orkem v Commission*, [1989] ECR 03283, ECLI:EU:C:1989:387.

78 Case C-301/04, *Commission v. SGL Carbon AG*, [2006] ECR I-05915 ECLI:EU:C:2006:432, paras. 33-51.

79 See also Case T-112/98, *Mannesmannröhren-Werke AG*, [2001] ECR II-00729, ECLI:EU:T:2001:61.

80 Art. 16 2013 Guidelines on Investigation Procedures for OLAF Staff.

81 Art. 9(2) Regulation (EU) No. 883/2013.

Guidelines specify that the Investigation Unit ‘shall not use his past statements against him in any way’.⁸²

2.2.1.10 Legal professional privilege and other forms of professional secrecy

DG Comp

Although legal professional privilege is not expressly regulated by Regulation 1/2003 (nor by the 2004 Implementing Regulation), the CJEU has developed a (limited) EU concept of the client-attorney privilege to be applied in competition cases. In *AM&S Europe Ltd* the CJEU held that only some correspondence is covered by the privilege, namely correspondence with external lawyers (but not with in-house lawyers or lawyers in third countries).⁸³ This is due to the fact that in many Member States employed/non-independent lawyers are not subject to the rules of the Bar Association. Furthermore, such correspondence must have been prepared for the purposes and in the interests of the client’s rights of defence and within the framework of obtaining legal advice in relation to the subject-matter of the procedure. In *Hilti v. Commission*, the CJEU held that the privilege extends to memoranda prepared by in-house lawyers which simply report what the independent lawyers have said.⁸⁴ This case law has been recently confirmed in *Akzo Nobel Chemicals Ltd*, which extended the privilege also to preparatory documents drawn up exclusively for the purpose of seeking legal advice from a lawyer in the exercise of the rights of defence. Furthermore, the Court held that, if the privilege applies, the Commission cannot read that document (i.e. it cannot be used neither as evidence nor for further investigations).⁸⁵

ECB

Recital 48 of the SSM Regulation states that ‘legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)’.

SSM Regulation Article 10 (on a general request for information) states that ‘professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.’

ESMA

With respect to legal professional privilege, Articles 23a CRAR and 60 EMIR specify that ‘the powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d [requests for information, general investigations, on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege’.

OLAF

There is no reference to legal professional privilege in the EU secondary law concerning OLAF investigations.

82 Art. 16 of the 2013 Guidelines on Investigation Procedures for OLAF Staff.

83 Case C-155/79, *AM & S Europe Limited v Commission*, [1982] ECR 01575, ECLI:EU:C:1982:157.

84 Case T-30/89, *Hilti AG v Commission*, [1991] ECR II-01439, ECLI:EU:T:1991:70.

85 Case T-125/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, [2007] ECR II-03523, ECLI:EU:T:2007:287.

2.2.2 Monitoring of bank accounts (real time)

2.2.2.1 Scope of the power

DG Comp

The Commission does not have this power in competition law.

ECB

The ECB does not have this power unless the NCAs have it (in such a case the ECB can have the same additional powers that NCAs possess).

ESMA

ESMA does not have this power.

OLAF

OLAF does not have this power.

2.2.3 Right to enter premises ('droit de visite')

2.2.3.1 Scope of the power

DG Comp

Regulation No. 1/2003 provides for the Commission's powers to conduct 'all necessary' inspections of undertakings or associations of undertakings (Art. 20), or even of 'other premises, land and means of transport, including the homes of directors, managers and other members of the staff of the undertakings and associations of undertakings concerned' (Art. 21). The latter is a real novelty introduced by Regulation 1/2003 compared to its predecessor, Regulation 17/62.⁸⁶ However, so far it has rarely been exercised in practice.

During the inspection of undertakings, the Commission officials can:

- enter any premises, land, or means of transport;
- examine books and other records (irrespective of the medium on which they are stored);
- make a copy thereof;
- seal business premises and books or records 'for the period and to the extent necessary for the inspection'. This power is provided in order to prevent the destruction of important documents overnight;⁸⁷ its duration is up to 72 hours. Art. 23(1)(e) provides for the possibility to fine the undertaking in the event the seals are broken;⁸⁸
- ask any representative or member of the staff questions in order to explain 'facts or documents relating to the subject-matter and purpose of the inspection', and record the answers (see above under interviews conducted during inspections).

According to Art. 21(4) of Regulation 1/2003, during the inspection of other premises, the Commission – just like in the inspection of undertakings – has the power to enter the premises,

⁸⁶ The rationale, according to Recital 26, is that '[e]xperience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking'.

⁸⁷ See Recital 25 Regulation (EC) No. 1/2003.

⁸⁸ In 2006 the Commission fined an undertaking a total of € 38 million for breaking the seals (and the CJEU upheld this decision).

examine books and other records and make a copy thereof; on the other hand, the Commission does not have the power to seal premises or to ask for explanations relating to facts and documents.

ECB

The ECB does not seem to have been denied any powers in this respect, at least compared to other EU enforcement authorities:

1. The ECB (including its Enforcement and Sanctions Division) may undertake an on-site inspection at the business premises of the legal persons referred to in Article 10 SSM (Article 12 SSM). This differs from the Dutch system, for instance where the file goes to the department where a sanction can be imposed, that department does not have the power to repeat the investigation and on-site inspections on its own. It only deals with the file submitted by the relevant department which discovered the breach and investigated it.⁸⁹
2. If necessary, the on-site inspection can be undertaken without announcing it to the person being supervised (note: there is nevertheless an obligation to notify the NCA).
3. ECB inspectors can enter any business premises and land and they possess those investigative powers under Article 11 (1) SSM – such as requiring the submission of documents, the right to examine books and records and to make copies of such documents and obtain explanations (Article 12 (2) SSM Regulation).
4. Where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records.

ESMA

ESMA can enter any business premises and land belonging to legal persons which are subject to an investigation decision adopted by ESMA (or an IIO in the case of an investigation) and shall have all the powers stipulated in Article 23c(1) CRAR/63(1) EMIR, i.e., investigative powers such as examining records, making copies of data, summoning witnesses, etc. ESMA shall also have the power to seal any business premises and books or records for the period of and to the extent necessary for the inspection (Articles 23d (1) CRAR and 63 (1) EMIR).

OLAF

OLAF has wide powers of inspection as regards internal investigations. Regulation 883/2013 provides that the Office has the right of immediate and unannounced access ‘to any relevant information, including information in databases, held by institutions, bodies, offices and agencies, and to their premises’. This information, according to OLAF’s internal guidelines, also includes ‘private documents (including medical records) where they may be relevant to the investigation’.⁹⁰ Furthermore, OLAF can inspect the accounts of institutions, bodies, offices and agencies. OLAF can make a copy of any document held by EU bodies and, in addition, it has a power similar to that of seizure: if necessary, it may ‘assume custody of such documents or data to ensure

⁸⁹ From an informal discussion with an official from the Dutch Central Bank (October 2016).

⁹⁰ Art. 13 2013 Guidelines on Investigation Procedures for OLAF Staff.

that there is no danger of their disappearance'.⁹¹ The Regulation provides for a duty to inform EU institutions, bodies, offices and agencies whenever OLAF conducts an internal investigation on their premises or consults a document or requests information held by them.⁹² The OLAF Guidelines specify that the Investigation Unit shall inform the Secretary-General or an equivalent authority of the EU institution, body, office or agency concerned whenever it intends to conduct an inspection of its premises. Furthermore, if necessary, it will inform the head of security of that EU body prior to conducting an inspection of or on its premises.⁹³ At the end of the inspection, a report is drawn up and is then countersigned by the participants in the inspection.

As regards external investigations, the legal framework is more complex: Art. 3 of Reg. 883/2013 refers to Art. 9 of Reg. 2988/95 (which makes a further reference to sectoral rules) and to Reg. 2185/96. From these regulations, it emerges that on-the-spot checks and inspections of economic operators must be conducted 'in compliance with the rules and practices of the Member States concerned'. In other words, both EU law and national law define the powers available to OLAF staff. This often makes the scope of the available powers uncertain, such as, for example, in the case of forensic investigations.

As for the scope of the investigations, Art. 7 of Regulation 2185/96 provides that on-the-spot checks and inspections may concern, in particular: '– professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators, – computer data, – production, packaging and dispatching systems and methods, – physical checks as to the nature and quantity of goods or completed operations, – the taking and checking of samples, – the progress of works and investments for which financing has been provided, and the use made of completed investments, – budgetary and accounting documents, – the financial and technical implementation of subsidized projects.' On the other hand, EU law does not provide for the power to seal premises: '[w]here necessary, it shall be for the Member States, at the Commission's request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.'⁹⁴

Both internal and external investigations may have the gathering of computer data as their aim. Internal rules implement Art. 4(2) of Regulation 883/2013 (as regards internal investigations) and Art. 7(1) of Regulation 2185/96 (as regards external investigations) by specifying rules for digital forensic operations conducted by OLAF specialists. The 2013 Guidelines provide that digital forensic operations may be carried out 'in accordance with the principles of necessity and proportionality'. Furthermore, if conducted in the context of external investigations, they must be carried out 'in compliance with national legal provisions'.⁹⁵ Interviewees reported that in many countries such forensic powers are not available and therefore it is not always clear whether OLAF can conduct such investigations during an inspection. When allowed by national law, these operations should be preceded by the 'preliminary identification of the digital media concerned'. On 15 February 2016 OLAF published more detailed 'Guidelines on Digital Forensic Procedures for OLAF Staff', which provide for some safeguards for economic operators.

91 Art. 4(2)(a) Regulation (EU) No. 883/2013.

92 This does not mean that the persons concerned are always informed before an inspection, which may also take place overnight ('unannounced').

93 Art. 13 2013 Guidelines on Investigation Procedures for OLAF Staff.

94 Art. 7 Regulation (Euratom, EC) No. 2185/96.

95 Art. 15 2013 Guidelines on Investigation Procedures for OLAF Staff.

2.2.3.2 Legal shape

DG Comp

The inspection of undertakings can be conducted either (a) by agreement or (b) by surprise (a ‘dawn raid’); the latter has become much more frequent in practice.⁹⁶ In the first case, officials conducting the inspection have to produce *written authorisation* by the Commission specifying the penalties if and when the production of books is incomplete or if the answers to questions are incomplete or misleading. There is no obligation to allow an inspection to take place, but if the undertaking in question agrees to this, it is under a positive duty to cooperate with officials in order to provide them with the information sought.⁹⁷ If the inspection is mandatory (by surprise), the Commission adopts a *decision*.⁹⁸

ECB

It is a decision of the ECB to launch an investigation (Article 142 SSM Framework Regulation) or a decision allowing an on-site inspection to take place (Article 143 SSM Framework Regulation).

The decision to launch an investigation shall specify all of the following: ‘(a) the legal basis for the decision and its purpose; (b) the intention to exercise the powers laid down in Article 11(1) of the SSM Regulation; (c) the fact that any obstruction of the investigation by the person being investigated constitutes a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation’ (Article 142 SSM Framework Regulation).

The decision allowing an on-site inspection shall specify at least the following: ‘(a) the subject matter and the purpose of the on-site inspection; and (b) the fact that any obstruction to the on-site inspection by the legal person subject thereto shall constitute a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation’ (Article 143 (2) SSM Framework Regulation). In the case of an investigation, the officials and other persons authorised by the ECB and by an NCA shall be granted access to the business premises and land of the legal person subject to the investigation by the same decision (Article 143 (3) SSM Framework Regulation).

According to Article 145 SSM Framework Regulation, the ECB shall notify the supervised entity of its decision to inspect it. The ECB can also inspect without prior notification, ‘if the proper conduct and efficiency of the inspection so require’.

ESMA

This is the decision of ESMA (more specifically of an IIO). Persons under investigation ‘shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, specify the date on which it is to begin and indicate the periodic penalty payments provided for in Article 36b, the legal remedies available under Regulation (EU) No. 1095/2010 as well as the right to have the decision reviewed by the Court

⁹⁶ N. Khan, *op. cit.* 148.

⁹⁷ Case C-301/04, *Commission v. SGL Carbon AG*, [2006] ECR I-05915 ECLI:EU:C:2006:432

⁹⁸ Art. 20(4) Regulation (EC) No. 1/2003.

of Justice of the European Union. ESMA shall take such decisions after consulting the competent authority of the Member State where the inspection is to be conducted' (Articles 23d (4) CRAR and 63 (4) EMIR).

OLAF

This is a written authorisation issued by the OLAF Director-General which indicates the subject-matter and purpose of the investigation, the legal bases for conducting the investigation and the investigative powers stemming from those bases.⁹⁹

2.2.3.3 Threshold

DG Comp

The EU legal framework does not specify any threshold in order to conduct inspections of undertakings pursuant to Art. 20 of Regulation 1/2003. In practice, the decision to carry out an inspection is often based on only uncorroborated grounds of suspicion: 'it is increasingly the norm for the Commission to initiate its enquiries into serious infringements through a 'dawn raid' in cases where the Commission does not already have any firm evidence in its possession'.¹⁰⁰ On the other hand, inspections of other premises pursuant to Art. 21 of Regulation 1/2003 can only be ordered if there is a 'reasonable suspicion' that documents are kept on other premises, and those documents may be relevant to prove a 'serious violation' of competition law. The decision ordering the inspection must state the reasons that have led the Commission to conclude that a suspicion exists.

ECB

The formulation of the reason for conducting on-site inspections is quite broad, namely 'in order to carry out the tasks conferred on it by this Regulation [SSM], and subject to other conditions set out in relevant Union law' (Article 12 (1) SSM).

ESMA

The threshold is in order to carry out its duties under CRAR and EMIR.

OLAF

There is no indication of a specific threshold to enter business premises (above the one necessary to open OLAF investigations, i.e. a 'sufficient suspicion' as indicated in Art. 5 Regulation 883/2013: again, there is no difference between the threshold to open an investigation and the threshold to apply investigative powers). However, in order to obtain authorisation from the Director-General, the Investigation Selection and Review Unit verifies the 'legality, necessity and proportionality' of the proposed measure (see above, 2.1.5.4). The criteria of necessity and proportionality, however, are fairly vague and do not seem to represent a real higher threshold; it occurs very rarely that an investigation measure is not authorised because the proportionality check has failed. A sort of higher threshold seems to be provided for economic operators other than those directly concerned (third parties): on-the-spot checks may be conducted when it is

⁹⁹ Arts 3(3) and 7(2) Regulation (EU) No. 883/2013.

¹⁰⁰ N. Khan, *op. cit.* 151.

‘strictly necessary’ to have access to relevant evidence held on their premises.¹⁰¹ According to the internal guidelines, also digital forensic operations are carried out ‘in accordance with the principles of necessity and proportionality’.

2.2.3.4 Purpose limitation

DG Comp

As in the case of requests for information (see above), in order to prevent ‘fishing expeditions’, Arts 20(4) and 21(2) provide that the Commission specifies the subject-matter and purpose of the inspection. On several occasions the CJEU has stressed that this is a fundamental requirement, designed not merely to show that the proposed entry of the premises of the undertaking is justified, but also to enable those undertakings to understand the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence, including the right to seek a judicial review.¹⁰² If, during the inspection, there is an accidental discovery of another infringement, the Commission must adopt a second decision in order to conduct a new inspection.¹⁰³

ECB

See above. Based on Article 143 (3) SSM Framework Regulation¹⁰⁴ it can also be assumed that when an on-site inspection is conducted as part of an investigation, the inspection should have the same purpose and scope as the investigation.

ESMA

On-site inspections can be conducted in order to carry out the duties under CRAR and EMIR (Articles 23d (1) CRAR and 63 (1) EMIR).

OLAF

The written authorisation issued by the OLAF Director-General must indicate the subject-matter and purpose of the investigation. According to the internal guidelines, digital forensic operations should be preceded by the preliminary identification of the digital media concerned; in this kind of investigation, however, it is by nature more difficult to limit the scope of the investigation (accessing a computer provides the possibility to access all data contained therein).

2.2.3.5 Ex-ante judicial authorisation

DG Comp

Regulation 1/2003 does not provide for *ex-ante* judicial authorisation for the inspection of undertakings (by means of a decision). The CJEU, although recognising that such measures have an impact on the right to private life, has held that a prior judicial authorisation is not necessary,

¹⁰¹ Art. 5 Regulation (Euratom, EC) No. 2185/96; Art. 14.7 2013 Guidelines on Investigation Procedures for OLAF Staff.

¹⁰² Case C-583/13, *Deutsche Bahn AG v Commission*, [2015], ECLI:EU:C:2015:404; Case C-37/13, *Nexans SA and Nexans France SAS v European Commission*, [2014], ECLI:EU:C:2014:2030, §34; Case C-94/00, *Roquette Frères SA*, [2002] ECR I-09011, ECLI:EU:C:2002:603, §44-50; Case T-340/04 *France Télécom SA*, [2007] ECR II-00573, ECLI:EU:T:2007:81.

¹⁰³ Case T-288/11, *A+P Kieffer Omnitec Sàrl v European Commission*, [2013], ECLI:EU:T:2013:228.

¹⁰⁴ ‘If the on-site inspection follows an investigation conducted on the basis of an ECB decision, as referred to in Art. 142, and provided that the on-site inspection has the same purpose and scope as the investigation, ...’.

since it is not the only element considered by the ECtHR to assess a violation of Art. 8 ECHR. According to the CJEU, other defence rights – including the possibility to have a post-inspection judicial review – suffice in order not to violate the right to private life.¹⁰⁵

As regards the inspection of other premises, Art. 21(3) Regulation 1/2003 provides that before executing the Commission's decision, it is necessary to obtain judicial authorisation from a national judicial authority.

ECB

Judicial authorization is necessary if the national law so requires. 'The national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU' (Article 13(2) SSM).

ESMA

Judicial authorisation is necessary where the national law so requires. Such authorisation may also be requested as a precautionary measure (Articles 23d (8) CRAR and 63 (8) EMIR).

'The national judicial authority shall control that the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No. 1095/2010' (Articles 23d (9) CRAR and 63 (9) EMIR).

OLAF

It depends on the applicable national law. Art. 3(3) Regulation 883/2013 provides that if the assistance of national authorities – which is necessary to ensure that OLAF's tasks are carried out effectively – 'requires authorisation from a judicial authority in accordance with national rules, such authorisation shall be applied for'.

¹⁰⁵ Case C-583/13, *Deutsche Bahn AG v Commission*, [2015], ECLI:EU:C:2015:404 (appeal against a General Court's decision of 2013).

2.2.3.6 Internal review mechanism

DG Comp

There is no real internal review mechanism concerning the adoption of a measure. The Hearing Officer (see above, 2.2.1.6) plays a limited role as regards respect for legal professional privilege, in the sense that he can issue a reasoned opinion to the Commissioner when the requested parties claim that legal-professional privilege or the privilege against self-incrimination are being violated. Art. 4(2)(a) of the Decision of the President of the Commission 2011/695/EU applies also to inspections: the Hearing Officer may therefore communicate his/her views to the parties in question (and issue a reasoned recommendation if no mutually acceptable resolution is reached) when undertakings claim that certain pieces of information are covered by privilege. No time limits are provided by the legal framework. A sort of suspensive effect is provided in the 2011 Commission notice on best practices: the Commission does not read the document until it has adopted a decision on the undertaking's claim and has allowed the undertaking to refer the matter to the CJEU.

ECB

As mentioned before, a production order launching an investigation and an on-site inspection is the decision of the ECB. The Administrative Board of Review conducts an internal administrative review of the decisions taken by the ECB (Article 24 SSM Regulation). 'Any request for review shall be made in writing, including a statement of grounds, and shall be lodged at the ECB within one month of the date of notification of the decision to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be' (Article 24 (6) SSM).

The scope of the review is both procedural and substantive and this is in conformity with the SSM Regulation of the ECB's decisions.

Furthermore, 'a request for review pursuant to paragraph 5 shall not have suspensory effect. However, the Governing Council, on a proposal by the Administrative Board of Review may, if it considers that circumstances so require, suspend the application of the contested decision' (Article 24 (8) SSM).

Article 24 SSM governing the Administrative Board of Review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Article 24 (11) SSM).

ESMA

The Boards of Appeal for three ESAs review appeals against the decisions of ESMA (Article 60 ESMA Regulation), including a request for information (Articles 23b (3) CRAR and 61 (3)) EMIR), the launching of an investigation (production orders) (Articles 23c (3) CRAR and 62 (1) EMIR) and making an on-site inspection (Articles 23 9d) (4) CRAR and 64 (4) EMIR).

'The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision' (Article 60 (2) ESMA Regulation).

‘If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded’ (Article 60 (4) ESMA Regulation). ‘The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned’ (Article 60 (5) ESMA Regulation).

The appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision (Article 60 (3) ESMA Regulation).

‘Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU’ (Article 61 (3) ESMA Regulation).

OLAF

As an *ex ante* review mechanism, in order to obtain authorisation from the Director-General, the Investigation Unit submits a request to the Investigation and Selection Review Unit, which verifies ‘the legality, necessity and proportionality of the proposed investigative activity and [provides] an opinion to the Director-General on the basis of which he makes a decision’. As a sort of *ex post* review mechanism concerning respect for procedural guarantees, the ‘legal advice unit’ may receive complaints from the persons concerned and it provides a report to the Director-General who will then take appropriate action within two months. At the end of the entire investigation, the Investigation Selection and Review Unit conducts the ‘final review’ (see above, 2.1.5.4).

2.2.3.7 Enforcement of investigative powers

DG Comp

Normally the Commission enforces its powers by imposing fines when undertakings refuse to allow inspections.¹⁰⁶ However, the Commission cannot use force to enter premises. If undertakings oppose an inspection decision, therefore, the Commission can ask Member States for assistance (even using the police or an equivalent enforcement authority); and national authorities may require judicial authorisation according to national rules:¹⁰⁷ if judicial authorisation at the national level is required, this must be applied for.¹⁰⁸ The assistance of national authorities can also be sought when access to ‘other premises’ is obstructed.¹⁰⁹

¹⁰⁶ Art. 23 Regulation (EC) No. 1/2003.

¹⁰⁷ Arts 20(6) and 20(7) Regulation (EC) No. 1/2003.

¹⁰⁸ Case C-94/00, *Roquette Frères SA*, [2002] ECR I-09011, ECLI:EU:C:2002:603 (the Court should ensure that the COM decision is authentic and that coercive measures are neither arbitrary nor excessive).

¹⁰⁹ Art. 21(4) Regulation (EC) No. 1/2003.

ECB

The ECB has the necessary powers to conduct an on-site inspection. However, if the supervised entities obstruct the conduct of the investigation, national assistance is necessary for the ECB to gain access to premises (Article 11 SSM Regulation) and to seal any business premises and books or records (Article 12 SSM Regulation). The third question is less relevant. The legal provisions regulate more the opposite situation, i.e., the presence of national authorities during relevant activities:

1. Article 10 (3) SSM Regulation – an obligation for the ECB to make any obtained information available to the national competent authorities;
2. Article 12 (1) SSM Regulation – an obligation to notify the national competent authority about any forthcoming on-site inspection;
3. The ECB shall be in charge of establishing an on-site inspection and the composition thereof, together with the involvement of NCAs (Article 144 SSM Framework Regulation);
4. ‘Officials of the national competent authority of the participating Member State concerned shall also have the right to participate in the on-site inspections’ (Article 12 (4) SSM).

ESMA

ESMA has the necessary powers to conduct an on-site inspection during daily supervision and when a special investigation is launched. In this latter case, the IIO conducts the investigation and prepares a report for the Board of Supervisors of ESMA, including the recommendation to adopt one or more supervisory measures and to impose fines (Articles 24 and 36 a CRAR and 65 and 73 EMIR). The Board takes the relevant decisions.

With respect to the third question, the situation is governed the other way around, namely when the NCAs can participate and be involved (Articles 23d CRAR and 63 EMIR):

1. In good time before the inspection, ESMA shall give notice of the inspection to the competent authority of the Member State where the inspection is to be conducted;
2. ESMA shall take decisions allowing on-site inspections after consulting the competent authority of the Member State where the inspection is to be conducted;
3. Officials of, as well as those authorised or appointed by, the competent authority of the Member State where the inspection is to be conducted shall, at the request of ESMA, actively assist the officials of and other persons authorised by ESMA. To that end, they shall enjoy the powers set out in those articles. Officials of the competent authority of the Member State concerned may also attend the on-site inspections upon request;
4. ESMA may also require the competent authorities to carry out specific investigatory tasks and on-site inspections on its behalf as provided for in this Article and in Article 23c(1) (on investigative powers). To that end, the competent authorities shall enjoy the same powers as ESMA as set out in those articles;
5. Where the officials of and other accompanying persons authorised by ESMA find that a person obstructs an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection.

OLAF

OLAF does not need any assistance from national authorities to conduct internal investigations, but relies on cooperation agreements with other EU institutions and bodies and on the duty of EU servants to cooperate.¹¹⁰

On the other hand, as regards the enforcement of on-the-spot checks in the context of external investigations, national authorities assist OLAF and ensure, ‘in accordance with Regulation No 2185/96, that the staff of the Office are allowed access, *under the same terms and conditions as its competent authorities and in compliance with its national law*, to all information and documents relating to the matter under investigations which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently’.¹¹¹ On-the-spot checks are, therefore, conducted both by OLAF and national officials: Regulation 2185/96 and the 2013 Guidelines provide that national authorities may participate in the on-the-spot check, or the on-the-spot check itself may be carried out jointly between OLAF and the competent national authority.¹¹² In practice, OLAF informs national authorities about any inspections and then it is up to them whether or not to accompany OLAF staff: according to the interviewees, the approach of national authorities can be very different in the Member States: normally they are present at least at the beginning of the inspection, in other countries (e.g. the UK) normally OLAF staff conduct the inspections on their own. Interviewees have not reported any cases in which an economic operator has refused to allow OLAF to enter its premises.

2.2.3.8 Access to a lawyer*DG Comp*

Regulation No. 1/2003 does not expressly provide for the right to have access to a lawyer in relation to inspections. However, some clarifications can be found in a CJEU case whereby it was determined that there is a possibility to consult a lawyer before and during an inspection, but the lawyer’s presence is not a legal condition for the validity of the inspection.¹¹³

¹¹⁰ Art. 4(7) Regulation (EU) No. 883/2013.

¹¹¹ Art. 3 Regulation (EU) No. 883/2013.

¹¹² Art. 4 Regulation (Euratom, EC) No. 2185/96; Art. 14.2 2013 Guidelines on Investigation Procedures for OLAF Staff. Art. 14.3 adds that, where necessary, experts who are not OLAF staff may assist the members of the Investigation Unit in carrying out on-the-spot checks.

¹¹³ Case T-357-06, *Koninklijke Wegenbouw Stevin*, [2012] ECLI:EU:T:2012:488, § 232-233: ‘232. The Court therefore takes the view that the presence of an undertaking’s external or in-house lawyer is possible when the Commission carries out an investigation, but that the presence of an external or in-house lawyer cannot determine the legality of the investigation. When an undertaking so desires, and in particular when it does not have a lawyer at the investigation site, it can thus request the advice of a lawyer by telephone and ask that lawyer to go there as soon as possible. In order to ensure that the exercise of that right to legal assistance does not impair the proper conduct of the investigation, the persons charged with carrying out the investigation must be able to enter all the undertaking’s premises immediately, to notify it of the inspection decision and to occupy the offices of their choice, without waiting until the undertaking has consulted its lawyer. The persons charged with carrying out the investigation must also be put in a position to control the undertaking’s telephone and computer communications in order, in particular, to prevent the undertaking from contacting other undertakings which are also the subject of an investigation decision. Moreover, the time which the Commission is required to grant an undertaking to enable it to contact its lawyer before the Commission starts consulting the books and other records, taking copies, affixing seals on premises or documents or asking any representative or member of staff of the undertaking for oral explanations depends on the particular circumstances of each individual case and, in any event, can be only extremely limited and reduced to a strict minimum. 233. In the present case, by refusing to accede to the applicant’s request to await the arrival of its external lawyers in a waiting room before allowing the Commission to enter its premises, and in particular the office of its managing director, the Commission did

Furthermore, Art. 6 of the ‘Explanatory note’ of the Commission concerning the inspection ‘by decision’ (revised on 11 September 2015) provides that: (a) the undertaking may consult an external lawyer during the inspection. However, his/her presence is not a legal condition for the validity of the inspection; (b) the inspectors may enter the premises and notify the decision without waiting for the undertaking to consult a lawyer; (c) the inspectors may accept a short delay pending consultation before starting to examine the books and other records related to the business, taking copies etc. (any delay must be kept to a minimum).

ECB

Not regulated explicitly.

ESMA

Not regulated explicitly.

OLAF

There are no specific EU law provisions on the right to consult a lawyer during on-the-spot checks. Normally lawyers are allowed to be present, but no specific information in that sense is provided for economic operators.

2.2.3.9 Privilege against self-incrimination

DG Comp

As explained above as regards interviews and production orders, the CJEU has recognised a limited right to remain silent for undertakings and persons subject to the Commission’s investigations: they cannot refuse to hand over pre-existing documents that may serve to prove the case; and they are obliged to answer factual questions and provide documents even if this information may be used to establish against them or against another undertaking the existence of an infringement (they can only refuse to answer questions that would require them to admit the very infringement that the Commission is investigating). As regards inspections, it is worth mentioning that a lack of cooperation during an inspection has been considered as an aggravating factor in determining the final sanction for a substantial violation of competition law.¹¹⁴

ECB

Not regulated explicitly.

ESMA

Not regulated explicitly.

not infringe its rights of defence. Consequently, the applicant’s refusal to grant the Commission’s inspectors access to its building before its lawyers arrived, which caused a delay of 47 minutes in the carrying out of the investigation, must be classified as refusal to submit to an investigation decision within the meaning of the provisions of Art. 15(1)(c) of Regulation No. 17’.

114 A fine imposed on *Sony* in 2007 was increased by 30 % because its employees had refused to answer questions and had shredded documents. See Commission Decision of 20 November 2007, C(2007) 5469 final, para. 219 et seq.

OLAF

There are no specific provisions on the right to remain silent during on-the-spot checks in the context of external investigations.

2.2.3.10 Legal professional privilege and other forms of professional secrecy*DG Comp*

As explained above as regards interviews and production orders, the CJEU has clarified that only correspondence with an external lawyer (i.e. not with in-house lawyers) is covered by the client-attorney privilege. It is up to the undertaking claiming protection under the privilege with regard to a given document to provide the Commission with appropriate justification and relevant material to substantiate its claim, while not being bound to disclose the content of such document. As regards the privilege during inspections, the 2011 Commission notice on best practices further specifies that:¹¹⁵

- Normally the Commission can take a cursory look at the documents to assess the undertaking's claim; however, undertakings can give appropriate reasons as to why such a cursory overview would jeopardise the privilege;
- If the Commission considers the undertaking's claim to be unfounded, it can immediately read the document and make a copy; on the other hand, if the Commission cannot exclude that the document may be protected, it places the document in a sealed envelope and takes it to the Commission's premises, with a view to the subsequent resolution of the dispute (which involves the Hearing Officer);
- Fines can be imposed on undertakings for clearly unfounded claims, which can also be considered as aggravating circumstances in the determination of the final sanction for a violation of competition law.

ECB

Recital 48 of the SSM Regulation states that 'legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)'.

SSM Regulation Article 10 (on a general request for information) states that 'professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.'

ESMA

'The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d [requests for information, general investigations, on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege' (Articles 23a CRAR and 60 EMIR).

¹¹⁵ Art. 2.7 Commission notice on best practices for the conduct of proceedings concerning Arts. 101 and 102 TFEU, 2011/C 308/06.

OLAF

There are no provisions on legal professional privilege in EU secondary law concerning OLAF investigations. Some indications can be found as regards digital forensic external investigations in the 2016 Guidelines on Digital Forensic Procedures for OLAF staff: if the representatives of economic operators claim that a device contains data of a 'legally privileged nature', Art. 6 provides for a meeting before the OLAF Digital Evidence Specialist aimed at 'resolving the issue'. During this meeting, representatives of economic operators 'may be assisted by a person of their choice'.

2.2.4 Access to traffic data and recording of telecommunications**2.2.4.1 Scope of the powers***DG Comp*

Normally the Commission does not have this power, since the only available investigative measures are inspections of business and non-business premises, the request for information, and the interviews. It is worth mentioning, however, that in a recent case (*Goldfish BV v. Commission*, T-54/14, 8 September 2016, not yet available in English) the General Court held that the Commission may rely on recordings seized lawfully in a dawn raid even if those recordings were made illegally by a third party.

ECB

The ECB does not have this power unless the NCAs have it.

ESMA

ESMA has the power to request records of telephone and data traffic (Articles 23c (1e) CRAR and 62 (1e) EMIR).

OLAF

OLAF does not have this power.

The following answers from section 2.2.4 concern the case of ESMA.

2.2.4.2 Legal shape

The power to request records of telephone and data traffic is an investigative power (Articles 23c CRAR and 62 EMIR). Investigative powers can be used based on a decision by ESMA to start an investigation (Articles 23c (3) CRAR and 62 (3) EMIR).

2.2.4.3 Threshold

Not regulated explicitly. ESMA can use this power in order to carry out its duties.

2.2.4.4 Purpose limitation

The purpose is in order to carry out duties under CRAR and EMIR.

2.2.4.5 Ex-ante judicial authorisation

Judicial authorisation is necessary where the national law so requires. Such authorisation may also be requested as a precautionary measure (Articles 23c (5) CRAR and 63 (8) EMIR).

‘The national judicial authority shall control that the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on ESMA’s file. The lawfulness of ESMA’s decision shall be subject to review only by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No. 1095/2010’ (Articles 23c (6) CRAR and 63 (9) EMIR).

2.2.4.6 Internal review mechanism

The Boards of Appeal for three ESAs review appeals against the decisions of ESMA (Article 60 ESMA Regulation), including a request for information (Articles 23b (3) CRAR and 61 (3) EMIR) and the launching of an investigation (production orders) (Articles 23c (3) CRAR and 62 (1) EMIR).

‘The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision’ (Article 60 (2) ESMA Regulation).

‘If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded’ (Article 60 (4) ESMA Regulation). ‘The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned’ (Article 60 (5) ESMA Regulation).

The appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision (Article 60 (3) ESMA Regulation).

‘Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU’ (Article 61 (3) ESMA Regulation).

2.2.4.7 Enforcement of investigative powers

ESMA has the power to request records of telephone and data traffic. It does not require any assistance by NCAs except for judicial authorization when the national law so obliges or as a precaution.

2.2.4.8 Access to a lawyer

Not regulated explicitly.

2.2.4.9 Privilege against self-incrimination

Not regulated explicitly.

2.2.4.10 Legal professional privilege and other professional secrecy

‘The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d [requests for information, general investigations, on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege’ (Articles 23a CRAR and 60 EMIR).

2.3 CONCLUSIONS

The analysis of the legal framework in the ‘books’ and in action concerning four different European enforcement authorities (EEAs) has led to the following findings, both as regards the extent of the investigative powers available to OLAF, and the procedural safeguards recognised for the persons concerned.

The following are the main findings as regards OLAF’s investigative powers from a comparative perspective:

1. A preliminary remark concerns the legal framework. Despite the recent Regulation No. 883/2013, there is still a great deal of uncertainty – even among interviewees – concerning the exact extent of OLAF’s autonomous investigative powers. In most cases, these depend on the powers granted to its national counterparts (the administrative authorities), which results in a ‘variable geometry’. Minor differences are present also in internal investigations, depending on the content of the decisions adopted by EU institutions and bodies. When certain powers are not available in one Member State, alternative solutions are sought in practice, for example by opening a judicial investigation at the national level (‘mixed inspections’) and exchanging the related information; even when there is no specific legal basis, such arrangements depend on the willingness of the national authorities, and on their ‘creativity’ in order to foresee a role for the OLAF staff;
2. Contrary to all other EEAs, OLAF does not have a real power to issue production orders in external investigations, outside the context of an ongoing inspection, accompanied by the possibility to sanction a refusal to provide information or the provision of misleading information. Furthermore, OLAF has no power to summon witnesses, a power which is accorded (at least to some extent) to the other three EEAs. The reasons for such a lack of authority is not easy to find; according to the interviewees this is only due to ‘political reasons’, i.e. to the resistance of Member States to grant more investigative powers to an EU body;
3. OLAF does not have the power to monitor bank accounts; however, none of the EU investigated authorities has such authority;
4. During external investigations, OLAF has the power to visit premises, but the content of this power is defined by national law. Therefore, its extent may be different in the Member States

(see the national reports). This is not the case with the other three EU authorities where EU law regulates this autonomous power for the EEAs. Furthermore, OLAF has no autonomous power to seal premises or to seize documents which the other EEAs have. Finally, the Commission is the only EEA which can inspect non-business premises;

5. OLAF has no power to request records of telephone and data traffic, which ESMA has;
6. In general, unlike other authorities, OLAF has no sanctioning mechanisms in relation to a refusal to cooperate with its investigations. This is probably perceived by the interviewees as the great weakness of the existing legal framework;
7. Concerning the purpose limitation of investigative powers, in the field of competition law the CJEU has elaborated case law whereby the Commission has to indicate the clear purpose of the investigative measure. Also the written authorisation issued by the OLAF Director-General must indicate the subject matter and purpose of the investigation. It is not clear, however, to what extent in practice OLAF applies the same principles as those developed by the CJEU in the field of competition law, and to what extent it follows the national rules when conducting on-the-spot checks (i.e., whether the authorisation actually limits the scope of the investigation);
8. As is the case for the other EEAs, also for OLAF there is normally no threshold for adopting an investigative measure (OLAF has a threshold for opening investigations as such, but there is no a different higher threshold for adopting investigative measures). A sort of legality and proportionality check is conducted before authorising an investigative measure: this is done through a sort of *ex ante* internal review mechanism concerning legality, necessity and proportionality, whereby the Investigation Selection and Review Unit provides an opinion for the Director-General. Interviewees reported that this is often merely a formal control.

The following are the main findings as regards the safeguards provided by OLAF's legislative framework from a comparative perspective:

1. Only the EU legal framework which is applicable to the Commission in competition law specifies in which cases it is necessary to obtain judicial authorisation before adopting a certain investigative measure; for the other EEAs, including OLAF, the necessity of prior judicial authorisation depends on the applicable national law;
2. OLAF, similar to the Commission in the field of competition law, does not have a real internal review mechanism; at least not yet (see COM (2014) 340 final). The current system provides only for non-binding opinions for the Director-General issued either by the OLAF Investigation Selection and Review Unit or the Legal Advice Unit. ESMA and the ECB both have internal review/appeal boards to review decisions taken by these entities;
3. Probably because of strong criticism being directed against the unclear previous legal framework, as well as because of the difficulties in ensuring the admissibility of evidence in national proceedings, the new OLAF Regulation provides for a level of safeguards during the interviews which is higher than that provided in the context of other EEAs' interviews (particularly as regards the right of access to a lawyer and the privilege against self-incrimination). These safeguards in the area of competition law derive largely from the case law, rather than legislation. Since the ECB and ESMA are relatively still in their infancy, no specific case law on these matters is so far available for these authorities; the legislative framework is not very elaborate on these issues.

4. On the other hand, with respect to the right to enter premises, similar to ECB and ESMA, OLAF's legislative framework does not regulate the right of access to a lawyer or the privilege against self-incrimination; the case law of the CJEU in the field of competition law also applies to inspections, and it is unclear to what extent OLAF adheres to such case law during its on-the-spot checks. Even the interviewees did not fully clarify what safeguards apply to on-the-spot checks and inspections; the general belief is that OLAF is much more respectful of procedural guarantees than national administrative authorities;
5. There is similar uncertainty concerning the protection of legal professional privilege, which is not explicitly regulated by the OLAF legislative framework. This does not mean that it is neglected in practice: in the case of the ECB, for example, in a recital the SSM Regulation refers to it as a fundamental principle of Union law, where the CJEU has laid down conditions on how it should be afforded;
6. Other forms of professional secrecy are not regulated as a limit to investigation powers.

3. GERMANY

M. Böse & A. Schneider

3.1 INTRODUCTION¹

This report provides a comparative overview on the cooperation mechanism between EU institutions and the competent authorities in Germany. At EU level, it covers four institutions (Commission – DG Competition, ECB, ESMA, and Commission – OLAF) and three areas (competition, financial markets and the protection of EU financial interests); as one of the German authorities (BaFin) is the national counterpart of ECB and ESMA, the German report follows a tripartite structure in each section.

3.2 OVERVIEW OF THE NATIONAL PARTNERS

- a) What is the legal architecture of the *national counterparts* of the four EU authorities (OLAF, ECB, ESMA, DG Competition)? A brief introduction of the relevant national authorities and their legislative framework for vertical cooperation with the four EU authorities in the areas of PIF (AFCOS), competition law, banking law, and law on credit rating agencies/trade repositories.

In Germany, the regulatory framework in the areas of competition, financial markets and fraud differs significantly from area to area. Accordingly, there are different national counterparts of the EU authorities in these areas, namely the Federal Cartel Office (*Bundeskartellamt, BKartA*) for the Commission (DG Comp), the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*), supported by the German Federal Bank (*Deutsche Bundesbank*), for the ECB and ESMA, and the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*), supported by the national authorities competent for implementing EU funds and by customs authorities, for OLAF.

¹ A significant part of this report is based on three interviews conducted with officials of the Federal Cartel Office (Bundeskartellamt), the Federal Ministry of Finance (Bundesministerium der Finanzen), the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) in September and October 2016. The authors would like to thank Mr Jan Mühle (Bundeskartellamt), Mr Ralf Becker, Mrs Stephanie Deblitz and Dr Armin Wölk (Bundesanstalt für Finanzdienstleistungsaufsicht), Mr Martin Leuering, Mr Thomas Hapke, Mrs Kristin Schabe, and Mr Alexander Schoenmakers (Bundesministerium der Finanzen) for their great willingness to provide information on operational aspects of administrative investigations and cooperation with the corresponding EU authorities.

(1) Competition law (BKartA)

The Federal Cartel Office (*Bundeskartellamt*, hereafter BKartA) is an independent higher federal authority seated in Bonn which is assigned to the Federal Ministry of Economics and Technology (§ 51 (1) Act against Restraints of Competition, *Gesetz gegen Wettbewerbsbeschränkungen – GWB*). The BKartA exercises the functions and powers of competition authority if the effect of the restrictive or discriminatory conduct extends beyond the territory of a Bundesland (§ 48 (2) GWB). This means that it is also responsible for the application and enforcement of EU competition law (§ 50 (1) GWB).

Furthermore, the BKartA is the competent competition authority for the cooperation in proceedings of the Commission or national competition authorities of other Member States (§ 50 (3) GWB), and the cooperation within the Network of European Competition Authorities (ECN) in particular (§ 50a GWB).

(2) Financial markets law (BaFin)

The Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, hereafter BaFin) is an autonomous public-law institution with its seats in Bonn and Frankfurt/Main, which is subject to the legal and technical oversight of the Federal Ministry of Finance (§§ 1, 2 *Finanzdienstleistungsaufsichtsgesetz – FinDAG*). The BaFin is responsible for the supervision of banks and financial service providers, insurance undertakings and securities trading (§ 4 (1) FinDAG). In particular, the BaFin is the competent authority for the supervision of credit rating agencies (§ 17 (1) Securities Trading Act, *Wertpapierhandelsgesetz – WpHG*; Reg No. 1060/2009) and on OTC derivatives, central counterparties, trade repositories and credit rating agencies (§ 18 (1) WpHG; Reg No 648/2012; see also § 6 (1a) Banking Act, *Kreditwesengesetz – KWG*).

Banking supervision is a shared task of the BaFin and the German Federal Bank (*Deutsche Bundesbank*) (§ 6 (1) KWG). The German Federal Bank (*Bundesbank*) is responsible for ongoing supervision, i.e. the evaluation of documentation submitted by banks, inspection reports and annual financial statements and performing on-site inspections (§ 7 (1) KWG). The main responsibility, however, lies with the BaFin that issues guidelines regarding the ongoing supervision by the German Federal Bank² and is exclusively competent to order inspections and to adopt regulatory measures, thereby taking into account the findings of the German Federal Bank (§ 7 (2) KWG). The BaFin is the competent authority for cooperation with ESMA (§ 7a WpHG; see also § 7b (1) and (4) KWG) and the cooperation with the European Banking Authority (§ 7b (1) to (3a) KWG). The cooperation with the ECB is a common task of BaFin and the Bundesbank (§ 7 (1a) KWG; see supra); both authorities inform each other of information exchanged with the ECB.

(3) Protection of EU financial interests (BMF)

In Germany, the Federal Ministry of Finance (*Bundesministerium der Finanzen*, hereafter: BMF) is the contact point for OLAF; in close cooperation with OLAF, it coordinates anti-fraud investigations carried out by OLAF in Germany.³ The function and tasks of the BMF as national

² See the Richtlinie zur Durchführung und Qualitätssicherung der laufenden Überwachung der Kredit- und Finanzdienstleistungsinstitute durch die Deutsche Bundesbank (Aufsichtsrichtlinie) of 21 May 2013, English version available at <http://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Richtlinie/rl_130521_aufsichtsrichtlinie_en.html> (last visited 11 August 2016).

³ Information provided by the BMF (25 June 2010), available at <http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Stabilisierung_des_Euro/2010-12-16-haushaltsentlastung-finanzenkontrolle-erh.html> (last visited 11 August 2016).

contact point and anti-fraud coordination service (AFCOS)⁴ are not regulated by law. The BMF is not entitled to take any investigative or administrative measures against individual or corporations.⁵ The task of the coordination unit is twofold: On the one hand, it has a conceptual and strategic function in the area of antifraud policy (e.g. OLAF reform and the evaluation of the new OLAF regulation; representation of Germany in the various committees at EU level), on the other hand it fulfils operative tasks in the coordination of anti-fraud investigations triggered by OLAF.⁶ Its operative function, however, is limited as the investigative and administrative measures are taken by the competent authorities of the states (*Länder*) with regard to the expenditure side of the EU budget and by the customs administration with respect to the revenue side (in particular traditional own resources).⁷

- b) How do these authorities give effect to their duties of cooperation under EU law: Are there specific provisions for direct enforcement cooperation, or do national authorities simply apply the general rules (for comparable cases under national law)? The aim is to identify how the EU dimension of national law enforcement has been incorporated into the national framework. Is this done explicitly, implicitly, or perhaps even not at all?

(1) Competition law (BKartA)

As mentioned, the BKartA directly applies EU competition law (Article 101, Article 102 TFEU). The administrative proceedings and the imposition of fines are subject to the same rules as those applicable to purely domestic cases.

As regards cooperation with the Commission, there are special provisions on the exchange of information in the ECN and its use as evidence (§ 50a GWB; see also § 50b GWB). Apart from these provisions, the cooperation with the Commission follows the general rules (§ 50 (3), second sentence GWB). In particular, the investigative powers of the BKartA in domestic cases also apply to investigations at the request of the Commission.⁸

(2) Financial markets law (BaFin, Bundesbank)

In its cooperation with ESMA, the BaFin exercises the powers of the competent national authority under EU law (§ 17 (1) and (2), § 18 (1) and (4) WpHG). In addition, the general rules on domestic investigations apply (§ 17 (3), § 18 (1), third sentence, (6) WpHG). The cooperation with the ECB is subject to the general rules on banking supervision and the cooperation of BaFin and the Bundesbank (§ 7 (1a), fourth sentence KWG). This means that the Bundesbank must not adopt binding measures against credit institutions and has to comply with the guidelines issued by the BaFin (*supra* a] [2]).

(3) Protection of EU financial interests (BMF)

The cooperation with OLAF is not regulated by national law. Apparently, the role of the BMF is limited to its function as a contact point (e.g. for collecting and reporting irregularities to OLAF) and coordination unit.⁹ In the latter function, the BMF assists OLAF in establishing

4 Art. 3 (4) Regulation (EU, Euratom) No. 883/2013.

5 Information provided by the Bundesministerium der Finanzen, *supra* note 1.

6 Information provided by the Bundesministerium der Finanzen, *supra* note 1.

7 Information provided by the Bundesministerium der Finanzen, *supra* note 1.

8 E. Rehbinder, in U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50 margin no. 11.

9 Information provided by the Bundesministerium der Finanzen, *supra* note 1.

contact with the competent federal or state authority dealing with the case; if the competent authorities cooperate directly with OLAF, they are expected to keep the BMF informed of the investigation.¹⁰ The investigative measures in the area of traditional own resources are carried out by customs authorities according to the national rules for administrative proceedings, in particular the provisions on tax inspections (§§ 193 ff. Fiscal Code, *Abgabenordnung – AO*)¹¹ and, in the area of EU expenditure, by the federal or state authorities applying the conditions set out in the administrative decision granting a subsidy.¹² As regards the latter, the threat of revoking the grant has proven a sufficient means to ensure cooperation of the recipient.¹³ In addition, the applicable law may also provide for investigative powers (information requests, production orders, inspections, e.g. § 33 of the Act on the Implementation of Common Market Organisations – *Marktorganisationsgesetz – MOG*).¹⁴ In any case, the BMF has no power to carry out investigative measures. However, at the request of OLAF, it has referred to publicly available information on economic operators in a few cases.¹⁵

- c) To which extent are national thresholds for opening investigations (such as a degree of suspicion or formal decisions by certain national authorities) also applied in proceedings for EU authorities? How is this done precisely?

(1) Competition law (BKartA)

There is no explicit provision on the threshold to be applied in proceedings for the Commission. Basically, there are two scenarios: If the Commission requests the BKartA to carry out an inspection (Article 22 (2) Reg. No. 1/2003), the BKartA is merely acting on the basis of the Commission's request, i.e. in the framework of administrative and legal assistance and not in the course of a domestic investigation. Accordingly, the threshold for the opening of an investigation does not apply; the BKartA, however, has to comply with the legal requirements of the requested investigative measure. If, by contrast, the BKartA initiates a domestic investigation on the basis of the information forwarded by the Commission, the national rules on the opening of an investigation apply (e.g. the margin of discretion).

(2) Financial markets law (BaFin, Bundesbank)

The threshold for opening an investigation in cooperation with ESMA or the ECB is not explicitly regulated. In that regard, the considerations on competition law (supra [1]) apply accordingly, as regards an instruction of the ECB (Article 9 (1) Reg. No. 1024/2013) or a request of ESMA (Article 23d (6) Reg. No. 1060/2009, Article 63 (6) Reg. No. 648/2012) to carry out investigations on their behalf. In any case, the investigative powers (information request, production order) form part of ongoing supervision so that the threshold is rather low (e.g. § 4 (3) WpHG: 'based on indications for monitoring' – 'aufgrund von Anhaltspunkten für die Überwachung') or even non-existent (e.g. § 44 (1) KWG: 'with or without a special reason' – 'auch ohne besonderen Anlass').¹⁶

¹⁰ Information provided by the Bundesministerium der Finanzen, supra note 1.

¹¹ H. Gemmel, *Kontrollen des OLAF in Deutschland* (2002), pp. 144 ff, 148; see also S. Strobel, *Die Untersuchungen des Europäischen Amtes für Betrugsbekämpfung (OLAF)* (2012), pp. 260 f.

¹² Information provided by the Bundesministerium der Finanzen, supra note 1.

¹³ Information provided by the Bundesministerium der Finanzen, supra note 1.

¹⁴ Strobel, supra note 11, pp. 147, 170.

¹⁵ Information provided by the Bundesministerium der Finanzen, supra note 1.

¹⁶ This assessment has been confirmed by the BaFin, supra note 1.

(3) Protection of EU financial interests (BMF)

As the cooperation with OLAF is not regulated at all, there is no provision on the applicable threshold, either. Furthermore, any investigation in this field is not conducted by the BMF, but by the competent state authority.¹⁷ In any case, inspections in customs proceedings are not subject to a threshold (e.g. suspicion), but form part of ongoing tax supervision.¹⁸ The rules on a criminal investigation (and the corresponding powers of the tax investigation service – *Steuerfahndung*) do not apply (§ 208 (1) No 1, § 404 AO).¹⁹ Since the other tasks of the *Steuerfahndung* (§ 208 (1) No 2 and 3 AO) are closely linked to investigations on tax crimes, they are considered to be inapplicable, too.²⁰ On the other hand, the administrative powers of the *Steuerfahndung* are the same as those of tax offices and should therefore apply accordingly in OLAF customs investigations (e.g. tax inspections, § 208 (2) No 1 AO).²¹

- d) Are administrative proceedings precluded/to be postponed once national criminal proceedings have started? In some cases, national law and constitutional safeguards preclude administrative proceedings from continuing, because criminal proceedings are already pending (or likely to be opened). We are interested in the ‘why’ and what this means precisely for investigations by EU authorities.

(1) Competition law (BKartA)

The BKartA has a double function: to prevent and/or to terminate violations of competition law (preventive function, administrative proceedings *stricto sensu*; §§ 54 ff GWB – *Verwaltungsverfahren*) and to sanction illegal conduct by administrative fines (repressive function, §§ 81 ff GWB – *Bußgeldverfahren*) which is subject to the Regulatory Offences Act (*Ordnungswidrigkeitengesetz* – *OWiG*).

There is no procedural rule on the relationship between administrative and criminal proceedings. This means that the initiation of a criminal investigation does not preclude administrative proceedings; in order to comply with constitutional safeguards (e.g. the privilege against self-incrimination), obligations under administrative law are suspended (see infra section 3.3). The relationship between administrative proceedings and sanctioning proceedings under the Regulatory Offences Act (administrative fines) is not regulated either, which means that parallel proceedings are not expressly precluded. In practice, however, sanctioning proceedings under the Regulatory Offences Act and administrative proceedings are not conducted in parallel; the Federal Cartel Office usually decides at a very early stage of proceedings whether to initiate sanctioning proceedings or administrative proceedings.²² If there are grounds to believe that a cartel offence has been committed, the investigation follows the rules of sanctioning proceedings and the corresponding procedural safeguards apply.

By contrast, proceedings regarding the imposition of administrative fines are precluded by criminal proceedings because there is no need for an administrative fine if the offender is to be punished by a criminal sentence. If there are indications to the effect that the conduct constitutes a criminal offence, the administrative authority must transfer the case to the public prosecutor’s

17 Information provided by the Bundesministerium der Finanzen, supra note 1.

18 M. Böse, *Wirtschaftsaufsicht und Strafverfolgung* (2005), p. 220.

19 Gemmel, supra note 11, pp. 146-147.

20 Gemmel, supra note 11, p. 147.

21 See also (with regard to tax inspections) Gemmel, supra note 11, p. 147.

22 Information provided by the BKartA, supra note 1.

office (§ 41 (1) OWiG). In competition law, however, the BKartA enjoys an exclusive power for the sanctioning of legal persons (§ 82 GWB) because of its expertise in this area. The BKartA imposes administrative fines on corporations even if the relevant conduct is not only a regulatory, but also a criminal offence. By contrast, the individual offender is subject to criminal proceedings only. If, however, the public prosecutor dispenses with criminal proceedings, he is obliged to transfer the case back to the BKartA (§ 41 (2) OWiG).

(2) Financial markets law (BaFin)

In financial markets law, a criminal investigation is not precluded by administrative proceedings, and the initiation of criminal proceedings does not affect the investigative powers of the BaFin as far as the administrative measure does not present a threat to the purpose of the criminal investigations (§ 4 (5), third sentence WpHG). Like in competition law (supra [1]), the relationship between administrative proceedings and sanctioning proceedings under the Regulatory Offences Act (administrative fines) is not regulated, and parallel proceedings are not prohibited; in practice, administrative and sanctioning proceedings are conducted independently and by different units of the BaFin.²³ The relationship between criminal proceedings and administrative sanctions is subject to the general rules (§ 41 OWiG, supra [1]).

(3) Protection of EU financial interests (BMF)

In principle, customs proceedings are not barred by a criminal investigation (§ 393 (1) AO). Nevertheless, as the obligations under tax law (and in the framework of tax inspections in particular) may affect the constitutional rights (e.g. the privilege against self-incrimination), the inspector must not proceed with the auditing until the person concerned has been informed that a criminal investigation has been initiated against him and that he cannot be forced to cooperate with the auditor and the revenue authority (§ 10 (1) Regulation on tax inspections, *Betriebsprüfungsordnung – BpO*). Unlike in financial markets and competition law, the person concerned may be subject to criminal investigation, and therefore, the rights of the defendant (the privilege against self-incrimination in particular) must be strictly observed, given the fact that the tax inspector may take the initiative to initiate a criminal investigation.

3.3 ANALYSIS OF THE INVESTIGATORY POWERS

3.3.1 The interviewing of persons and production orders

As has been explained above, there are mainly three institutions serving as counterparts for the EU institutions: the Federal Cartel Office (*Bundeskartellamt, BKartA*) for the DG Comp, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*), supported by the German Federal Bank (*Deutsche Bundesbank*), for ECB and ESMA, and the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*), supported by the national authorities competent for implementing EU funds, and by customs authorities, for OLAF. Each of these institutions is subject to a different legal regime that regulates their investigative powers. It is therefore necessary to distinguish between the different pieces of legislation.

²³ Information provided by the BaFin, supra note 1.

a) The interviewing of persons (which includes oral/written questioning) and production orders.

(1) *Competition law (BKartA)*

The applicable rules depend on the manner of assistance chosen by the Commission. If it operates on the basis of Regulation No. 1/2003, the Commission usually makes use of its own investigative powers (Article 17 ff. Reg No. 1/2003). The powers enjoyed by the Commission also apply to assisting national competition authorities (Article 20 (5), second sentence Regulation No. 1/2003).²⁴ National law applies to measures that are not provided for by EU law, i.e. coercive measures (Article 20 (6) Reg No. 1/2003), which means that the general rules on the enforcement of investigative measures (e.g. search and seizure) apply (§§ 58, 59 GWB).

Moreover, national law applies if the national competition authorities act at the request of the Commission (Article 22(2) Reg No. 1/2003). However, this option has not yet been used by the Commission. Probably, this is because it is generally easier for the Commission to operate itself than to request investigations by the national competition authorities. This means that, in practice, the BKartA is only involved in giving support under Article 20 (6), (7) Reg. No. 1/2003.

The rules on administrative proceedings before competition authorities can be found in §§ 54 ff. GWB. These rules are applicable in proceedings that are led by the European Commission (§ 50 (3) GWB). However, in practice, the BKartA does not make use of its administrative powers when cooperating with EU competition authorities.²⁵ Rather, they usually open an investigation for regulatory offences. As has been explained above, these are sanctioning proceedings that fall within the ambit of the Regulatory Offences Act (*Ordnungswidrigkeitengesetz, OWiG*, supra 3.2). This means that the rules of criminal procedure apply (§ 81 GWB, §§ 2, 46 (1) OWiG). In consequence, interviews with suspects and witnesses must follow the rules on witness privileges in §§ 52 ff. StPO, which grant substantial rights to remain silent to relatives of the suspect and members of certain professions. The privilege against self-incrimination is also fully respected in criminal procedure law (§ 136 (1) sent. 2 StPO). Also, § 55 StPO explicitly grants the right to remain silent to witnesses who would otherwise have to incriminate themselves (see *infra*). Moreover, witnesses can refuse to produce documents under § 95 (2) StPO. It is generally believed that the same right applies to the suspect, although this is not explicitly stated in the Code of Criminal Procedure.²⁶ This means that production orders can easily be rebutted in competition law cases and are therefore not of practical importance. As the criminal law standard is considered to also apply to administrative proceedings that are conducted at the same time, it is clear that criminal procedure law is much more important in this context than administrative law.

For the subject matter of this project, the proceedings under administrative law, it must be concluded that the respective legal provisions are unimportant. The BKartA almost exclusively uses its investigative powers under § 46 OWiG and does not base investigations on administrative law.²⁷ It follows that the following analysis of the BKartA's administrative power must be read with the *caveat* that it is mainly of an academic nature.

24 M. Böse, 'The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases', in: K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), Vol. I, pp. 838 (846).

25 Information provided by the BKartA, supra note 1.

26 See B. Gercke, in B. Gercke et al. (eds.), *Heidelberger Kommentar zur Strafprozessordnung* (2012), § 95 margin no. 6; M. Greven, in R. Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung* (2013), § 95 margin no. 6.

27 Information provided by the BKartA, supra note 1.

The general rule on investigations under administrative law in competition law is contained in § 57 (1) GWB: The competition authorities²⁸ may conduct any investigation and collect any evidence required. However, modifications of this rule concerning the interviewing of persons are contained in §§ 57 (2) ff. and 59 GWB.

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied vis-à-vis ‘persons concerned’/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?
 - Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

As the Commission generally carries out its own investigations (Article 18 ff. Reg. No. 1/2003), requests for information under German law play an only marginal role in the field of vertical cooperation with EU competition authorities. § 59 (1) GWB allows the competition authorities to request from undertakings and associations of undertakings the disclosure of information regarding their economic situation, as well as the surrender of documents. This applies to any undertaking, i.e. also those that are parties to the proceedings (§ 54 (2) GWB), including those against whom the procedure is directed. This means that § 59 GWB applies to ‘defendants’. The owner of undertakings and, in case of legal persons, the legal representatives are obliged to produce the requested documents and disclose the requested information (§ 59 (2) GWB).

However, as far as the disclosure of information is concerned, the rule takes account of the privilege of self-incrimination. § 59 (5) GWB *mutatis mutandis* refers to § 55 of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*). This provision provides for a right to refuse to answer any questions the reply to which would subject the person asked, or one of his near relatives²⁹, to the risk of being prosecuted for a criminal offence or a regulatory offence. While a risk of criminal prosecution is rare in these cases, some violations of competition law constitute regulatory offences (§ 81 GWB). Under the general rules on regulatory offences, which apply in the context of § 81 GWB, particularly §§ 9, 130 OWiG, a large number of natural persons may potentially be liable for violations of competition law, which means that § 55 StPO is of importance. As § 30 OWiG allows for a fine of legal persons for regulatory offences that have been committed by their representatives, there has been debate on whether the possibility of such a fine should invoke § 55 StPO for corporations in the context of § 59 (5) GWB.³⁰ In any case, the persons concerned need to be informed of their right to refuse to answer (§ 59 (5) GWB and § 55 (2) StPO). The difference from EU law, where the privilege against self-incrimination is limited to confessions³¹, is due to the fact that sanctioning proceedings are conducted against

28 For a definition, see § 48 (1) GWB.

29 § 55 StPO refers to the relatives listed in § 52 (1) StPO. These are the fiancé(e), spouse or civil partner of the accused or a person who is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused.

30 See S. Klaue, in U. Immenga & E.-J. Mestmäcker (eds.), *Wettbewerbsrecht* (2014), § 59 margin no. 39; G. Dannecker & J. Biermann, in U. Immenga & E.-J. Mestmäcker (eds.), *Wettbewerbsrecht* (2014), § 81 margin nos. 251 ff.; A. zur Nieden, in W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht*, 80th instalment (May 2014), § 59 margin no. 34. On § 30 OWiG, see A. Schneider, ‘Corporate Liability for Manslaughter – a comparison between English and German Law’, (2009) *Zeitschrift für Internationale Strafrechtsdogmatik*, no. 1, pp. 33 ff.

31 Case 347/87, *Orkem v Commission*, [1989] ECR I-3283, ECLI:EU:C:1989:387, paras. 28 ff.

both corporations and individuals, and the latter usually enjoy a higher level of protection; accordingly, § 81a GWB provides for exceptions to the privilege against self-incrimination that apply to corporations only (see *infra*).

In the case of production orders, the matter is more complicated. As § 55 StPO only concerns witness testimonies, it does not apply to production orders. The majority of scholars therefore do not accept a right to refuse the production of documents in case of possible self-incrimination.³² Although such a right might be a logical addition to § 59 (5) GWB and § 55 StPO, the lack of it is deemed to be a deliberate decision by the legislator.³³ It should be noted that, even in criminal proceedings, there is a no clear provision on the protection against self-incrimination with respect to production orders. Nonetheless, § 95 (2) StPO, which grants the right to refuse the production of documents, is generally understood to include the defendant.³⁴ For correspondence with a lawyer, see *infra* 3.3.3.

§ 57 GWB allows the competition authorities to collect any evidence. This includes production orders and witness testimonies. However, § 59 GWB takes precedence if applicable. Witnesses are natural persons who are not part of the proceedings (see § 54 GWB).³⁵ According to § 57 (2) GWB, witnesses can invoke their rights to remain silent that are granted in the Code of Civil Procedure (§§ 383 f. ZPO) when interviewed. This applies to close relatives of the parties³⁶ (§ 383 (1) no. 1-3 ZPO), clergymen (§ 383 (1) no. 4 ZPO), people working in media (§ 383 (1) no. 5 ZPO) and ‘persons to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers’ (§ 383 (1) no. 6 ZPO). This means that all people who are sworn to professional confidentiality may refuse to testify, including lawyers, in-house lawyers and medical doctors, but also e.g. tax consultants. Moreover, witnesses may refuse to answer questions if the answer were to lead to property loss, prosecution or being dishonoured of the witness or a close relative or if they had to disclose trade secrets (§ 384 ZPO). In order to invoke these rights, witnesses need to substantiate them before the competition authority (§§ 57 (2) GWB, 386 ZPO).

§ 57 GWB also allows the interviewing of persons who take part in the proceedings and are therefore not witnesses.³⁷ As participants, they do not have the right to refuse to testify. However, generally these people will fall within the scope of § 59 GWB and are at least protected against self-incrimination.

§ 81a GWB contains a special rule on duties to disclose information for legal persons and associations of persons. If these undertakings are threatened by a fine for violation of competition law, they are obliged to disclose information about the total turnover of the undertaking (§ 81a (1) GWB). This is important for determining the amount of the fine (§ 81 (4), second sentence GWB). Individuals acting on behalf of the legal person or the association of persons may refuse

32 W. Töllner, ‘Die Ermittlungsbefugnisse der Kartellbehörden in Deutschland’, (2011) *Europäisches Wirtschafts- und Steuerrecht*, no. 1, p. 21; zur Nieden, *supra* note 30, § 59 margin no. 33; Klaue, *supra* note 30, § 59 margin no. 54.

33 Zur Nieden, *supra* note 30, § 59 margin no. 33.

34 See B. Gercke, in B. Gercke et al. (eds.), *Heidelberger Kommentar zur Strafprozessordnung* (2012), § 95 margin no. 6; M. Greven, in R. Hannich (ed.), *Karlsruher Kommentar zur Strafprozessordnung* (2013), § 95 margin no. 6.

35 K. Schmidt, in U. Immenga & E.-J. Mestmäcker (eds.), *Wettbewerbsrecht* (2014), § 57 margin no. 16. This excludes legal representatives of corporations.

36 See the list in note 29, *supra*.

37 Schmidt, *supra* note 35, § 57 margin no. 24.

to answer questions if the answers were to expose them personally or a relative as specified in § 52 (1) StPO to the risk of being prosecuted for a criminal or administrative offence. However, a risk of prosecution of the legal person or association of persons does not justify a refusal to answer. German law therefore makes a clear distinction between legal and natural persons. This is because the principle of self-incrimination is deemed to be connected to human dignity (Article 1 Basic Law, *Grundgesetz – GG*), which legal persons do not have.³⁸

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

The GWB does not contain specific rules on the access to lawyers. Therefore, the general rules for administrative procedures apply, in this case the Federal Act of Administrative Procedure (*Verwaltungsverfahrensgesetz – VwVfG*). § 14 (1) VwVfG allows those that take part in administrative proceedings to authorise others to act for them. The representative can communicate with the administrative authorities on behalf of the concerned party. Moreover, anyone can accompany the party to negotiations and discussions, which includes meetings for questioning and production orders. This means they have access to a lawyer. If the BKartA has opened sanctioning proceedings, which is the norm, § 46 (1) OWiG in conjunction with §§ 137 ff. StPO grant the right of access to a lawyer.

- Is an ex ante judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorization is denied – is there a right to appeal?

Ex ante judicial authorisation is not necessary.

- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

The competition authority must first initiate proceedings in order to avail itself of its investigative competences. However, it is up to the discretion of the authority whether it wants to start proceedings or not. § 59 GWB only applies ‘to the extent necessary to perform the functions assigned to the competition authority’. This means that there must be sufficient grounds for supposing that a violation of competition law might have taken place.³⁹ This requirement corresponds to the threshold for initiating a criminal investigation (suspicion of a cartel offence).⁴⁰ § 59 GWB is limited to information regarding the economic situation of the undertaking.

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a de facto measure? What are the legal consequences of this

38 See BVerfGE 95, 220 (242).

39 See zur Nieden, supra note 30, § 59 margin no. 14 f.

40 Regional Court Berlin (Kammergericht), Decision of 4 February 1981 – Kart 5/81 (*Metro – Kaufhof*), WuW/E/OLG 2433 (2436).

(for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

The legal form depends on the exact measure. A request for information under § 59 GWB is made in the form of a formal decision (*Beschluss*) by the BKartA (§ 59 (6) GWB). It is therefore an administrative act (*Verwaltungsakt*), which means that it needs to be in writing with reasons and needs to contain information about legal remedies (§ 61 GWB). Moreover, it is enforceable even if a legal remedy has been sought (see §§ 63 ff. GWB). Non-compliance with this decision even constitutes a regulatory offence under § 81 (2) no. 6 GWB.

Investigative measures under § 57 GWB are not taken by formal decision. As interim measures, they generally cannot be taken separately. However, as far as witness testimony is concerned, the reference to the Code of Civil Procedure allows for certain legal remedies: if a witness claims a reason for refusal to testify, the competition authority can decide whether there is sufficient ground for refusing to testify in an interlocutory decision (§ 57 (2) GWB, § 387 ZPO).⁴¹ A complaint can be filed against this decision. Moreover, if a witness refuses to testify without good reason, he or she can be fined (§ 390 ZPO).⁴² This sanction can also be addressed by a complaint.

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

The enforcement of these measures is executed by the BKartA. Formal requests for information are enforced by a coercive fine (*Zwangsgeld*). Non-compliance with a request for information (§ 59 GWB, § 81a GWB) also constitutes a regulatory offence and can be sanctioned. Witnesses can be obliged to testify if they have no right to refuse testimony under Civil Procedure Law.

In practice, the BKartA usually asks information in an informal manner, i.e. it is left to the discretion of the person concerned whether they want to comply or not. Usually, these requests are complied with. If not, the BKartA may proceed by following the procedure envisaged in § 59 GWB.

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

Regulation (EC) 1/2003 contains measures that the European Commission can execute autonomously (see EU report) on German territory. If the Commission does not act itself, the BKartA takes over.⁴³ There is no rule in German law that allows EU officials to be present during investigations. § 50 (4) GWB only applies to officials of competition authorities of other Member States. However, Article 22 (2) subpara. 2 of Regulation (EC) 1/2003 can be used in order to justify the presence of EU officials.⁴⁴

41 § 387 ZPO refers to trials and therefore speaks of an 'interlocutory judgment'. Competition authorities do not have the power to render judgments; they take decisions instead.

42 However, in contrast to § 390 (2) ZPO, § 57 (2), first sentence GWB does not allow the imprisonment of the witness.

43 See Böse, *supra* note 24, pp. 838 (842 ff.).

44 *Ibid.*, p. 849.

(2) *Financial markets law (BaFin)*

The BaFin and the Bundesbank work closely together in ensuring the supervision of finances (§ 7 KWG). Both take part in the activities of ESMA and the ECB following the rules contained in the KWG and WpHG. Rules on investigations by the BaFin can be found in §§ 44 ff. KWG. Moreover, the cooperation with EU authorities on credit rating agencies and OTC derivatives is regulated in §§ 17 (3), 18 (1), (4) - (6) WpHG which partly refer to § 4 WpHG.

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied *vis-à-vis* ‘persons concerned’/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?
 - Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

§§ 44 ff. KWG allow the BaFin, persons and entities used by the BaFin and the Bundesbank to request information about business activities, documents and, if necessary, copies of relevant documents from institutions or a superordinated undertaking, the members of its governing bodies and its employees. § 44 KWG is directed at authorised institutions and entities. § 44a KWG deals with cross-border cases and § 44b KWG includes holders of major participating interests. With regard to unauthorised banking business and financial services. § 44c (1) KWG allows the BaFin to request information and documents from an undertaking ‘about which facts are known which warrant the assumption that it conducts banking business or provides financial services without the authorisation required under this Act or without the authorisation required under Article 14 of Regulation (EU) 648/2012 or that it conducts business prohibited under section 3’⁴⁵. § 44c KWG therefore specifically aims at gathering information about illegal activities. However, as regards supervision of significant credit institutions by the ECB, the powers in the framework of ongoing supervision (§ 44 KWG) are more relevant in practice.

The privilege against self-incrimination is taken account of in § 44 (6) KWG (see also § 44c (5), second sentence KWG). According to this provision, a person obliged to furnish information may refuse to do so in respect of any questions, the answers to which would place him/her or one of his/her relatives as designated in § 383 (1) nos. 1 to 3 ZPO⁴⁶ at risk of criminal prosecution or proceedings for regulatory offences. § 44 (6) KWG is therefore similar to § 55 StPO. Information about this right is not necessary. However, the rule only applies to a request for information.⁴⁷ A request for documents has to be complied with, even if the content is incriminating.⁴⁸ According to case law, this even applies if criminal proceedings have already been initiated against the

45 § 44c (1) KWG, English translation by the Bundesbank, available at <https://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_kwg_en.pdf;jsessionid=327A152DB5D0C3ABD0BFFA02144EE5_DA.1_cid381?__blob=publicationFile&v=1> (last visited 15 December 2016).

46 Fiancé(e), spouse or civil partner of the accused or a person who is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused.

47 Administrative Court (*Verwaltungsgericht*) Frankfurt, Judgement of 4 June 2009 – 1 K 4060/08.F (not yet reported).

48 Hessian Supreme Administrative Court (*Hessischer Verwaltungsgerichtshof*), Decision of 25 May 2007 – 6 TG 1483/06 (not yet reported); P. Häberle, in P. Häberle (ed.), *Erbs/Kohlhaas – Strafrechtliche Nebengesetze*, 198th instalment (April 2014), § 44c KWG margin no. 7.

person obliged to give information.⁴⁹ This result has been regarded as constituting a breach of *nemo tenetur* by some scholars and several solutions have been suggested, including the idea not to use these documents as evidence in criminal proceedings.⁵⁰ Recent case law seems to be leaning towards this solution.⁵¹ Nonetheless, the situation is still far from clear. In BaFin practice, institutions have not refused to produce documents, relying on the privilege against self-incrimination.⁵² According to legislation, documents gathered by the BaFin can be handed over to criminal prosecution authorities and can be used without any limitation (see § 9 KWG).⁵³

As §§ 44 ff. KWG applies to all types of undertakings that may have provided financial services, the undertaking in question may be a firm of lawyers or tax accountants or it may employ such persons. These persons have a confidentiality obligation, which would be breached if the lawyer or accountant were obliged to disclose information on their clients' conduct. In 2011, the Federal Supreme Administrative Court (*Bundesverwaltungsgericht*) had to decide a case where the BaFin asked for information about a client from a lawyer.⁵⁴ It held that the confidentiality obligation (§ 43a (2) BRAO) did not apply if a separate law demanded the disclosure of information, as the Professional Statute for Lawyers allowed for exceptions (§ 2 (2) BRAO).⁵⁵ One of these laws demanding the disclosure of information is § 44c KWG.⁵⁶ Accordingly, professional secrecy does not hinder the interviewing of persons under § 44 ff. KWG.⁵⁷

As far as the supervision of credit rating agencies is concerned, § 17 (3) WpHG refers to the general investigative powers according to § 4 WpHG, thereby supplementing Article 23 Reg. No. 1060/2009. According to § 4 (3) WpHG, the BaFin has the power to request information and documents from anyone (see also with regard to specific actors and specific information to be provided § 4 (3a) ff. WpHG; see also *infra d*). However, the duties of confidentiality (e.g. the legal professional privilege, § 43 (2) BRAO) and provisions granting a right to remain silent must be fully respected (§ 4 (3), third sentence WpHG). This is further elaborated in § 4 (9) WpHG, providing that a person may refuse to provide information if this would place himself or one of his relatives at risk of criminal prosecution. Unlike the corresponding provision in § 44 (6) KWG, § 4 (9), second sentence WpHG requires the BaFin to inform the person concerned of this right and the right to consult with a defence counsel. Again, the privilege against self-incrimination only applies to the disclosure of information, not to the production of documents. When exercising its competences under § 18 WpHG (supervision on OTC derivatives, central counterparties and trade repositories), the BaFin can request information, documents and copies (§ 18 (6) WpHG). If the BaFin so wishes, documents must also be handed over in English (§ 18 (5) WpHG). The reason

49 Administrative Court (*Verwaltungsgericht*) Berlin, (1988) *Neue Juristische Wochenschrift*, pp. 1105 (1106 ff.). See also M. Hartung, 'Zum Umfang des Auskunftsverweigerungsrechts nach § KWG § 44 KWG', (1988) *Neue Juristische Wochenschrift*, pp. 1070 (1071 ff.). It should be kept in mind that the infringement of § 3 KWG constitutes a criminal offence under § 54 KWG.

50 See, for an overview J.H. Lindemann, in K.-H. Boos et al. (eds.), *Kreditwesengesetz* (2012), § 44c KWG margin no. 61 ff., and generally, Böse, *Wirtschaftsaufsicht und Strafverfolgung*, supra note 18, pp. 436 ff., 514 f., 542 f.

51 Hessian Supreme Administrative Court (*Hessischer Verwaltungsgerichtshof*), decision of 23rd August 2012 – 6 B 1374/12, *Deutsches Verwaltungsblatt* 2012, 1445 (1449), margin no. 34; Hessian Supreme Administrative Court (*Hessischer Verwaltungsgerichtshof*), Decision of 25 May 2007 – 6 TG 1483/06 (not yet reported).

52 Information provided by the BaFin, supra note 1.

53 Cf. Hartung, supra note 49, pp. 1070 (1071 f.).

54 BVerwGE 141, 262.

55 BVerwGE 141, 262 (266 f., margin no. 24 ff.).

56 BVerwGE 141, 262 (267 f., margin no. 25).

57 See also Hessian Supreme Administrative Court (*Hessischer Verwaltungsgerichtshof*), Decision of 23 August 2012 – 6 B 1374/12, *Deutsches Verwaltungsblatt* 2012, 1445 (1447 f.).

for this is probably that EU authorities might have a hard time understanding documents written in German. Again, the right to request documents does not diminish professional privileges or rights to remain silent, therefore legal privilege and the privilege against self-incrimination are fully protected (§ 18 (6), second sentence WpHG). The legal professional privilege, however, has not become relevant in practice.⁵⁸

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

This is regulated by § 14 VwVfG (see supra). § 4 (9), second sentence WpHG explicitly refers to the right to consult a lawyer before interrogation.

- Is an ex ante judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorisation is denied – is there a right to appeal?

Ex ante judicial authorisation is not required.

- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

In general, the investigative powers (information request, production order) form part of ongoing supervision so that the threshold is rather low (e.g. § 4 (3) WpHG: ‘based on indications for monitoring’ – ‘*aufgrund von Anhaltspunkten für die Überwachung*’) or even not existent (e.g. § 44 (1) KWG: ‘with or without a special reason’ – ‘*auch ohne besonderen Anlass*’).⁵⁹ Some provisions, however, require a suspicion of illegal conduct (§ 44c KWG).

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a de facto measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

The request for information or documents is an administrative act (*Verwaltungsakt*).⁶⁰ It may therefore be enforced through coercive measures (§ 17 FinDAG).

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

The BaFin enforces its decisions itself (§ 17 FinDAG). It uses the measures available for the enforcement of administrative acts under the Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz – VwVG*). These include acting in representation, a coercive fine and the

⁵⁸ Information provided by the BaFin, supra note 1.

⁵⁹ This assessment has been confirmed by the BaFin, see supra note 1.

⁶⁰ Lindemann, supra note 50, § 44c KWG margin no. 33.

use of force (see § 9 VwVG). The BaFin can also use other persons or institutions for fulfilling its tasks (§ 4 (3) FinDAG).

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

The ECB and the ESMA are allowed to conduct their investigation autonomously (Article 10 Reg. No. 1024/2013, Article 23c Reg. No. 1060/2009, Article 61 Reg. No. 648/2012), but are supported by the BaFin and the Bundesbank. Both institutions usually play a major role in the joint supervisory teams.⁶¹ On the other hand, ESMA may also ask the BaFin to investigate the case and to exercise the powers available according to national law; up to now, this has happened in only a few cases.⁶²

(3) Protection of financial interests (BMF)

The BMF coordinates cooperation with OLAF as AFCOS. As explained above, there is no specific legal framework for cooperation with OLAF. Nor does the BMF have operative powers. Accordingly, external investigations are conducted by national authorities competent with respect to EU funds (mainly of the *Länder*) and by the customs authorities in the area of traditional own resources.

The method of cooperation depends on whether EU expenditure or revenue is concerned. In case of EU expenditure, beneficiaries' obligations to cooperate, e.g. by presenting documents or allowing on-the-spot checks and inspections are included in the grant agreement. This is standard procedure for all EU subsidies.⁶³ If the beneficiary refuses cooperation, the grant may be revoked. This is a major incentive for cooperation, as the persons concerned are naturally loath to part with EU subsidies. Therefore, there is hardly ever resistance to on-the-spot checks and inspections carried out in cases of EU expenditure.⁶⁴

In case of EU revenue (in particular traditional own resources), the German customs authorities use the investigative powers provided for them by law. The legal framework is contained in the AO. It also applies to customs duties (§§ 1 (1), 3 (3) AO). When revenue authorities cooperate with OLAF, they probably investigate potential tax evasions that have happened in the past. In a purely national case, these cases would mostly be regarded as criminal investigations and therefore follow the Code of Criminal Procedure. As OLAF does not have competences in criminal law, support to OLAF can only follow the rules in administrative law.⁶⁵ On an administrative level, investigations usually take place in a tax inspection (*Betriebsprüfung* – §§ 193 ff. AO).⁶⁶ The descriptions below will focus on the investigative measures provided in the AO.

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied vis-à-vis 'persons concerned'/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?

61 Information provided by the BaFin, supra note 1.

62 Information provided by the BaFin, supra note 1.

63 Information provided by the Bundesministerium der Finanzen, supra note 1.

64 Information provided by the Bundesministerium der Finanzen, supra note 1.

65 See Strobel, supra note 11, pp. 138 ff; Gemmel, supra note 11, p. 134.

66 See Gemmel, supra note 11, p. 144.

- Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

In case of autonomous investigations by OLAF, it uses its own powers to request information and documents. National law is important if OLAF does not investigate at all, which is not the subject of this project, or in so-called coordination cases.⁶⁷ In this situation, OLAF could request information from the competent authorities via AFCOS. However, there has only been one coordination case including Germany and concerning EU expenditure so far.⁶⁸ This means that rules on the interviewing of persons and production orders in German law are of minor importance. Nonetheless, they may become relevant during on-the-spot checks and inspections (see *infra* 3.3.3).

The revenue authorities have strong powers to request information and documents. The participants in proceedings (§ 78 AO) are obliged to provide any information on facts that are significant for taxation (§ 93 (1) AO) and present or submit any document requested (§ 97 AO). The same is true during a tax inspection (§ 200 (1), second sentence AO). This power is therefore also directed at those that have to pay taxes.

However, this extensive right corresponds with several restrictions on the obligation to disclose information or documents. §§ 101-103 AO contain several rights to refuse to furnish information and documents. § 101 AO applies to relatives of a participant. Relatives are fiancé(e)s, including within the meaning of the Civil Partnership Act, spouses or civil partners, relations by blood or by marriage in direct line, siblings, children of siblings, spouses of siblings, and siblings of spouses, siblings of the parents and persons who are related to each other like parents and children through a permanent foster relationship involving a common household (foster parents and foster children) (§ 15 (1) AO). All these people can refuse cooperation.

§ 102 AO stipulates the right to withhold information to certain professions in order to protect professional secrecy. These are clergymen, with regard to information that was entrusted to them or became known to them in their capacity as spiritual advisors, members of the Bundestag, of a parliament of a Land or a second chamber, with regard to persons who in their capacity as members of these bodies confided to them facts or to whom they confided facts in this capacity, as well as to the facts themselves, defence counsels, solicitors, patent agents, notaries, tax consultants, auditors, tax representatives, certified accountants, medical doctors, dentists, psychological psychotherapists, psychotherapists specialising in the treatment of children and juveniles, pharmacists and midwives, with regard to information entrusted to them or which became known to them in their professional capacity and persons who are or were professionally involved in the preparation, production or dissemination of periodically printed matter or radio broadcasts with regard to the author, contributor or source of contributions and documentation and with regard to information received by them in their professional capacity insofar as this concerns contributions, documentation and information for the editorial element of their activity (§ 102 (1) AO). This rule also applies to assistants (§ 102 (2) AO). Therefore, one can say that professional secrecy is widely protected.

According to § 103 AO, persons who are neither participants nor obliged to furnish information for a participant may refuse to answer any questions the reply to which would subject them, or one of his/her relatives (see § 15 AO), to the risk of criminal prosecution or proceedings under

⁶⁷ See section 4 ii. of the EU report.

⁶⁸ Information provided by the Bundesministerium der Finanzen, *supra* note 1.

the Act on Administrative Offences. This means that the person who is supposed to pay taxes cannot refuse to answer questions, even if criminal prosecution is possible.⁶⁹ The reasons for this are practical: if the participant could refuse to disclose information when risking prosecution, he or she would probably invoke this right very often.⁷⁰ This would make tax crime impossible to investigate. However, the effects of the obligation to disclose information are rendered less harsh by the secrecy clause in § 30 AO. § 30 AO forbids turning over information to the prosecution office unless the crime in question falls within the cases stipulated in § 30 (4) no. 4 and 5, (5) AO or is a tax crime.

§§ 101-103 AO only apply to the disclosure of information. However, § 104 (1), first sentence AO states that, to the extent that the disclosure of information may be refused, the rendering of opinion and the submission/presentation of documents or valuables may be refused as well. In contrast to the other areas of law that were indicated before, requests for information and documents are therefore treated similarly in tax law.

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

According to § 80 AO, the participants can authorise another person to represent himself/herself. This can also be a lawyer. Moreover, the participant can bring an adviser to meetings and interviews. The rule in § 80 AO is therefore similar to § 14 VwVfG.

- Is an ex ante judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorization is denied – is there a right to appeal?

Ex ante judicial authorisation is not required.

- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

The revenue authorities must indicate the content of the required information and whether it is necessary for the taxation of the person asked or someone else (§ 93 (2) AO). Also, the information must be relevant for taxation (§ 93 (1) AO). Apart from that, there are no thresholds to comply with.

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a de facto measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

The request for information or documents is an administrative act (*Verwaltungsakt*). This means that coercive measures for enforcement are available.

⁶⁹ B. Rätke, in F. Klein & G. Orlopp (eds.), *Abgabenordnung* (2016), § 103 AO margin no. 1.

⁷⁰ D. Wunsch, in U. Koenig (ed.), *Abgabenordnung* (2014), § 103 AO margin no. 5.

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

Requests for information are enforced by the tax offices, main custom offices or revenue authorities of the *Länder* (§ 249 (1), second sentence AO). The enforcement follows the rules in §§ 328 ff. AO, which are similar to those of the VwVG (see supra).

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

EU law gives OLAF the right to request information autonomously.⁷¹ However, there is no legal basis to enforce an information request (e.g. by sanctions).⁷² In any case, the BMF should be notified of all investigations.

3.3.2 The monitoring of banking accounts (real time)

The national counterparts of the Commission (DG Competition), ESMA, ECB and OLAF do not have this power. However, the authority can exercise its investigative power to request documents in order to obtain information on banking accounts (supra 3.3.1]).

3.3.3 The right to enter premises, including searches and seizure

(1) Competition law (BKartA)

The Commission usually undertakes inspections on its own. This means that it sends its own employees to carry out inspections. The BKartA is informed of the planned inspection and usually one member of the BKartA is requested to assist in the inspection (Art. 20 (5) Reg. No. 1/2003). This member has the same rights as the employees of the Commission (Art. 20 (5), second sentence Reg. No. 1/2003). The German rules on the right to enter premises are therefore especially important in the context of Art. 20 (6), (7) Reg. No. 1/2003, i.e. in cases when the undertaking opposes the inspection.

As it is not possible to know in advance whether an undertaking will oppose the inspection, the practice of the BKartA is to prepare for this case by asking for a judicial order (*Durchsuchungsbeschluss*, see below) that can be shown if necessary. Nonetheless, so far no one has refused cooperation with an inspection by the Commission.⁷³

It should be noted that, again, the BKartA will generally not make use of its investigatory powers under administrative law, but open an investigation for regulatory offences (see 3.3.1). This means that the investigatory powers and safeguards granted in criminal procedures apply.⁷⁴ Search and seizure are regulated by §§ 94 ff. StPO. These provisions do not protect against self-incrimination, i.e. they allow the seizure of incriminating documents. However, certain objects that are covered by witness privilege cannot be seized (§ 97 StPO). Moreover, searches (and subsequently seizures) cannot be directed against certain witnesses that work in confidential professions (§ 160a StPO). As criminal proceedings are not the topic of this report, the §§ 94 ff.

71 See EU report.

72 See by contrast for information requests issued by national authorities § 36 (3) No 1 lit. b and § 33 (1) MOG.

73 Information provided by the BKartA, supra note 1.

74 Information provided by the BKartA, supra note 1.

StPO will not be explained in more detail. Nonetheless, it should be borne in mind that the competences under administrative law are not used in practice.

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied *vis-à-vis* ‘persons concerned’/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?
 - Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

The competition authorities have the right to inspect and examine business documents of undertakings and associations of undertakings on their premises during normal business hours under administrative law (§ 59 (1) no. 3 GWB). In order to do so, persons entrusted by the competition authority to carry out an examination may enter the offices of undertakings (§ 59 (3) GWB). Searches are permitted if there is sufficient ground to assume that the premises contain documents that could be requested by the competition authorities under § 59 (1) GWB. This shows that searches are not limited to business premises. If there are sufficient grounds to assume that relevant documents can be found e.g. in the private apartment of the CEO, it is possible to search the apartment. § 58 GWB also allows the seizure of objects that may be important as evidence.

It has already been explained that searches under § 59 (4) GWB and therefore under administrative law, albeit admissible in law, do not occur in practice. If the BKartA wants to search the premises of an undertaking, there is usually sufficient ground to suspect a regulatory offence. This means that the rules on criminal proceedings apply (§ 81 GWB, §§ 2, 46 (1) OWiG). This is also the case when the BKartA lends support to the Commission under Art. 20 (6), (7) Reg. No. 1/2003. In practice, this support is therefore based on §§ 94 ff. StPO.

Like § 59 (1) GWB, the right to enter premises can be applied *vis-à-vis* undertakings that are participants in the proceedings and therefore defendants. There is no right to refuse a search or seizure in cases of possible self-incrimination.⁷⁵

German administrative law does not generally protect professional privilege. Accordingly, there is no rule in the GWB that prohibits, for instance, the seizure of lawyer-client correspondence. This is different in the Code of Criminal Procedure that protects lawyer-client correspondence if it is in the lawyer’s possession (§ 97 (2) StPO). In this respect, it should be noted that legal professional privilege does not apply to in-house lawyers under German criminal law.⁷⁶

However, when national competition authorities are providing assistance under Art. 20 (6) Reg. No. 1/2003, they act within the legal framework of the EU and are therefore implementing EU law and therefore fall within the scope of the EU fundamental rights. This means that the protection of legal privilege under EU law applies in the manner that has been recognized by the Court of Justice.⁷⁷ If the competition authorities act at the request of the Commission, they use

⁷⁵ Klaue, *supra* note 30, § 59 margin no. 65.

⁷⁶ See § 53 (1) no. 3 StPO, which has recently been changed to exclude in-house lawyers from testimonial privilege by the Law for Restructuring the Rights of In-House Lawyers and Changing the Code of Procedure of Fiscal Courts (*Gesetz zur Neuordnung des Rechts der Syndikusrechtsanwälte und zur Änderung der Finanzgerichtsordnung*, BGBl. 2015 I, 2517).

⁷⁷ See Case 155/79, *AM & S Europe v Commission*, [1982] ECR-01575, ECLI:EU:C:1982:157; Case C-550/07 P, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:512. For an overview, see Böse, *supra* note 18, pp. 838 (843 ff.).

the legal framework provided by national law. This would mean that there is no protection of lawyer-client confidentiality under administrative law and only limited protection under criminal law. Nonetheless, the authorities can be seen as implementing EU law and are therefore bound by EU fundamental rights (Art. 51 CFR).⁷⁸ For this reason, it has been argued that the protection of legal professional privilege under EU law should also apply to national investigations in these cases, even if national law offers lower protection.⁷⁹ This reading is in line with the Court of Justice, which has stated (albeit referring to Art. 20 (6) Reg. No. 1/2003) that ‘[...] the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.’⁸⁰ Whether German case law accepts this reasoning in the future, remains to be seen.⁸¹

- To which extent are lawyers allowed to be of assistance? What is the scope and form of their assistance (consultation; presence; etc.)?

There are no special rules for access to a lawyer. § 14 VwVfG applies in the administrative context. According to this provision, the authorised person can participate in any act of the proceedings. Moreover, the authorised person should be the first one to be contacted by the authorities (§ 14 (3) VwVfG). If the participant has an obligation to help the proceedings along, e.g. a duty to submit to a search, the authorised person must be notified as well. This means that lawyers can be present anytime if they are authorised. The same is true under Criminal Procedure Law (§§ 137 ff. StPO).

- Is an ex ante judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorisation is denied – is there a right to appeal?

The search generally requires an ex ante authorisation (§ 59 (4) GWB) by the Local Court (*Amtsgericht*) of the district where the competition authority has its seat.⁸² The same is true for criminal law (§§ 98, 105 StPO). For the BKartA, this is Bonn. The test under administrative law is simple: there must be sufficient grounds to assume that documents will be found on the premises to be searched which can be inspected or examined under § 59 (1) GWB. Moreover, the search must be necessary. This means that other methods of investigation (e.g. requests for information) must be less promising.

In order to receive a court order, the competition authority has to file a request containing information about the legal foundation, subject matter and purpose of the search and about why other investigative measures do not promise as much success.⁸³ The judge at the Local Court

78 This reasoning applies to all cases that are based on European competition law, even if only the national competition authorities investigate.

79 Böse, supra note 24, pp. 838 (849 f.); zur Niden, supra note 30, § 59 margin no. 30; S. Barthelmeß & L.-P. Rudolf, in: U. Loewenheim et al. (eds.), *Kartellrecht* (2016), Art. 22 VerfO margin no. 33. Different: District Court (Landgericht) Bonn, (2007) *Neue Zeitschrift für Strafrecht* 605 (607).

80 Case C550/07 P, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:512, margin no. 119.

81 It has rejected this argument in the past, see District Court (Landgericht) Bonn, (2007) *Neue Zeitschrift für Strafrecht* 605 (607).

82 The requirement of ex ante judicial authorisation is laid down in the Constitution (Art. 13 (2) GG).

83 Klaue, supra note 30, § 59 margin no. 57.

usually decides very quickly. Often, there are judges on standby on Sundays and at night for the purpose of granting quick judicial orders. In practice, the judicial order is usually granted.

The decision by the local judge can be appealed against following the complaint procedure in the Code of Criminal Procedure (§ 59 (4), fourth sentence GWB and §§ 306 ff. StPO). If so, the body that has taken the decision decides whether it wants to redress the complaint (§ 306 (2) StPO). If not, the matter goes to the District Court (*Landgericht*) (§ 306 (2) StPO and § 73 (1) GVG), which decides about the complaint and, if applicable, gives the necessary order (§ 309 (2) StPO). A further appeal is not possible (cf. § 310 StPO).

In cases of imminent danger, there is an exception to this requirement: the persons referred to in paragraph 3 may conduct the necessary search without judicial order, but only during business hours (§ 59 (4), fifth sentence GWB).

- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

The thresholds for the *droit de visite* in administrative law are rather low. However, there are several additional procedural safeguards. In case of a search, a record of the search and its essential results must be prepared on the spot (§ 59 (4), sixth sentence GWB). This record must also include the reasons for assuming imminent danger, if applicable.

Moreover, there are specific requirements for seizure. If neither the person affected nor any relative of legal age was present at the seizure or if the person affected or, in his/her absence, a relative of legal age explicitly objected to the seizure, the competition authority must seek judicial confirmation by the Local Court in the district of which the competition authority has its seat within three days of the seizure (§ 58 (2) GWB). The person concerned may always ask for judicial confirmation (§ 58 (3) GWB).

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a de facto measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

Decisions by the BKartA in the context of § 59 GWB are formal decisions in the sense of § 61 GWB (see above).

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

In cases of non-cooperation, it is the national authorities that enforce investigative powers (Art. 20 (6) Reg. No. 1/2003). They use their own employees, but can also use third parties (e.g. accountants) for the inspection. However, so far, non-cooperation has not occurred.

In national competition investigations, the BKartA is regularly supported by the police. However, the police usually do not participate in investigations by the Commission.⁸⁴ This is because the Commission has more manpower and therefore does not need as much support from

⁸⁴ Information provided by the BKartA, supra note 1.

the police as the BKartA. Moreover, the Commission usually meets less opposition because it can fine companies in the event of lack of cooperation. In contrast, the BKartA might need police power in the event of opposition. Still, police officers could also be called in by the Commission.

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

Regulation (EC) 1/2003 establishes powers that the European Commission can exercise autonomously within German territory. There is no rule in German law that allows EU officials to be present during investigations. § 50 (4) GWB only applies to officials of competition authorities of other Member States. However, Art. 22 (2) subpara. 2 of Regulation (EC) 1/2003 can be used in order to justify the presence of EU officials.⁸⁵

(2) *Financial markets law (BaFin)*

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied vis-à-vis ‘persons concerned’/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?
 - Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

The most important provision in this respect is § 44 KWG that regulates inspections in the framework of ongoing supervision (whereas § 44c KWG applies to undertakings that are suspected of illegal activities). § 44 (1) KWG allows the BaFin (and on its behalf the Bundesbank) to carry out inspections on the premises of the undertaking. Generally, the inspections have to occur during normal office and business hours. However, in order to prevent imminent risks to public order and safety, the employees of the BaFin or the Bundesbank will be authorised to enter and inspect these premises also outside ordinary office and business hours (§ 44 (1), third sentence KWG). By contrast, when investigating illegal activities, the BaFin may also inspect these places outside business hours and even enter private homes (§ 44c (2) KWG). Furthermore, the BaFin may search the premises of the undertaking and of persons who are obliged to disclose information (§ 44c (3), first sentence KWG). In contrast to § 59 (4) GWB, it is also possible to search the persons themselves for objects that could be of importance as evidence in the investigation (§ 44c (3), second sentence KWG). These items can also be seized (§ 44c (4) KWG). These powers are not foreseen in the framework of ongoing supervision (§ 44 KWG). Until now, no searches have been carried out at the request of the ECB.⁸⁶

There is no protection against self-incrimination. § 44 (6) KWG (see also § 44c (5), second sentence) only applies to the disclosure of information, not to inspections, searches and seizure. Nor are professional privileges mentioned in the law. Taking into account that § 44c KWG is considered to take precedence over lawyer-client confidentiality [*supra* 3.3.1],⁸⁷ it must be doubted whether any restriction to the right to enter premises based on professional secrecy is recognized.

⁸⁵ Böse, *supra* note 24, pp. 838 (849).

⁸⁶ Information provided by the BaFin, *supra* note 1.

⁸⁷ BVerwGE 141, 262.

There seems to be no debate about this in German law. However, when the BaFin cooperates with EU authorities like ECB and ESMA, this should be regarded as the implementation of EU law. Accordingly, the EU rules on the protection of legal professional privilege should also apply in the context of financial security.⁸⁸ Therefore, legal documents that are important for the defence in criminal proceedings cannot be seized in this context. This view is somewhat supported by the decision of the Federal Supreme Administrative Court.⁸⁹ Although this decision does indeed stipulate the precedence of § 44c KWG, the Court has weighed the legal professional privilege against the function of § 44c KWG before taking this decision. This means that the result could well be different if confidentiality was more important than it was in the case that was the basis of this decision.⁹⁰

§ 4 (4) WpHG, which is referred to by § 17 (3) WpHG, gives the BaFin the right to enter and inspect the business premises of those that have to comply with a request for information during business hours. In order to prevent imminent risks to public order and safety, employees of the BaFin are allowed to enter private homes and business premises outside of general office hours, but only if there are sufficient grounds to suspect a violation of the WpHG by the person who has to disclose information (§ 4 (4), second sentence WpHG). Although § 18 WpHG does not explicitly refer to § 4 WpHG, this provision applies to all tasks of the BaFin, including those laid down in § 18 (1) WpHG.

There are no explicit rules for taking into account professional privilege or protection against self-incrimination. However, as § 4 (4) WpHG refers to the premises of ‘persons required to provide information pursuant to subsection (3)’, the right to enter these premises does not apply if someone can completely refuse to disclose information. This is true for private homes that belong to a person with a right to disclose information.⁹¹ In these cases therefore, the rights to refuse information have an impact on the right to entry to business premises.

Searches and seizure are only allowed in cases of insider dealing and market manipulation (Art. 14, 15 Reg. no. 596/2014) and therefore not available for cooperation with ESMA and ECB. Furthermore, German law does not provide for a power to seal premises (see Art. 23 (2) Reg. No. 1060/2009).

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

There are no special rules. § 14 VwVfG applies.

- Is an ex ante judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorisation is denied – is there a right to appeal?

⁸⁸ See, on these rules, Case C550/07 P, *Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:512, margin nos. 40 ff.

⁸⁹ BVerwGE 141, 262.

⁹⁰ See also Lindemann, *supra* note 50, § 44c KWG margin no. 27a f.

⁹¹ D. Zetzsche, in E. Schwark & D. Zimmer (eds.), *Kapitalmarktrechts-Kommentar* (2010), § 4 WpHG margin no. 64.

Searches require prior authorisation by judicial order (§ 44c (3), fourth and fifth sentence KWG). In the event of imminent danger, a search of business premises and persons is permitted without judicial order, but not a search of living accommodations.

The Local Court (*Amtsgericht*) of the district where the premises are situated has jurisdiction over this matter. The procedure is similar to the one under § 59 (4) GWB. The only question is whether the search could lead to information or objects that shed light on the illegal activities.

If the authorisation is denied, a complaint can be filed under the rules of criminal procedure (§ 44c (3), sixth sentence KWG and §§ 306 ff. StPO). The procedure is similar to the one described above. § 44c KWG also requires the authorities to provide a written record of the search.

For § 4 WpHG, prior authorisation is not necessary.

- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

In general, ongoing supervision does not require a specific threshold (§ 44 (1) KWG: ‘with or without a special reason’). Accordingly, § 4 (4) WpHG allows the entry to premises if this is necessary for the performance of the BaFin’s tasks. By contrast, § 44c KWG requires a suspicion of illegal business activities.

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a de facto measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

The decisions to start an inspection or a search are administrative acts. There are procedures for the enforcement of those acts that are more formalised (see *supra*).

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

The BaFin enforces its decisions itself (§ 17 FinDAG). It uses the measures available for the enforcement of administrative acts under the Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz – VwVG*). These include acting in representation, a coercive fine, and the use of force (see § 9 VwVG). The BaFin can also use other persons or institutions for fulfilling its tasks (§ 4 (3) FinDAG). In particular it may request the police to offer support (§ 15 (2), second sentence VwVG), but this has not been necessary yet.⁹² Furthermore, it is a regulatory offence to refuse entry (§ 56 (2) no. 16, § 39 (3) no. 2 WpHG).

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

The ECB and the ESMA are allowed to carry out inspections autonomously (Art. 12 Reg. No. 1024/2013, Art. 23d Reg. No. 1060/2009, Art. 63 Reg. No. 648/2012), but may request

⁹² Information provided by the BaFin, *supra* note 1.

support from the BaFin. In practice, the role of the BaFin is mainly limited to assisting ESMA in dealing with the local situation on the ground (e.g. language problems).⁹³ On the other hand, ESMA may also ask the BaFin to inspect business premises according to national law; up to now, this has happened in only a few cases.⁹⁴ In the framework of the SSM, most inspections are conducted by the Bundesbank alone; but there also many inspections that are carried out by mixed teams where the ECB (and the BaFin) are involved, too.⁹⁵

(3) *protection of financial interests (BMF)*

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied *vis-à-vis* ‘persons concerned’/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?
 - Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

As has been explained above, the BMF as AFCOS does not have operative competences. The operative part of on-the-spot checks and inspections is carried out by the customs authorities in case of revenue fraud. In the area of EU expenditure, obligations to allow inspections form part of the grant agreement (see *supra* 3.3.1 (3)).

In case of investigations by OLAF, the revenue authorities could use the form of a tax inspection (*Außenprüfung*, §§ 193 ff. AO).⁹⁶ This would require a written inspection order (§ 196 AO) that must be issued two to four weeks in advance of the inspection (§ 197 AO, § 5 (4) BpO). By ordering an inspection, the revenue authorities make sure that they can make use of their rights to enforce an inspection under the AO.⁹⁷ This is especially important, as OLAF lacks the power to enforce inspections.

The inspection order usually contains the names of the tax inspectors (§ 5 (3) BpO). In case of investigations by OLAF, OLAF investigators might be named as inspectors alongside officials of the revenue authorities where appropriate. Members of the BMF can also participate in the inspection, but only in an observational role.⁹⁸ In the past, at least in expenditure cases this has happened occasionally, but nowadays, members of the BMF rarely take part in inspections due to personal restraints.⁹⁹

Searches and seizures are not permitted in administrative taxation proceedings. However, in purely national cases, these proceedings are often combined with criminal proceedings where revenue authorities have further powers. Still, investigations by OLAF are not criminal proceedings, but purely administrative ones. Therefore, the restrictions for tax inspections apply (in comparison with search and seizure in criminal law). For instance, a surprise inspection is not possible under the AO.

93 Information provided by the BaFin, *supra* note 1.

94 Information provided by the BaFin, *supra* note 1.

95 Information provided by the BaFin, *supra* note 1.

96 Information provided by the Bundesministerium der Finanzen, *supra* note 1. See also Gemmel, *supra* note 11, pp. 144 ff.

97 Information provided by the Bundesministerium der Finanzen, *supra* note 1.

98 *Ibid.*

99 *Ibid.*

The tax inspectors may enter and inspect sites and business premises during office and working hours (§ 200 (3), second sentence AO). During inspections, the taxpayer has to submit documents to the employees or auditors. However, § 104 AO also applies in this context. This means that the person concerned can refuse to present documents if one of the §§ 101 ff. AO applies [see supra 1.3.1 (3)]. In practice, this is mostly important in the case of § 102 AO. The persons named in this paragraph, who have an obligation to guarantee confidentiality, can refuse to name their clients and to present documents that would reveal the identity of their clients.¹⁰⁰ Whether they are obliged to present documents that have been rendered anonymous is a controversial issue. On the one hand, this would solve the conflict between confidentiality and duty of cooperation. On the other hand, it could take considerable time to render documents anonymous, and one can hardly expect undertakings of lawyers to spend that much time without clear legal obligation.¹⁰¹ As the inspection is generally directed against the taxpayer, § 103 AO mostly does not apply. Accordingly, there is no protection against self-incrimination in inspections. However, §§ 30 and 393 (2) AO also apply in this context [see supra section 2, section 3 a (3)].¹⁰²

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

The rule in § 80 AO is similar to § 14 VwVfG. Therefore, lawyers can be present during inspections.

- Is an ex ante judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorization is denied – is there a right to appeal?

Ex ante judicial authorisation is not required for inspections.

- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

Not really. Inspection is regarded as a rather low-key administrative measure in German law (see supra 2 c (3)).

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a de facto measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

The decision to order an inspection is an administrative act. Enforcement follows the rules for administrative acts (see supra).

¹⁰⁰ See Rätke, supra note 69, § 104 margin no. 3 ff.

¹⁰¹ Ibid., § 104 margin no. 6.

¹⁰² See also Gemmel, supra note 11, pp. 165 ff.

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

If necessary, cooperation is enforced by the tax offices, main customs offices or revenue authorities of the *Länder* (§ 249 (1), second sentence AO). The enforcement follows the rules in §§ 328 ff. AO, which are similar to those of the VwVG (see supra).

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

OLAF may carry out inspections on its own (Art. 5 Regulation [EURATOM, EC] 2185/96), but lacks the power to enforce its powers.¹⁰³ Members of OLAF might be appointed as tax inspectors alongside members of the revenue authorities where appropriate. This means that they can participate in inspections themselves. However, if the person concerned resists the inspection, only the revenue authorities have the power to enforce the inspection order. In this case, the official of OLAF becomes an observer of national law enforcement.¹⁰⁴

3.3.4 Access to traffic data and recordings of telecommunications

The BKartA and the revenue authorities do not have this power in administrative proceedings. The BaFin has access to traffic data and recordings of telecommunications, but this power is limited to the investigation of insider dealing and market manipulation (§ 4 (3c) and (3d) WpHG). The references to the powers under § 4 WpHG (§ 17 (3), § 18 (1), third sentence WpHG) do not cover this particular measure as they do not expressly provide for a restriction of the secrecy of telecommunication (Art. 10 GG, see § 4 (3c), third sentence, (3d) second sentence WpHG). This means that the power to access telecommunication data does not apply to cooperation with ESMA and the ECB. The corresponding power of ESMA (Art. 23c (1) lit. e ESMA-Regulation) has not been implemented into German law yet.

3.4 EX POST JUDICIAL PROTECTION BY NATIONAL COURTS

This section deals with the organization of ex post judicial control at the national level. Ex ante judicial control is included per measure. The following questions are relevant:

- Are investigatory actions subject to judicial review as such, or taken account of in later (sanctioning) decisions? In the latter case, how does this system work when the sanctioning decision is taken at EU level?
- To which extent are decisions to use certain powers as such subject to review/appeal (*Verwaltungsakt*, etc.)?

¹⁰³ Strobel, supra note 11, pp. 202-203.

¹⁰⁴ Information provided by the Bundesministerium der Finanzen, supra note 1.

As a rule, investigative measures in administrative proceedings (request for information, production orders, inspection) have to be based on a formal decision (*Verwaltungsakt*, see § 61 (1) GWB, § 196 AO).¹⁰⁵

In competition law, the administrative decision is subject to judicial review by the Higher Regional Court (*Oberlandesgericht*) Düsseldorf (§ 63 paras. 1 and 4 GWB). The *ex ante* authorisation for a search (§ 59 (4) GWB) is subject to appeal to the competent district court (*Landgericht*), see *supra* section 3 (cf. § 59 (4), fourth sentence GWB).

Decisions of the BaFin are subject to the general remedies, i.e. the internal remedy available in administrative law (*Widerspruch*, § 68 Code of Administrative Court Procedure, *Verwaltungsgerichtsordnung* – VwGO) and to the action of annulment before the administrative court (*Anfechtungsklage*, § 42 VwGO).¹⁰⁶ Similarly, tax law provides for an internal remedy (*Einspruch*, § 347 AO) and for judicial review before the fiscal court (§ 40 Code of procedure of fiscal courts, *Finanzgerichtsordnung* – FGO).¹⁰⁷ In the framework of expenditure (subsidies), inspections are usually based on cooperation obligations according to the grant approval: if the economic operator does not comply with these obligations, the competent authority may revoke the grant approval.¹⁰⁸ This decision (revocation) is a formal decision, too, that is subject to the general remedies available in administrative law (*Widerspruch*, *Anfechtungsklage*, *supra*).

In general, decisions on investigative measures are rarely challenged before court.¹⁰⁹

– Do remedies have suspending effect?

In competition law, the appeal against a decision on investigative measures has no suspending effect (see by contrast § 60 GWB).¹¹⁰ The same applies to remedies against corresponding decisions of the BaFin (§ 4 (7), § 17 (4), § 18 (7) WpHG, § 49 KWG) and inspection orders of the revenue authorities (§ 361 Fiscal Code).¹¹¹

– Must internal administrative appeals have been exhausted, before access to a court is open?

In competition law, there is no internal administrative remedy (see *supra*). In financial markets law and tax law, an action for annulment is inadmissible if the internal remedy (*Widerspruch*, *Einspruch*) has not been exhausted (§ 68 VwGO, § 44 FGO).

105 U. Braun, in K.-H. Boos et al. (eds.), *Kreditwesengesetz* (2012), § 44 margin no. 85; Klaue *supra* note 30, § 59 margin no. 66; R. Rüsken in: F. Klein et al. (eds.), *Abgabenordnung* (2016), § 196 margin no. 1; Zetzsche, *supra* note 91, § 4 WpHG margin no. 36.

106 Braun, *supra* note 105, § 44 margin no. 85; Zetzsche, *supra* note 91, § 4 WpHG margin no. 36, 69.

107 Rüsken, *supra* note 105, § 196 margin no. 55.

108 Information provided by the Bundesministerium der Finanzen, *supra* note 1.

109 Information provided by the Bkarta, the BaFin and the Bundesministerium der Finanzen, *supra* note 1. As regards the BaFin, this applies to the regular ongoing supervision only whereas investigative measures on illegal activities are usually challenged in order to delay proceedings and the final decision on the corresponding activity.

110 Klaue, *supra* note 30, § 59 margin no. 66.

111 Braun, *supra* note 105, § 44 margin no. 85; Rüsken, *supra* note 105, § 196 margin no. 55; Zetzsche, *supra* note 91, § 4 WpHG margin no. 72.

- Are there time limits applicable?

In administrative and tax proceedings, the time limit to file the internal remedy is one month (§ 70 (1) VwGO, § 355 (1) AO); the same time limit applies to the action for annulment (§ 74 (1) VwGO, § 47 (1) FGO).

- What is the scope of internal and judicial review?

Judicial review by administrative and fiscal courts is limited to the assessment of whether the appealed decision is illegal and violates individual rights of the applicant (§ 113 VwGO, § 100 FGO). Internal review is not limited to the legality of the administrative decision, but also applies to its expedience (§ 68 VwGO, § 367 (2) AO), i.e. the authority has to re-assess the exercise of its margin of discretion.¹¹²

- Are specialized remedies available in cases of access to privileged information (professional secrecy or LPP)?

No, there are no such special remedies available.

3.5 CONCLUSIONS – IDENTIFICATION OF BEST PRACTICES AT THE NATIONAL LEVEL

Including:

- To which extent does the national report reveal differences between the national legal frameworks for the various policy areas?
- To which extent are these differences related to the applicable EU rules or the consequences of legislative choices at the national level?

The three areas differ significantly in the design of administrative proceedings: On the one hand, we have ongoing supervision of business activities without particular reason (supervision of banks and other actors in the financial markets, protection of financial interests), on the other hand there are investigations that require reasonable grounds for the assumption of illegal conduct (competition law). In the latter area, the competent authority has more and stronger investigative powers (see also § 44c KWG in the banking sector). In practice, however, cartel cases are mainly investigated in the framework of sanctioning proceedings (administrative fines). Moreover, the recipient of EU subsidies is subject to cooperation obligations under the grant agreement. As a consequence, the competent authority will not have to rely on investigative powers under statutory law, but can refer to the grant agreement and its power to withdraw the grant if the recipient refuses to cooperate. To some extent (with regard to revenues in particular), German authorities have the power to enforce cooperation, but the sanctioning mechanism does not apply to OLAF investigations.

Furthermore, the design of the enforcement regime differs in the role assigned to federal authorities: Whereas competition law and financial markets law is mainly enforced by federal authorities (BKartA, BaFin), the role of the BMF is limited to a coordinating function because, due to the federal structure of the German state, the supervision of EU expenditure mainly falls

¹¹² Rätke, supra note 69, § 367 margin no. 3.

within the competence of the states (*Bundesländer*). As a consequence, there is no central (federal) authority competent with respect to investigations of irregularities affecting the expenditure-related financial interests of the Union. On the other hand, the cooperation mechanism depends on the legal and institutional framework on the EU level: Whereas the Commission (DG competition) has a set of powers to investigate and to enforce (penalties and fines), the investigative powers of OLAF are rather limited. The investigative powers of ESMA and ECB are similar to those of the Commission, but the institutional framework is much more complex; in addition, the cooperation under the new mechanisms has only just started, and so the experience with practical implementation is rather limited.

However, the comparison clearly reveals that investigations by OLAF (and cooperation with national authorities) are less efficient due to the lack of a federal authority competent for investigation and enforcement and of corresponding powers of OLAF itself. Whereas the first factor is rooted in the federalist structure of Germany, the second aspect originates from a reluctance to vest a Union body with investigative powers in the framework of criminal proceedings. Accordingly, OLAF's mandate has been limited to administrative investigations. Nevertheless, these investigations are to provide a basis for criminal proceedings in the Member States, and thereby differ from the concept of administrative proceedings under German law where the distinction between criminal proceedings (in a broad sense, including administrative offences) and administrative proceedings relies on the objective to be pursued and the measures to be taken (imposition of sanctions vs. administrative decisions prohibiting a certain conduct). As a consequence, administrative proceedings mainly rely on ongoing supervision whereas a suspicion of illegal conduct usually triggers sanctioning proceedings and thereby renders the powers under administrative law more or less irrelevant (see *supra* with regard to the practice of the BKartA). This means that the role of 'suspicion-based' administrative investigations is rather limited in Germany. From this perspective, the establishment of a European Public Prosecutor's Office seems a logical step even though it still meets the Member States' concerns mentioned above and reflected in the decentralised structure of the EPPO that mainly relies on Delegated Prosecutors acting within the national criminal justice systems. In this respect, the attribution of coercive powers to OLAF might not only affect the national criminal justice systems, but also the emerging legal framework of supranational criminal investigations.

4. THE NETHERLANDS

J. Graat

4.1 INTRODUCTION

At the outset of this report it must be noted that vertical cooperation between the European authorities and their Dutch counterparts is primarily regulated by generally applicable rules. In some cases, specific implementation Acts have been adopted in which cooperation is regulated, but with regard to the use of investigative powers these Acts often refer to the General Administrative Law Act (*Algemene wet bestuursrecht*), hereafter referred to as GALA. The GALA lays down the generally applicable rules on supervision of compliance with administrative law.¹ This supervision is the responsibility of administrative bodies (*zelfstandig bestuursorganen*).² However, the supervision powers in the GALA *are not exercised by the administrative bodies themselves*, but by individuals who have been appointed as supervisors in the light of article 5:11 GALA. This article states that a supervisor is a person who by or pursuant to 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 in article 5:15-5:19 GALA.³ Specific Acts can limit the use of certain powers in the GALA or provide complementary powers.

Furthermore, it is important to note that in some cases cooperation between the national and European counterpart has not (yet) occurred. This means that in these cases, the description of cooperation is based on a hypothetical situation. In addition, for the purpose of this report informal talks and interviews have been held with employees of the national authorities. The information received during these interviews and informal talks about the cooperation with the European authority is included in this report where it contributes to the topic discussed and when the topic in question plays a relevant role in the practice of the national counterpart.

In addition, the scope of the overall project is limited to the investigatory stage in which there is already a certain degree of suspicion that EU law has been violated. However, the GALA does not distinguish between supervision in the sense of *monitoring* compliance with certain rules and supervision in the sense of *investigating* a possible violation of a certain rule.⁴ Hence in both

1 Title 5.2 GALA.

2 *Kamerstukken II 1993/94, 23700, 3, p. 4.*

3 See for instance ACM Designation of Supervisors Regulations (*Besluit aanwijzing toezichthouders ACM*), *Stcrt.* 2013, 9716.

4 *Kamerstukken II 1993/94, 23700, 3, p. 128*; P.H.J. Jonge & F.T.J. Kruijsbergen, *Toezicht op de naleving* (2014), p. 17. See also instruction 132 of the Legislative Draft Instructions (*Aanwijzingen voor de regelgeving*) on the

phases – monitoring and investigating – a supervisor may, unless a statutory regulation states otherwise, use his or her administrative powers.⁵

4.2 OVERVIEW OF THE NATIONAL PARTNERS

4.2.1 The legislative framework for vertical cooperation

In the field of competition law and more specifically Regulation 1/2003, the Commission cooperates with the *Authority for Consumers and Markets (Autoriteit Consument en Markt)*, hereafter referred to as the ACM.⁶ This relatively young national body was established in 2013, merging the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit*), the Independent Post and Telecommunications Authority (*Onafhankelijke Post en Telecommunicatie Autoriteit*) and the Consumer authority (*Consumentenautoriteit*).⁷ The ACM is an autonomous administrative authority⁸ and exercises supervision over compliance with the rules laid down in the Competition Act, (*Mededingingswet*),⁹ consumer law and laws in other specific sectors.¹⁰

In the context of Regulation 1/2003, the Commission may either request the ACM to conduct an on-site inspection as referred to in Article 20 on its behalf¹¹ or it may request assistance when it conducts Article 20 or 21 on-site inspections itself¹². Article 20 Regulation 1/2003 covers inspections of premises, land and means of transport of undertakings and associations of undertakings while Article 21 covers inspections of other premises, land and means of transport, including the homes of directors, managers and members of staff of the undertakings and associations of undertakings. If the Commission requests the ACM to act on its behalf, the appointed ACM officers,¹³ who are supervisors in the light of Article 5:11 GALA, have the administrative powers in Article 5:15 – 5:19 GALA.¹⁴ These are complemented by those in the Competition Act and the Act establishing the Authority for Consumers and Markets¹⁵ (*Instellingswet Autoriteit Consument en Markt*, hereafter referred to as Iw ACM), as amended by the *ACM Stroomlijningswet*^{16, 17}

difference between administrative supervision and criminal investigations. *Aanwijzingen voor de regelgeving, Stcrt.* 1992, 230.

5 These administrative powers can also be used in the phase in which the possibility of an administrative decision to impose a fine (*bestuurlijk boetebesluit*) is investigated. O.J.D.M.L. Jansen, *Handboek strafzaken* 108.7, electronic source (updated until 31 October 2007). See also O.J.D.M.L. Jansen, *Het Handhavingsonderzoek: behoren het handhavingstoezicht, het boeteonderzoek en de opsporing verschillend te worden genormeerd? Een interne rechtsvergelijking* (1999), pp. 97-98.

6 Art. 88 Competition Act.

7 Autoriteit Consument & Markt, onze organisatie, <<https://www.acm.nl/nl/organisatie/organisatie/de-autoriteit-consument-en-markt/>> (last visited 25 January 2017).

8 See the online register for autonomous administrative authorities, <https://almanak.zboregister.overheid.nl/overzicht_op_alfabet/> (last visited 12 December 2016).

9 Mededingingswet, *Stb.* 1997, 242.

10 *Kamerstukken II* 2011/12, 33186, 3, pp. 2-3.

11 Art. 22(2) Regulation (EC) No. 1/2003 jo. 89g(1) CA.

12 Art. 89b(1) CA; *Kamerstukken II* 2003/04, 29276, 3, p. 10; *Kamerstukken II* 2006/07, 30071, 37, p. 2.

13 Art. 89g(1) CA jo. 12a Iw ACM jo. ACM Designation of Supervisors Regulations.

14 *Kamerstukken II* 2012/13, 33622, 3, pp. 6-7.

15 Instellingswet Autoriteit Consument en Markt, *Stb.* 2013, 102.

16 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.

17 Art. 89g CA jo. Chapter 6 CA jo. Chapter 3(1) Iw ACM.

Article 89b Competition Act, hereafter abbreviated as CA, covers the other form of cooperation, which is assistance to investigations conducted by the Commission itself, but does not lay down the powers that appointed ACM officers¹⁸ may use. Article 89b(3) CA could be considered as an exception in this regard, since it states that if the Commission faces resistance, the ACM officers will offer assistance and if necessary ask the help of the police.¹⁹ In all other situations in which the ACM officers provide assistance to the Commission they derive their powers directly from Regulation 1/2003.²⁰ This does not only mean that the content of the powers is determined by the Regulation, but also that the safeguards for the defence that exist under Union law apply.²¹ Hence in these situations the ACM officers do not possess the competences in Title 5.2 GALA, Chapter 3(1) Iw ACM and Chapter 6 CA.²²

The second form of cooperation – offering assistance to the Commission – is the one that occurs in practice. This is because assistance by the ACM can also solve issues such as language barriers which Commission officials might face. The first form – requesting the ACM to act on the Commission's behalf – does not play an important role in the light of Regulation 1/2003.²³

The *Dutch Central Bank (De Nederlandsche Bank)*, hereafter referred to as the DCB, is an autonomous administrative authority²⁴ and the national competent authority for the purpose of Regulation 1024/2013 (hereafter: the SSM Regulation).²⁵ The employees appointed by the DCB Designation of Supervisors Regulation (*Besluit aanwijzing toezichthouders DNB*),²⁶ are the ones who are *de facto* responsible for assisting the ECB during investigations and inspections in the context of the SSM Regulation.²⁷ These DCB officers are supervisors according to Article 5:11 GALA.²⁸

The implementation act of the SSM Regulation²⁹ added Article 1:71 in its current form to the Act on Financial Supervision (*Wet op het financieel toezicht*), hereafter referred to as the AFS. Assistance by the DCB includes enforcing the cooperation of those subjected to a general investigation or on-site inspection as referred to in Article 11 and 12 of the SSM Regulation and

18 Art. 89b(1) CA jo. 12a Iw ACM jo. ACM Designation of Supervisors Regulations.

19 However, Art. 20(6) Regulation (EC) No. 1/2003 does *not* state that the national authorities need to offer the necessary assistance in case of opposition *in compliance with national law*. Consequently, the legal basis for offering assistance in these situations, including asking the assistance of the police, can also be the Regulation itself.

20 Art. 20(2) jo. (5) and 21(4) Regulation (EC) No. 1/2003.

21 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

22 S.B. Noë, *T&C Mededingingswet*, Art. 89b Mededingingswet, aant. 2, updated until 1 September 2016 (electronic source).

23 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (until November 30, 2016) (October 2016).

24 See the online register for autonomous administrative authorities, <https://almanak.zboregister.overheid.nl/overzicht_op_alfabet> (last visited 12 December 2016).

25 Art. 2(2) Regulation (EU) No. 1024/2013 (SSM)jo. Regulation (EU) No. 575/2013 jo. Art. 2(1)(l) Besluit uitvoering EU-verordeningen financiële markten, *Stb.* 2012, 567; *Kamerstukken II* 2014/15, 34049, 3, pp. 3, 4.

26 *Besluit aanwijzing toezichthouders DNB*, *Stcrt.* 2006, 252.

27 Art. 1:71 jo. 1:72 Act on Financial Supervision; *Kamerstukken II* 2014/15, 34049, 3, p. 17. The DCB Designation of Supervisors Regulation was adopted on the basis of Art. 1:72 Act on Financial Supervision.

28 *Kamerstukken II* 2003/04, 29708, 3, p. 41.

29 *Uitvoeringswet verordening banktoezicht*, *Stb.* 2015, 184.

the sealing of places, books and records.³⁰ The DCB officers have the powers laid down in article 5:15-5:17 GALA,³¹ but not the ones in article 5:18 and 5:19 GALA.

Article 9(1) third paragraph SSM Regulation states that to the extent necessary to carry out the tasks conferred on it by the Regulation, the ECB may instruct the DCB to use one of its powers, under and in accordance with the conditions set out in national law, where the Regulation does not confer such powers on the ECB.³² In addition, the SSM Regulation states that the national competent authority will offer assistance in compliance with national law if a person obstructs an investigation or on-site inspection.³³ Consequently, the DCB officers exercise national competences on the basis of Article 1:71 AFS when the ECB meets resistance to an investigation or on-site inspection. In other situations in which the SSM Regulation refers to assistance, the DCB officers do not exercise national powers, but the powers laid down in the SSM Regulation. This for instance is the case when DCB officers assist the ECB during an on-site inspection.³⁴ Furthermore, the Regulation states that national officers have the right to participate in an on-site inspection,³⁵ but it remains unclear what this right exactly entails.

The *Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten)*, hereafter referred to as AFM, is the competent authority for the purpose of Regulation 1060/2009 on credit rating agencies³⁶ as amended by Regulation 513/2011 as well as for trade repositories under Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)³⁷. It is an autonomous administrative authority.³⁸ Contrary to the ACM and DCB who in a decision have appointed the officers who will cooperate with the Commission and ECB, the AFM has not adopted a decision in which the officers are appointed who will assist ESMA upon its request. However, cooperation between the AFM and ESMA in investigations as will be described hereafter is mostly a hypothetical scenario, since no Dutch credit rating agency (CRA) is registered with ESMA and there are no Dutch trade repositories (TR) either.³⁹

Article 23 of Regulation 1060/2009, before it was amended by Regulation 513/2011, regulated the use of investigation and supervisory powers by the national competent authorities. These had

30 Art. 1:71(1) jo. (2) AFS; *Kamerstukken II* 2014/15, 34049, 3, p. 17.

31 Art. 1:71(3) AFS.

32 See also *Kamerstukken II* 2014/15, 34049, 3, p. 7. Furthermore, according to Art. 9(1) second paragraph Regulation (EU) No. 1024/2013 (SSM) the ECB has the same powers as the DCB has under relevant Union law for the exclusive purpose of carrying out its tasks in Art. 4(1-2) and 5(2) Regulation (EU) No. 1024/2013 (SSM). This means that the ECB may exercise the enforcement measures provided to the DCB by EU legislation, such as Directive 2013/36 (CRD IV). These powers can primarily be found in the Dutch implementation act for CRD IV. See the Implementatiewet richtlijn en verordening kapitaalvereisten, *Stb.* 2014, 253; R.P.A. Kraaijeveld & G.J.S. ter Kuile, 'Toezichtsbevoegdheden en sancties onder het Single Supervisory Mechanism', (2015) *Tijdstift voor Sanctierecht & Onderneming*, no. 5, p. 235.

33 Art. 11(2) jo. 12(5)(EU) No. 1024/2013 (SSM).

34 Art. 12(4)(EU) No. 1024/2013 (SSM).

35 Art. 12(4)(EU) No. 1024/2013 (SSM).

36 Art. 22 Regulation (EC) No. 1060/2009 jo. 5:89(1) AFS jo. 7, Regeling aanwijzing bevoegde autoriteit toezicht effectenverkeer, *Stcrt.* 1995, 250; See also Art. 2(1)(d)(1^o) Besluit uitvoering EU-verordeningen financiële markten 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.

37 Art. 2(1)(i)(2^o) Besluit uitvoering EU-verordeningen financiële markten.

38 See the online register for autonomous administrative authorities, <https://almanak.zboregister.overheid.nl/overzicht_op_alfabet> (last visited 12 December 2016).

39 *Ibid.*

to exercise their powers in conformity with national law.⁴⁰ In this light, Article 5:89 AFS was adopted,⁴¹ according to which the AFM needs to appoint supervisors responsible for exercising supervision over compliance with the rules in Regulation 1060/2009.⁴² Article 1:72(2), 1:73, 1:74 and 1:75(1) and (3) AFS are applicable *mutatis mutandis*,⁴³ which means that the appointed supervisors have the competences in Article 5:15-5:17 GALA, but not those in Article 5:18-5:19 GALA⁴⁴. As an administrative body, the AFM also has the power in Article 1:74 AFS.⁴⁵

However, Regulation 1060/2009 was amended by Regulation 513/2011. The latter placed the responsibility for supervision concerning compliance with the rules in Regulation 1060/2009 with ESMA. Consequently, Article 23 of Regulation 1060/2009 was amended and Article 23a–23e was added which regulate ESMA's supervision and investigation competences. The EMIR contains an almost exact copy of Article 23a – 23e Regulation 513/2011 in Article 60-64. Since the EMIR immediately placed the task and powers of supervision and investigation with ESMA, no similar provision like Article 5:89 AFS exists for EMIR.

Upon request, the AFM may attend investigations and on-site inspections.⁴⁶ In addition, ESMA may request the assistance of the AFM for general investigations⁴⁷ or on-site inspections⁴⁸ or it may require the AFM to carry out such an investigation or inspection on its behalf. The latter can be done on the basis of Article 23d(6) Regulation 513/2011/Article 63(6) EMIR or by delegation on the basis of Article 30 Regulation 513/2011/Article 74 EMIR.⁴⁹ Furthermore, the AFM needs to provide assistance in case of opposition to an on-site inspection, which might include requesting the assistance of the police if necessary.⁵⁰

Regarding the abovementioned forms of cooperation Regulation 513/2011 and EMIR do not refer to the use of powers on the basis of national law. In other words, it seems that in all cases of assistance to ESMA, the AFM would exercise its powers on the basis of the Regulations. However, it could be argued that in case of delegation on the basis of Regulation 513/2011, national competences might still play a role, since Article 5:89 AFS was not deleted by the legislator after Regulation 513/2011 became applicable. A possible explanation for keeping this article is that if in the future ESMA were to delegate a specific supervisory task including certain competences, the AFM needs to have a basis in national law to exercise these delegated powers. Article 5:89 AFS provides the necessary link to the available national powers.⁵¹ However, it is more likely that in case of delegation the AFM would exercise the powers laid down in either of the Regulations for the simple reason that these are the powers that are delegated to them and the provisions on delegation in the Regulations do not refer to national law. Furthermore, as stated

40 Art. 23(2) and (3) Regulation (EC) No. 1060/2009 before it was amended by Regulation (EU) No. 513/2011.

41 *Kamerstukken II* 2010/11, 32036, 16, p. 7.

42 This would also make them supervisors in the light of Art. 5:11 GALA. See also Art. 5:89(2-3) jo. 1:72(1-2) AFS; *Kamerstukken II* 2010/11, 32036, 16, p. 7.

43 Art. 5:89(3) AFS.

44 Art. 1:73(1) AFS.

45 Art. 5:89(3) jo. 1:74(1) AFS.

46 Art. 23c(4) jo. 23d(5) Regulation (EU) No. 513/2011/ Art. 62(4) jo. 63(5) Regulation (EU) No. 648/2012 (EMIR).

47 Art. 23c(4) Regulation (EU) No. 513/2011/ Art. 62(4) Regulation (EU) No. 648/2012 (EMIR).

48 Art. 23d(5) Regulation (EU) No. 513/2011/ Art. 63(5) Regulation (EU) No. 648/2012 (EMIR).

49 Delegation is also possible with regard to Art. 23b Regulation (EU) No. 513/2011 and Art. 61 Regulation (EU) No 648/2012 (EMIR) concerning requests for information.

50 Art. 23d(7) Regulation (EU) No. 513/2011/ Art. 63(7) Regulation (EU) No. 648/2012 (EMIR).

51 Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

before no national provision similar to Article 5:89 AFS exists in relation to the EMIR. Hence the AFM will most likely only exercise powers on the basis of the Regulations in case of future cooperation with ESMA.

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*), hereafter referred to as the 2012 Act,⁵² states that the Minister of Finance is the competent authority in the light of Article 4 Regulation 2185/96.⁵³ OLAF may inform this minister of its intent to conduct an on-the-spot check and investigation in the Netherlands in order to be provided with the necessary assistance.⁵⁴ In the light of the purpose and object of the inspection it is then determined which minister is the appropriate one to offer the assistance referred to in Regulation 2185/96 and to appoint officials for that purpose.⁵⁵

The Customs Manual (*Handboek Douane*) further explains how the cooperation between OLAF and the Dutch national authority works in practice.⁵⁶ However, it follows from the interview that this Manual and most importantly Chapter 45 on cooperation with OLAF are currently under revision.⁵⁷ Hereafter, I will both describe the situation as it follows from the current Manual and sometimes from a Staff Working Document of the Commission on the implementation of Article 325 TFEU,⁵⁸ and the situation as was explained during the interview.

According to the Manual, not the Minister of Finance himself, but the *Dutch Customs Information Centre (Douane informatiecentrum)*, hereafter referred to as DIC, which comes under the responsibility of the Minister of Finance, receives the official notification of OLAF as referred to by article 4 Regulation 2185/96.⁵⁹ The DIC is the central information point for the Dutch customs authorities (*Nederlandse Douane autoriteiten*), hereafter referred to as Customs, when cooperating with OLAF⁶⁰ and it is also the *Anti-Fraud Coordination Service (AFCOS)* in the Netherlands.⁶¹ Hence in principle, all communication between OLAF and Customs goes via this central information point, including communication concerning the assistance of the customs authority during on-the-spot checks and inspections.⁶²

However, it follows from the interview that in the past the DIC handled mutual assistance cases and the cooperation with OLAF. On 1 April 2016, AFCOS was separated from the DIC

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

53 Art. 2(1) 2012 Act; *Kamerstukken II* 2011/12, 33247, 3, p. 5.

54 Regulation (Euratom, EC) No. 2185/96 refers to the Commission as the body conducting inspections and on-the-spot checks, but these investigations are often conducted by OLAF. *Kamerstukken II* 2011/12, 33247, 3, p. 2.

55 Art. 2(2) jo. (5) 2012 Act; *Kamerstukken II* 2011/12, 33247, 3, p. 6.

56 Customs Manual, the latest version of Chapter 45 dates from 18 November 2016.

57 Interview with employees of AFCOS (December 2016).

58 Commission Staff Working Document: Implementation of Art. 325 TFEU by the Member States in 2013, SWD(2014) 243 final, 17 July 2014.

59 Para. 4.2.1 of Chapter 45 Customs Manual.

60 Para. 2.2 of Chapter 45 Customs Manual.

61 Art. 3(4) Regulation (EU, Euratom) No. 883/2013. The 2012 Act constitutes the legal basis for this appointment. Commission Staff Working Document: Implementation of Art. 325 TFEU by the Member States in 2013, SWD(2014) 243 final, 17 July 2014, pp. 54-55.

62 Para. 2.2 of Chapter 45 Customs Manual.

and it is now part of *Customs*, which falls under the Ministry of Finance. Providing assistance to OLAF in the light of Regulation 2185/96 is the responsibility of AFCOS and no longer of the DIC. The AFCOS also has two anti-fraud teams.⁶³

According to the Manual, after receiving a notification from OLAF that it wishes to conduct an inspection, the DIC considers on the basis of the applicable laws and rules which ministry is competent to assist during the on-the-spot check and inspection. This is usually the Ministry of Finance, but it can also be the Ministry of Economic Affairs, Agriculture and Innovation.⁶⁴ When the Ministry of Finance is the appropriate ministry to assist OLAF, it is usually Customs which offers the *de facto* assistance, but this can also be done by the Dutch Fiscal Intelligence and Investigation Service (*Fiscale Inlichtingen en Opsporingsdienst*). Furthermore, the Ministry of Economic Affairs, Agriculture and Innovation can also ask Customs to provide the assistance during the inspections.⁶⁵ The DIC then informs the substitute director (*plaatsvervangend hoofd*) of the Customs unit under whose supervision the undertaking falls of the intended inspection. The substitute director of that unit then informs the DIC which officials will participate in the inspection.⁶⁶ The Manual states that a representative of the DIC, the national inspector of Customs and in some cases the penalty fraud coordinator are present during the inspection. Neither the DIC nor the penalty fraud coordinator is obligated to participate, but the DIC does so to supervise the inspection and the penalty fraud coordinator is the one who is competent to take a decision if a suspicion arises that a criminal act has been committed.⁶⁷

It follows from the interview that in principle the agreement exists that AFCOS communicates a request from OLAF to the appropriate ministry, which can be any ministry. However, in practice, most investigations concern subsidies in which there is a direct relation between Brussels and the customer, and therefore no ministry is directly involved. In those cases the Ministry of Finance is the appropriate ministry to provide assistance, which is then *de facto* provided by AFCOS. Furthermore, if a ministry other than the Ministry of Finance is the most appropriate one, it often requests AFCOS to provide the assistance, because it does not have its own inspection body. Since the number of requests from OLAF on a yearly basis is relatively low and the AFCOS has the most experience with providing assistance, it is in principle the body that handles all requests from OLAF and provides the necessary assistance.⁶⁸

Furthermore, the interviewees stated that in each case in which OLAF wishes to do an on-the-spot check, one representative of AFCOS is appointed to assist OLAF. In addition, contrary to what the current Manual states, according to the interviewees it is always someone from AFCOS who joins and never someone from the Fiscal Intelligence and Investigation Service. The Fiscal Intelligence and Investigation Service only has a role when a situation of transfer of competences occurs, because during the investigation the suspicion of a criminal act arises.⁶⁹ In addition to two or three representatives from OLAF, who sometimes bring a forensic specialist, and the

63 Interview with employees of AFCOS (December 2016).

64 Para. 4.2.2 of Chapter 45 Customs Manual. The Ministry of Economic Affairs, Agriculture and Innovation is the competent department when the inspection focuses on agricultural refunds or classical agricultural levies.

65 Para. 4.2.2 of Chapter 45 Customs Manual.

66 Para. 4.2.3 of Chapter 45 Customs Manual.

67 Para. 4.3.1 and 4.3.5 of Chapter 45 Customs Manual.

68 Interview with employees of AFCOS (December 2016).

69 Ibid.

AFCOS officer the penalty fraud coordinator (*boetefraudecoördinator*) is sometimes present as well. This is the case for instance when a transfer of competences (*sfeerovergang*) may take place during an on-the-spot check. A situation of transfer of competences entails the transition from the administrative supervision phase to the criminal investigation phase.⁷⁰ The penalty fraud coordinator can ensure that, if necessary, the exercise of administrative powers is seized the moment a suspicion of a criminal act arises.⁷¹

Prior to the actual on-the-spot check, meetings take place between AFCOS, OLAF and the penalty fraud coordinator. During these consultations the authorities discuss which kind of information can and will be requested, how much time there will be between notifying the undertaking and the actual visit and who will join the on-the-spot check. Agreements are reached on how the check should take place and possible situations of transfer of competences or already existing suspicions of criminal acts are discussed.⁷² These prior consultations are very important for a smooth operation.⁷³

Assistance (*bijstand*) on the basis of the 2012 Act⁷⁴ comprises all cooperation obligations the national officials have on the basis of Regulation 2185/96, such as the one in Article 7(2). When AFCOS officers offer assistance in the light of the Regulation, they have the administrative powers laid down in Article 5:15-5:19 GALA.⁷⁵ The explanatory memorandum to the 2012 Act states that the same powers are available to the OLAF representatives who are present during the on-the-spot check.⁷⁶ However, no criminal-law powers are provided to either the AFCOS officers or the OLAF representatives.

Lastly, it is important to realize that in principle the AFCOS inspector has an observer's role, which means that he does not participate in the investigation itself and that he does not exercise any competences. The investigation is conducted by OLAF, and OLAF takes the decisions.⁷⁷ The AFCOS representative supervises whether OLAF stays within the limits of its investigation and checks whether the company under investigation cooperates.⁷⁸

Conclusion

It can be concluded that the powers of ACM, DCB, AFM and AFCOS, when in one way or another cooperating with their European counterpart, are mainly based on the General Administrative Law Act. These competences are sometimes complemented by others, such as the right to seal and the right to enter a dwelling, which follow from separate specific acts, such as the Competition Act. In some situations the national authorities derive their powers from the applicable Regulations. Considering that the purpose of this report is to describe the competences which the national authorities have on the basis of national law when cooperating with their European counterpart, this

70 M.J. Borgers, 'De onderzoeksfase: toezicht, controle en opsporing', in F.G.H. Kristen et al. (eds.), *Bijzonder strafrecht: Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland* (2011), p. 476.

71 Ibid.

72 Ibid.

73 Interview with employees of AFCOS (December 2016).

74 Commission Staff Working Document: Implementation of Article 325 TFEU by the Member States in 2013, SWD(2014) 243 final, 17 July 2014, p. 55.

75 *Kamerstukken II* 2011/12, 33247, 3, p. 7; *Kamerstukken II* 2011/12, 33247, 4, p. 3.

76 Art. 7(1) Regulation (Euratom, EC) No. 2185/96; *Kamerstukken II* 2011/12, 33247, 3, pp. 2, 7.

77 Interview with employees of AFCOS (December 2016). See also Art. 6 Regulation (Euratom, EC) No. 2185/96.

78 Interview with employees of AFCOS (December 2016).

report will primarily focus on cooperation in which national powers are exercised. Furthermore, unless stated otherwise, whenever this report refers to the AFCOS authority it means the AFCOS authority as described by the interviewees. This is the authority which is part of Customs.

4.2.2 Applicable national thresholds for opening investigations

In general, Dutch administrative law does not set any thresholds for opening an investigation. A supervisor ex Article 5:11 GALA may in principle exercise his powers without a suspicion that a regulation or rule has been violated.⁷⁹ Furthermore, the opening of an investigation does not depend on the issuing of a formal decision by a particular national authority. In addition, Chapter 6 CA and Chapter 3(1) Iw ACM do not set any specific thresholds which need to be met before investigations can be opened by the Commission.⁸⁰ The same goes for the AFS and the 2012 Act with regard to ESMA, the ECB and OLAF.

4.2.3 Concurrence of criminal and administrative proceedings

Dutch law does not contain a general rule according to which administrative proceedings need to be precluded or postponed when national criminal proceedings are started or when it is likely that criminal proceedings will be opened.⁸¹ On the basis of the *una via* rule an administrative body may not impose an administrative fine if the offender is being prosecuted for the same act and the examination in court (*onderzoek ter terechtzitting*) has started or a penalty order (*strafbeschikking*) has been issued by a public prosecutor.⁸² In addition, when an administrative fine has been imposed for a certain act, this will have the same legal consequences as a notice of discontinuation of prosecution.⁸³ However, until either of these points in the proceedings – the examination of a criminal case in court or the imposition of an administrative fine – concurrence of criminal and administrative punitive proceedings is not prohibited by Dutch law.⁸⁴ This means that simultaneous proceedings may run for a relatively long time, since it may take a while until the examination of a criminal case in court begins or an administrative fine is imposed.

Regulation 1/2003 does not contain a clause which states that the administrative investigations by the Commission or the ACM need to be stopped or postponed the moment a suspicion of a criminal offence arises during an investigation.

When the ECB, while carrying out its tasks under the SSM Regulation, has reason to suspect that a criminal offence may have been committed; it shall request the relevant NCA, which is

79 *Kamerstukken II* 1993/94, 23700, 3, p. 128. See Jonge & Kruijsbergen, *supra* note 4, p. 17. See also instruction 132 of the *Legislative Draft Instructions* on the difference between administrative supervision and criminal investigations.

80 However, the ACM and Commission need to request an *ex ante* judicial authorization before they can exercise certain powers.

81 *Kamerstukken II* 1994/95, 23700, 5, p. 64.

82 Art. 5:44(1) GALA.

83 Art. 243(2) of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*), hereafter referred to as DCCP; *Kamerstukken II* 2003/04, 29702, 3, p. 154.

84 The Supreme Court (*Hoge Raad* or *HR*) has also stated that after a reasonable suspicion arises that a person has committed a crime, a supervisor may exercise – or continue to exercise – his supervision competences if the person concerned is granted the safeguards applicable in criminal law, including the right to remain silent. HR 26 April 1988, ECLI:NL:HR:1988:AD5708. See also *Kamerstukken II* 1994/95, 23700, 5, p. 64.

the DCB, to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.⁸⁵ This means that if the same collection of facts constitutes a crime as well as a violation of directly applicable EU law or a decision or regulation of the ECB, the Independent Investigating Unit will suspend its procedure. It will formulate a proposal for a complete draft decision in which the DCB will be requested to send the case to the public prosecutor's office. Referring the suspicion of a crime to the DCB occurs according to the normal procedure for approval of a supervisory decision and in compliance with the applicable provisions of the SSM Regulation and the SSM Framework Regulation.⁸⁶

The *una via* rule in Article 5:44 (1) GALA is not of practical importance, since Regulation 513/2011 and EMIR both state that ESMA cannot delegate supervisory responsibilities, including registration decisions, final assessments and follow-up decisions concerning infringements.⁸⁷ Hence in the context of both Regulations, ESMA is exclusively competent to impose sanctions, which means that the AFM will not be confronted with a situation where the *una via* rule is relevant and applicable. Furthermore, if ESMA delegates an investigatory task to AFM on the basis of Article 30 Regulation 513/2011 or Article 74 EMIR, and during the exercise of this task a concrete suspicion of a criminal act arises, the AFM officials will *not* stop their investigation. They will finalize it and then send the collected information to ESMA who will then decide what to do with the case.⁸⁸ It may decide for instance to impose a sanction or if it finds that there are serious indications of the possible existence of facts likely to constitute criminal offences, it can refer the case for criminal prosecution to the relevant national authorities.⁸⁹ In addition, neither Regulation 513/2011 nor the EMIR state that ESMA needs to stop its investigations when a suspicion of a criminal act arises during its investigations.⁹⁰

The *una via* rule in Article 5:44(1) GALA is not of practical importance, since AFCOS is not involved in the decision on whether an infringement has occurred. It also has no say in the decision whether the case should be dealt with in criminal or in administrative punitive proceedings.

The Customs Manual states that if during the inspections a reasonable suspicion arises that a criminal act has been committed, OLAF has to suspend its investigation and the national inspector will contact the penalty fraud coordinator. If the latter confirms the existence of a reasonable suspicion, OLAF needs to end its investigation and the Fiscal Intelligence and Investigation Service will start a criminal investigation in which OLAF may take no part.⁹¹ Before the inspection begins, the DIC also informs OLAF about the possibility that during the inspection a suspicion that a criminal act has been committed could arise and what the consequences are if this happens.⁹²

85 Art. 136 Regulation (EU) No. 468/2014 (SSM Framework).

86 Kraaijeveld & Kuile, *supra* note 32, pp. 236-237.

87 Art. 30(4) Regulation (EU) No. 513/2011/ Art. 74(5) Regulation (EU) No. 648/2012 (EMIR).

88 Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

89 Art. 23e(8) Regulation (EU) No. 513/2011/ Art. 64(8) Regulation (EU) No. 648/2012 (EMIR).

90 However, ESMA shall not impose fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of *res judicata* as the result of criminal proceedings under national law. Art. 23e(8) Regulation (EU) No. 513/2011/ Art. 64(8) Regulation (EU) No. 648/2012 (EMIR).

91 Para. 4.3.5 of Chapter 45 Customs Manual.

92 Para. 4.2.5 of Chapter 45 Customs Manual.

The procedure in the Customs Manual is relatively similar to the answers given during the interview. The interviewees stated that before an on-the-spot check takes place, AFCOS checks whether a criminal investigation is already on-going. If this is the case, the public prosecutor is consulted and if he or she believes that the on-the-spot check would hamper or endanger the criminal investigation, the on-the-spot check will in principle not take place. Only if the public prosecutor thinks that the object of OLAF's investigation and the object of the criminal investigation can be sufficiently separated, is the on-the-spot check possible.⁹³

In addition to the situation that a suspicion of a criminal act already exists when OLAF wishes to conduct an on-the-spot check, it is also possible that a suspicion of a criminal act arises during such a check. This has happened once in the experience of the interviewees. This investigation was stopped by the penalty fraud coordinator and the case was transferred to the Fiscal Intelligence and Investigation Service.⁹⁴

In relation to the hypothetical situation in which OLAF acts with a twofold goal, meaning that for instance it wishes to investigate a potential fraud case as well as to reclaim subsidies, and a suspicion of a criminal act arises in relation to the fraud investigation, it would in theory be possible to continue the administrative investigation for the second goal, reclaiming the subsidies. However, the interviewees stated that they would be very careful in these situations and that in practice it would be very difficult to separate the two proceedings, the one related to the fraud case and the other to reclaiming subsidies. Hence the most likely scenario is that the administrative investigation would be halted completely the moment a suspicion of a criminal act arises.⁹⁵

Lastly, it is important to note that whenever a situation occurs that a criminal investigation is already ongoing when OLAF requests an on-the-spot check or when a suspicion of a criminal offense arises during such an on-the-spot check, the situation is thoroughly discussed with OLAF and all parties involved in order to reach an agreement that is most suitable to all.⁹⁶

4.3 ANALYSIS OF THE INVESTIGATORY POWERS

4.3.1 The interviewing of persons and production orders

a. Cooperation between the EU and national authorities

Before turning to the cooperation mechanisms between the European authorities and the national competent authorities, it is important to note that the power to conduct interviews and to issue production orders are both included in Article 5:16 GALA.

Article 19 Regulation 1/2003 concerns interviews with natural or legal persons who consent to the interview. With regard to cooperation between the ACM and the Commission, this article states that the ACM may request that its officers assist the Commission when conducting the interviews.⁹⁷ It has not been implemented by the Dutch legislator.⁹⁸

If the Commission orders the ACM on the basis of Article 22(2) Regulation 1/2003 to conduct an Article-20 on-site inspection on its behalf, the ACM officers may use their national

93 Interview with employees of AFCOS (December 2016).

94 Ibid.

95 Ibid.

96 Ibid.

97 Art. 19(2) Regulation (EC) No. 1/2003.

98 *Kamerstukken II* 2003/04, 29276, 3, p. 17.

competences, including the power to conduct interviews in Article 5:16 GALA. The Commission cannot request the ACM to conduct an Article-21 inspection on its behalf.⁹⁹

According to the Dutch legislator, Article 18 Regulation 1/2003 on requests for information needed no implementation.¹⁰⁰ It follows from Subsection 6 of Article 18 that the Commission may request the Dutch Government and the ACM to provide the Commission with the information it needs to carry out its duties under the Regulation. However, Article 18 of the Regulation does not give the Commission the power to either directly order the ACM to request information from undertakings or to assist the Commission when it exercises its competences on the basis of Article 18 Regulation 1/2003.

If the powers in Article 5:16 GALA are broader than the ones provided to the ECB, the ECB may instruct the DCB to use them.¹⁰¹ In addition, Article 1:71(3) AFS grants the DCB the powers in Article 5:15-5:17 GALA, which they can use if the ECB experiences resistance to a general investigation or on-site inspection.¹⁰²

If ESMA would request the AFM to assist during interviews, the AFM officers will probably derive this power from the applicable Regulation.¹⁰³ If ESMA would request the AFM to conduct interviews on its behalf, the AFM would also exercise this power on the basis of the Regulations.¹⁰⁴ The same goes for the situation in which ESMA would formally delegate its power to conduct interviews or to issue production orders to the AFM.¹⁰⁵

Regulation 883/2013 states that OLAF can interview persons concerned and witnesses, both in and outside the context of on-the-spot-checks.¹⁰⁶ In the event of an on-the-spot check, both OLAF and the national inspector have the power to conduct interviews on the basis of Article 5:16 GALA.¹⁰⁷ The same goes for production orders, which also fall under the scope of Article 5:16 GALA.

99 Art. 22(2) Regulation (EC) No. 1/2003 only refers to Article-20 inspections. A. Colombani et al., 'Cartels', in J. Faull et al. (eds.), *The EU Law of Competition* (2014), p. 1215. The fact that Article-21 inspections are not included in Art. 22(2) Regulation (EC) No. 1/2003 could be a slip of the pen, since the latter provision is an almost exact copy of Art. 13 Regulation (EEC) No. 17/62 which was replaced by Regulation (EC) No. 1/2003. In Regulation (EEC) No. 17/62 the power to inspect other premises which is now codified in Art. 21 Regulation (EC) No. 1/2003 did not exist. The EU legislator might therefore just have forgotten to include Article-21 inspections in Art. 22(2) Regulation (EC) No. 1/2003. However, the legislative history of Regulation (EC) No. 1/2003 does not show that the EU legislator actually intended to provide the Commission with the power to order a national competent authority to conduct an Article-21 inspection on its behalf.

100 *Kamerstukken II 2003/04*, 29276, 3, p. 17.

101 Art. 9(1) third paragraph Regulation (EU) No. 1024/2013 (SSM). See Kraaijeveld & Kuile, *supra* note 32, p. 229. These authors state that Art. 5:16 Awb allows a supervisor to ask questions, but that it is also used to demand that certain documentation is handed over. The DCB can therefore demand more information on the basis of Art. 5:16 Awb and is not limited by the rules in the SSM Regulation. The competence therefore seems broader than the one in Art. 11(1)(c) Regulation (EU) No. 1024/2013 (SSM) and the ECB can instruct the DCB to use this power.

102 Art. 1:71(1) AFS.

103 Art. 23c(4) Regulation (EU) No. 513/2011/ Art. 62(4) Regulation (EU) No. 648/2012 (EMIR); Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

Art. 23c(4) Regulation (EU) No. 513/2011/ Art. 62(4) Regulation (EU) No. 648/2012 (EMIR) also states that AFM officers may request to attend the investigation.

104 Art. 23d(6) Regulation (EU) No. 513/2011/ Art. 63(6) Regulation (EU) No. 648/2012 (EMIR).

105 Art. 30(1) Regulation (EU) No. 513/2011/ Art. 74(1) Regulation (EU) No. 648/2012 (EMIR).

106 Art. 9(2) Regulation (EU) No. 883/2013.

107 *Kamerstukken II 2011/12*, 33247, 3, p. 7; *Kamerstukken II 2011/12*, 33247, 4, p. 3.

b. The scope of Article 5:16 GALA

On the basis of *Article 5:16 GALA* a supervisor may conduct a written or verbal interview.¹⁰⁸ The addressee is obligated to answer truthfully.¹⁰⁹ The supervisor may also demand that a new document is created if this is necessary.¹¹⁰ Especially, for a written demand for information, the supervisor needs to motivate this demand and mention its legal basis.¹¹¹ The questions need to be related to the regulation on which the supervision focuses and they need to be sufficiently concrete.¹¹² Furthermore, Article 5:16 GALA includes the competence to order a person to stop (*staandehouding*) for the purpose of asking him for information.¹¹³ Article 5:16 GALA also allows supervisors to demand that information is retained for a certain period of time for the possible future exercise of the powers in Article 5:16 and 5:17 GALA and that a third party is asked for information on the basis of which it can be determined whether other supervision competences should be exercised.¹¹⁴

With regard to production orders, the District Court of Rotterdam has stated that Article 5:16 GALA includes the power to demand that certain business documents and records or copies of them are provided to the supervisor.¹¹⁵ However, it is not completely clear whether Article 1:74 AFS, which lays down the power to request information for administrative bodies, also in general includes the power to issue production orders. In a case where the AFM had ordered the provision of bank statements on the basis of Article 1:74 AFS, the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven* or *CBb*), hereafter referred to as *CBb*, stated that Article 1:74 AFS includes the power to require copies of documents and records if this power is exercised in the context of supervision over compliance with the AFS and in the light of Article 50(2) MIFID.¹¹⁶ So, the decision of the *CBb* was made in the specific context of the MIFID Directive of which Article 50 states that the competent authority needs the power to gain access to each document and a copy of it.

To determine their personal scope all powers in the GALA, including those in Article 5:16, need to be read in conjunction with Article 5:20(1) GALA, which lays down the duty to cooperate

108 A.B. Blomberg, 'Handhaving en Toezicht', in F.C.M.A. Michiels & E.R. Muller (eds.), *Handhaving: Bestuurlijk handhaven in Nederland* (2013), p. 46.

109 Art. 5:20(1) GALA contains the duty to cooperate which applies when the powers in Art. 5:15-5:19 GALA are exercised. *Kamerstukken II* 1993/94, 23700, 3, p. 144.

110 Hof Den Haag 23 April 2013, ECLI:NL:GHDHA:2013:CA3041. In this case, a company named Difotrust investigated electronic devices of companies for signs of violations of competition law. The former Netherlands Competition Authority, which is now part of the ACM, requested Difotrust to provide an overview of the companies for which they had done such investigations in the past five years. If necessary Difotrust had to establish a new document with this information.

111 Jonge & Kruijsbergen, *supra* note 4, p. 56.

112 Blomberg 2013, *supra* note 110, pp. 46-47.

113 *Kamerstukken II* 1996/97, 25280, 3, p. 98; Hof Leeuwarden 24 September 2003, ECLI:NL:GHLEE:2003:AL7459.

114 Hof Den Haag 23 April 2013, ECLI:NL:GHDHA:2013:CA3041.

115 Rb. Rotterdam 21 February 2013, ECLI:NL:RBROT:2013:BZ2448. This interpretation was confirmed in Rb. Rotterdam 21 November 2013, ECLI:NL:RBROT:2013:10889 and Rb. Rotterdam 28 November 2013, ECLI:NL:RBROT:2013:9229. In the appeal procedure following the last ruling the question whether Art. 5:16 GALA also includes production orders was raised, but was left unanswered. *CBb* 21 September 2015, ECLI:NL:CBb:2015:288.

116 *CBb* 21 September 2015, ECLI:NL:CBb:2015:288.

applicable to every person.¹¹⁷ This means that in principle the supervisor may require information from third parties, like people or companies who themselves are not suspected of participating in the violation, but who for instance possess the object which is the focus of the supervision.¹¹⁸ An example could be an accountant in possession of the company's administration. Furthermore, there is no general rule that information may only be required from third parties if it is no longer in the possession of the potential violator.¹¹⁹

However, the personal scope of Article 5:16 GALA can be limited by a specific law¹²⁰ and is limited by Article 5:13 GALA,¹²¹ which includes the so-called involvement criterion. This criterion entails that competences may only be exercised in relation to persons who are involved in the activities which are under supervision.¹²² The District Court of Rotterdam concluded that the scope of Article 5:20 (1) GALA extends beyond the representatives of an undertaking as long as this involvement criterion is fulfilled.¹²³ Sometimes whether or not a person is involved follows from the legal provision itself.¹²⁴ If this is not the case the supervisor will have to make his decision on the basis of the circumstances of the case and rely on his or her experience and expertise.¹²⁵ Furthermore, Article 5:13 GALA also limits the objects which fall under the scope of a certain power. This means that only documents and records which are relevant in the context of the rules over which supervision is exercised may be required.¹²⁶

It also follows from the case law of the European Court of Human Rights (ECtHR) that a person against whom a criminal charge exists is not obliged to cooperate with the supervisors in case the request for information is of a speculative nature and if it appears that the authority is not sure the requested information even exists.¹²⁷ So, authorities are not allowed to go on so-called fishing expeditions and submit broad and unclear requests for information. These speculative requests directed at persons against whom a criminal charge exists are not allowed and these persons fall under the scope of the *nemo tenetur* principle.

This also follows from a case of the District Court of Leeuwarden in which the court considered whether the actual existence of the requested information had been determined with sufficient certainty.¹²⁸ In addition, the legislator has stated in relation to Articles 5:16 and 5:17 GALA that fishing expeditions are prohibited. The supervisor will have to state for which purpose and on the basis of which legal task he or she wishes to obtain certain information.¹²⁹

117 *Kamerstukken II* 1993/94, 23700, 3, p. 147; Rb. Rotterdam 7 August 2003, ECLI:NL:RBROT:2003:AI1062; Blomberg 2013, supra note 110, p. 46.

118 *Kamerstukken II* 1994/95, 23700, 5, p. 79.

119 Hof Den Haag 23 April 2013, ECLI:NL:GHDHA:2013:CA3041. However, asking a third party may in such a case constitute a violation of Art. 5:13 GALA.

120 See for instance Art. 47(1) State Taxes Act (*Algemene Wet Rijksbelasting*).

121 *Kamerstukken II* 1993/94, 23700, 3, p. 141.

122 *Kamerstukken II* 1993/94, 23700, 3, p. 141. See also Jonge & Kruijsbergen, supra note 4, pp. 36-38.

123 Rb. Rotterdam 7 August 2003, ECLI:NL:RBROT:2003:AI1062.

124 *Kamerstukken II* 1994/95, 23700, 5, p. 78; Jonge & Kruijsbergen, supra note 4, p. 37.

125 *Kamerstukken II* 1994/95, 23700, 5, p. 78.

126 *Kamerstukken II* 1993/94, 23700, 3, p. 141.

127 *J.B./Switzerland* Decision of 3 May 2001, ECHR, 31827/96), § 69. See also *Funke/France*, Decision of 25 February 1993, ECHR, 10828/84 (); Blomberg 2013, supra note 110, p. 60; Borgers 2011, supra note 74, pp. 485-486; Noot Schalken bij *J.B./Switzerland* Decision of 3 May 2001, ECHR, 31827/96, *NJ* 2003, 354.

128 Rb. Leeuwarden 8 July 2004, ECLI:NL: RBLEE:2004:AR3918. This case concerned a fiscal investigation in which the Tax and Customs administration demanded a company to hand over its parallel administration (*schaduwadministratie*). The legal basis for this was Art. 47 State Taxes Act.

129 *Kamerstukken I* 2013/14, 33622, C, p. 8. Whether the legislator interprets Art. 5:16 GALA as including both production orders and interviews is unclear.

In addition to the above-mentioned limits to the exercise of the powers in Article 5:16 GALA, their use is also restricted by the general principles of good governance¹³⁰ and the subsidiarity and proportionality principle laid down in Article 5:13 GALA¹³¹. The application of the latter two principles means that the powers in Article 5:16 GALA may only be exercised if no less interfering power can be used to reach the same goal. If this is the case and therefore the exercise of the power is necessary, it should be exercised in the least interfering manner.¹³² Furthermore, a supervisor also needs to take certain requirements of due care into account, such as the obligation to inform the person involved of the reason why a competence is used.¹³³

c. Safeguards

Article 5:16 GALA does not require that an *ex ante judicial authorization* is requested before a person is interviewed or a production order is issued. The right to a lawyer is codified in Article 2:1(1) GALA, the privilege against self-incrimination in Article 5:10a GALA and the legal privilege in Article 5:20(2) GALA.

Article 2:1(1) GALA states that for the purpose of looking after his interests in dealing with administrative authorities, a person may be assisted or represented by a *lawyer*. The need for a lawyer may arise if officers wish to enter a building or use their competences in Article 5:16 GALA. It seems likely that Article 2:1(1) GALA applies when the applicable EU Regulations state that the national competent authorities need to perform certain tasks, such as conducting on-site inspections, *in compliance with national law*.¹³⁴ In such situations administrative bodies such as the ACM and DCB often use national powers whose exercise is then restricted by applicable national safeguards such as the one in Article 2:1(1) GALA.¹³⁵ If an EU Regulation, such as Regulation 2185/96, states that an EU authority may exercise national powers in compliance with national law, the question becomes what the exact role of Article 2:1 (1) GALA would be. Whether it is applicable might depend on the question whether on the basis of Dutch law OLAF could be classified as an administrative authority, since Article 2:1(1) GALA focuses on persons dealing with *administrative authorities*.

As stated before, when the Commission conducts interviews during an Article-20 inspection with the assistance of the ACM, the safeguards for the defence which exist under Union law apply.¹³⁶ In practice, interviews by the Commission in cooperation with the ACM never occur without prior notification. Consequently, a lawyer is usually already present when the interview is supposed to take place.¹³⁷ If an interview takes place in the context of an on-site inspection of which the

130 Such as the principle of due care and the principle of *détournement de pouvoir*. According to Art. 3:1(1) GALA, these general principles apply to *de facto* measures in so far as they are not incompatible with the nature of the measure. Supervision actions are usually *de facto* measures. Blomberg 2013, supra note 110, pp. 55-56.

131 *Kamerstukken II* 1994/95, 23700, 5, p. 72.

132 *Kamerstukken II* 1993/94, 23700, 3, p. 141; Jonge & Kruijsbergen, supra note 4, p. 32-33.

133 *Kamerstukken II* 1993/94, 23700, 3, p. 142.

134 See for instance Art. 22(2) Regulation (EC) No. 1/2003 and Art. 9(1) third paragraph Regulation (EU) no. 1024/2013 (SSM).

135 Art. 2:1 GALA is not declared applicable *mutatis mutandis* by Art. 89g CA, 1:71 AFS or the 2012 Act. However, it is a general rule of administrative law which in principle applies when supervisory powers are used. Jonge & Kruijsbergen, supra note 4, p. 17.

136 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

137 Interview with Edwin van Dijk, Former Team Manager Section Competition ACM (October 2016).

undertaking was not notified beforehand, the officers wait for the arrival of a lawyer unless this takes unreasonably long or the risk exists that materials will be destroyed while they wait.¹³⁸

A person may consult his lawyer before an interview begins. Furthermore, a lawyer may also ask for a recess during the interview to provide his client with additional advice. However, a lawyer is not allowed to answer any questions during the interview or to advise his client to remain silent with regard to a specific question without first asking for a recess. Lastly, regarding written interrogation, the lawyer often acts as a person's authorized representative (*gemachtigde*).¹³⁹

During supervision by JSTs and inspections by the centralised on-site inspections division, lawyers do not have a very important role. The supervision and inspections take place in consultation and usually without resistance. Since there is no experience yet with cooperation during investigations by the Enforcement and Sanctions Division it is not yet possible to elaborate on the role a lawyer has in those investigations.¹⁴⁰

It is most likely that the procedural safeguards, such as the right to a lawyer, as regulated by Union law are applicable if ESMA would conduct interviews or issue production orders in the Netherlands.¹⁴¹ One argument for this is that neither Regulation 513/2011 nor EMIR refer to national law in relation to any form of cooperation. Hence the AFM would most likely always exercise its powers on the basis of the Regulations and not on the basis of national law. Furthermore, during the interview the interviewees stated that for instance if one wants to lodge an objection against an imposed fine, the Court of Justice of the European Union and not the national court is the competent authority. It would therefore be odd if the national procedural safeguards and rules apply during the investigations, but the actual objections cannot be lodged on a national level.¹⁴² However, because there is no experience with investigations by ESMA of CRAs and TRs in the Netherlands, it is not possible to say with certainty whether EU or national safeguards would apply and what the exact content of those safeguards would be.¹⁴³

Whether Article 2:1(1) GALA applies for an on-the-spot check by OLAF and AFCOS depends on the question whether they are administrative bodies as defined by Article 1:1(1) GALA. It follows from the interview that it is in principle always possible and allowed to have a lawyer present when powers are exercised in the supervision stage, but AFCOS does not specifically notify the undertaking of this possibility.¹⁴⁴ A lawyer or advisor may be present during interviews and the exercise of other competences, and a company may request the OLAF inspectors to communicate with it via its lawyer. At the request of the undertaking the start of an on-the-spot check is also delayed until a lawyer is present, unless such a delay might endanger the intended investigations.¹⁴⁵

138 Ibid.

139 Ibid.

140 Informal talk with employees of the DCB (October 2016).

141 Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

142 Ibid.

143 Ibid.

144 Interview with employees of AFCOS (December 2016).

145 Ibid.

The exercise of the power to conduct interviews in Article 5:16 GALA¹⁴⁶ is limited by Article 5:10a (1) GALA, which states that a person has *the right to remain silent* when he is interrogated for the purpose of imposing a punitive sanction on him.¹⁴⁷ Paragraph 2 of Article 5:10a GALA states that a person must be informed of his right to remain silent before the interrogation starts.

Article 5:10a GALA has not been declared applicable *mutuatis mutandis* by Article 89g CA, Article 1:71 Wft or the 2012 Act. However, this provision generally applies and restricts the use of supervisory powers.¹⁴⁸ As a result of its adoption similar provisions in specific laws were also taken out, since they were no longer needed, and the legislator stated that future acts have to take this general provision into account.¹⁴⁹ In addition, the application of the right to remain silent is not limited to interrogations by supervisors ex Article 5:11 GALA. It also applies in case of an interrogation by administrative bodies or civil servants who are not supervisors in the sense of Article 5:11 GALA.¹⁵⁰

Similar to Article 2:1 GALA, Article 5:10a GALA probably applies if the EU Regulations state that certain tasks need to be performed in compliance with national law. It follows from the wording of Article 5:10a GALA that the right to remain silent only becomes applicable when the administrative body seriously considers the imposition of a punitive sanction¹⁵¹ and not when it only considers a remedial sanction.¹⁵² So, the purpose or goal of the question decides whether the person involved has the right to remain silent, which is only when the sole purpose of the question or request for information is to impose a punitive sanction. If the question has a non-punitive purpose, this right does not apply and the same goes for the situation in which a question has both a punitive and non-punitive purpose.¹⁵³ The latter situation for instance occurs when information is requested for the non-punitive purpose of taxation while the possibility of using this information in a future punitive administrative procedure or criminal procedure is not yet excluded.¹⁵⁴ In such a situation the person involved is obliged to provide the information requested, but this information may not be used in the possible future punitive administrative procedure or criminal procedure.¹⁵⁵

In case of a legal person, the right to remain silent is granted to the director of the undertaking who committed the violation. All other people connected to the undertaking which is under

146 With regard to Art. 1:74 AFS, this article does not state that Art. 5:10a GALA applies *mutatis mutandis*. However, this provision is probably applicable, because the provision in the AFS which provided the right to remain silent was deleted with the adoption of Art. 5:10a GALA. *Aanpassingswet vierde tranche Awb, Stb.* 2009, 265; *Kamerstukken II* 2006/07, 31124, 3, p. 29.

147 An individual may also refer directly to Art. 6 ECHR in a national case, since this article is a provision that is binding on all persons. See Art. 93 of the Dutch Constitution; Jonge & Kruijsbergen, *supra* note 4, p. 62.

148 Jonge & Kruijsbergen, *supra* note 4, p. 17.

149 *Kamerstukken II* 2006/07, 31124, 3, pp. 1-2.

150 *Kamerstukken II* 2003/04, 29702, 3, p. 95; *Kamerstukken II* 2005/06, 29702, 7, p. 40.

151 This is an administrative fine. *Kamerstukken I* 2013/14, 33622, C, p. 20.

152 This for instance is a periodic payment penalty. *Kamerstukken I* 2013/14, 33622, C, p. 20.

153 J.C.A. de Poorter & J. Verbeek, *T&C Awb*, Art. 5:10a Awb, aant. 2b, updated until 1 October 2015 (electronic source); Jonge & Kruijsbergen, *supra* note 4, p. 60.

154 HR 12 July 2013, ECLI:NL:HR:2013:BZ3640.

155 *Ibid.*

supervision are therefore obliged to cooperate and to provide the required information.¹⁵⁶ The same goes for third parties such as the daughter of a director.¹⁵⁷

In addition, the legislator states in the explanatory memorandum to the fourth tranche of the GALA that an interrogation constitutes the verbal questioning of a person for the purpose of the imposition of a punitive sanction.¹⁵⁸ This formulation seems to exclude written interrogations from the scope of Article 5:10a GALA. However, later on in the parliamentary records the legislator states that the text of Article 5:10a GALA does not exclude the possibility that under certain circumstances written questions can also place a particular degree of pressure on a person to answer, which would in principle make the questioning an interrogation in the light of Article 5:10a GALA.¹⁵⁹ Under which circumstances this could be the case is not clarified. About a decade later in the parliamentary records of the *Stroomlijnswet*, the legislator stated that the right to remain silent in Article 5:10a (1) GALA includes both verbal and written statements. In other words, it covers all situations in which information is asked for the purpose of imposing a punitive sanction.¹⁶⁰

As stated before, when the Commission conducts interviews during an Article-20 inspection with the assistance of the ACM, the safeguards for the defence which exist under Union law apply.¹⁶¹ In the hypothetical situation in which the ACM would conduct interviews during an Article-20 inspection on the basis of Article 22(2) Regulation 1/2003, the national safeguards including Article 5:10a GALA will apply. The parliamentary records to the *Stroomlijnswet* explicitly state that Article 5:10a GALA grants the right to remain silent in case of a violation or a suspected violation committed by a market organisation (*marktorganisatie*),¹⁶² to the legal representatives who committed the violation, co-perpetrators, the ones who directed the violation and those who ordered it. They all fall under the term offender. This also includes former employees who fall into either of these categories.¹⁶³

Furthermore, in competition law a person has the right to remain silent when he is interrogated about the suspicion against him. The nature or the purpose of the question decides whether it falls under the scope of the *nemo tenetur* principle. However, it is not always clear whether a seemingly harmless question such as ‘do you have a phone’ is merely a question of fact, which the person concerned is obliged to answer, or a question relating to the suspicion.¹⁶⁴

Article 12i Iw ACM extends the scope of the right to remain silent. This article covers both written and verbal statements¹⁶⁵ and states that Article 5:10a GALA also applies to natural persons who work for the market organisation other than the ones that already fall under Article 5:10a GALA. In other words, Article 12i extends the right to remain silent as well as the right to be

156 See ABRvS 13 June 2012, ECLI:NL:RVS:2012:BW8194. They are protected, however, by Art. 5:13 GALA which includes the involvement criterion. This means that Art. 5:16 GALA may only be directed at people who are involved in the activity on which the supervision focuses.

157 See ABRvS 13 June 2012, ECLI:NL:RVS:2012:BW8194. See also ABRvS 27 January 2010, ECLI:NL:RVS:2010:BL0746; Blomberg 2013, supra note 110, p. 57.

158 *Kamerstukken II* 2003/04, 29702, 3, p. 99.

159 *Ibid.*

160 *Kamerstukken II* 2012/2013, 33622, 7, p. 41; See also HR 8 March 2002, ECLI:NL:HR:2002:AD9880.

161 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

162 According to Art. 1 Iw ACM the term market organisation also covers undertakings and associations of undertakings as referred to in Art. 101 TFEU.

163 *Kamerstukken II* 2012/13, 33622, 7, pp. 41, 42; *Kamerstukken I* 2013/14, 33622, C, p. 18.

164 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

165 *Kamerstukken I* 2013/14, 33622, C, p. 19.

informed of this¹⁶⁶ to cover everyone who works for the market organisation and who is not suspected of involvement in the violation.¹⁶⁷ This means that employees, self-employed workers without employees (*zzp'er*) and interim managers also have the right to remain silent. However, Article 12i Iw ACM does not extend the scope of Article 5:10a GALA to former employees who did not order the violations, directed the violations or were co-perpetrators during their time of employment.¹⁶⁸ This is because the former employees who do not fall into any of these categories have nothing to fear from cooperating with the supervisors. Their employment is not threatened by it and neither will they be affected by any fine that could be imposed on the undertaking.¹⁶⁹ In addition, extending the right to remain silent to cover all former employees would result in an imbalance between protection of the market organisation and effective supervision by the ACM.¹⁷⁰

Since there is no experience yet with investigations by the Enforcement and Sanction division of the ECB¹⁷¹ and with investigations by ESMA of CRAs and TRs in the Netherlands, it is difficult to describe how the right to protection against self-incrimination works in practice. As stated before under the right to a lawyer, it follows from the interviews with the AFM that the right of protection against self-incrimination as regulated by Union law most likely applies.¹⁷²

Article 3(3) Regulation 883/2013 states that during on-the-spot checks and inspections, the staff of the Office will act in compliance with national law and *with the procedural guarantees provided in this Regulation*. Article 9 of the Regulation includes the right to avoid self-incrimination when a person is interviewed. Where, in the course of an interview, evidence emerges that a witness may be a person concerned,¹⁷³ the interview will be ended and the person concerned will be informed of his rights.¹⁷⁴ In other words, when interviews are held during on-site inspections in cooperation with national officials, the right to avoid self-incrimination as it is laid down in Article 9 of the Regulation is applicable. Furthermore, Article 3(3) Regulation 883/2013 also refers to national law. As stated before, Article 5:10a GALA is not declared applicable *mutatis mutandis* by the 2012 Act, but it is a safeguard which in principle applies when the power in Article 5:16 GALA is exercised.¹⁷⁵ The interviewees stated that they have not yet seen an on-the-spot check in which the right to protection against self-incrimination was invoked. OLAF tries to keep an investigation exclusively in the phase in which no suspicion of a criminal act exists yet for as long as possible.¹⁷⁶

166 *Kamerstukken II* 2012/13, 33622, 3, p. 52.

167 *Kamerstukken II* 2012/13, 33622, 3, p. 52; *Kamerstukken I* 2013/14, 33622, C, pp. 18-19.

168 *Kamerstukken II* 2012/13, 33622, 3, p. 52; *Kamerstukken II* 2012/13, 33622, 7, p. 41.

169 *Kamerstukken II* 2012/13, 33622, 7, pp. 41, 42.

170 *Kamerstukken I* 2013/14, 33622, C, p. 19.

171 Informal talk with employees of the DCB (October 2016).

172 Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

173 Art. 2(5) Regulation (EU) No. 883/2013 states that a person concerned is any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by the Office.

174 Art. 9(2) Regulation (EU) No. 883/2013.

175 *Kamerstukken II* 2003/04, 29702, 3, p. 95; *Kamerstukken II* 2005/06, 29702, 7, p. 40; Jonge & Kruijsbergen, *supra* note 4, p. 17.

176 Interview with employees of AFCOS (December 2016).

The *legal privilege* is covered by Article 5:20(2) GALA which states that “any person who is bound by a duty of secrecy by virtue of his office or profession or by statutory regulation may refuse to cooperate in so far as his duty of secrecy makes this necessary”. The duty of secrecy of lawyers is laid down in the Counsel Act (*Advocatenwet*).¹⁷⁷ This duty covers all the information a lawyer collects in his *capacity as a lawyer*, unless a law or a regulation from the Board of Representatives (*college van afgevaardigden*) states otherwise. Furthermore, the duty of secrecy extends to employees of the lawyer and other persons involved in the professional practice (*beroepsuitoefening*).¹⁷⁸ The duty of secrecy is further defined in the Rules of Professional Conduct 1992 (*Gedragsregels 1992*), which demand that a lawyer as well as his employees and staff refrain from revealing any particularities of their cases, clients and the nature and scope of the clients’ interest.¹⁷⁹ This means that a lawyer must not reveal any information concerning his client regardless of the question how or from whom he received it.¹⁸⁰

In addition to lawyers, Article 5:20(2) GALA also covers other traditional professions, such as that of a doctor, notary and clergyman. They may refuse to provide the requested information if it is part of the correspondence between them and the ones subjected to supervision.¹⁸¹ Article 5:20(2) GALA is applicable when the powers in Article 5:16 GALA are exercised and the competence in question can also be exercised in relation to third persons.¹⁸² Furthermore, like Articles 2:1 and 5:10a GALA, Article 5:20(2) GALA is probably applicable if the EU Regulations state that certain tasks need to be performed in compliance with national law.¹⁸³ A duty of confidentiality laid down in a contract between two parties in principle does not release a person from his duty to cooperate.¹⁸⁴

In criminal law, the Supreme Court has decided that it is in principle the person with the professional legal privilege – i.e. the lawyer – who decides whether documents, records or other information fall under their legal privilege.¹⁸⁵ The same goes for the situation in which a person, such as an expert, hired by a lawyer, has a legal privilege which is derived from the legal privilege of the lawyer.¹⁸⁶ In one of its cases the Supreme Court also stated that in certain situations legal persons may have a derivative legal privilege as well.¹⁸⁷

As stated before, when the Commission conducts interviews during an Article-20 inspection with the assistance of the ACM, the safeguards for the defence which exist under Union law apply.¹⁸⁸ In the hypothetical situation that the ACM would conduct interviews during an Article-22(2) jo 20

177 Art. 10a(1)(e) jo. 11a Counsel Act.

178 Art. 11a(1) Counsel Act.

179 Rule 6(1) and (3) of the Rules of Professional Conduct 1992, <<http://regelgeving.advocatenorde.nl/content/gedragsregels-1992>> (last visited 25 January 2017).

180 Explanation of rule 6 of the Rules of Professional Conduct 1992 <<http://regelgeving.advocatenorde.nl/content/gedragsregels-1992>> (last visited 25 January 2017).

181 Blomberg 2013, supra note 110, p. 53; *Kamerstukken II* 1993/94, 23700, 3, p. 148.

182 *Kamerstukken II* 1993/94, 23700, 3, pp. 147-148; Jonge & Kruijsbergen, supra note 4, p. 40.

183 Art. 3(2) of the 2012 Act and Art. 1:71 (3) AFS also explicitly state that Art. 5:20 GALA is applicable *mutatis mutandis*. However, Art. 5:20(2) GALA applies in all situations in which Art. 5:20(1) GALA applies, including when one of the powers in Art. 5:15-5:19 GALA is exercised. *Kamerstukken II* 1993/94, 23700, 3, pp. 147-148.

184 Hof Den Haag 23 April 2013, ECLI:NL:GHDHA:2013:CA3041.

185 HR 29 March 1994, ECLI:NL:HR:1994:ZC9693; HR 12 February 2002, ECLI:NL:HR:2002:AD4402. Jonge and Kruijsbergen claim that the same goes for Art. 5:20(2) GALA, since otherwise this professional legal privilege would be illusory. See Jonge & Kruijsbergen, supra note 4, p. 41.

186 HR 29 March 1994, ECLI:NL:HR:1994:ZC9693; HR 12 February 2002, ECLI:NL:HR:2002:AD4402.

187 HR 29 June 2004, ECLI:NL:HR:2004:AO5070.

188 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

inspection for the Commission, Article 5:20(2) GALA applies. In this light it is important to note that the Supreme Court has decided that in principle both external lawyers and in-house lawyers¹⁸⁹ have a professional legal privilege.¹⁹⁰ The decision of the Court of Justice of the European Union in the *Akzo Nobel* case that in-house lawyers do not have a professional legal privilege¹⁹¹ does not apply outside the scope of EU competition law.¹⁹² This means that Article 5:20(2) GALA covers in-house lawyers when ACM officials act on the basis of Article 89g CA and therefore exercise national competences. However, when ACM officials assist the Commission with the enforcement of EU competition law and exercise their competences on the basis of Regulation 1/2003¹⁹³ the legal privilege does not cover in-house lawyers.¹⁹⁴

In addition, the ACM has adopted the procedure concerning a lawyer's legal privilege (*ACM werkwijze geheimhoudingsprivilege advocaat 2014*) which states that if the person who needs to provide the information claims that the information in question is protected by legal privilege, this matter can be brought before a so-called legal privilege officer (*functionaris verschoningsrecht*). This procedure includes both external and in-house lawyers and covers documents and other information which are not in the possession of the lawyer, but in the possession of the person addressed.¹⁹⁵

During supervision by JSTs and inspections by the centralised on-site inspections division, the legal privilege is hardly ever invoked. The supervision and inspections take place in consultation and usually without resistance.¹⁹⁶ Since there is no experience yet with cooperation during investigations by the Enforcement and Sanctions division¹⁹⁷ it is not yet possible to elaborate on the role that the legal privilege has in these investigations. Furthermore, as stated before, it follows from the interviews with the AFM that the legal privilege as regulated by Union law would most likely apply if ESMA would conduct an investigation in the Netherlands.¹⁹⁸

Regulation 2185/96 states that OLAF must exercise its powers in compliance with national law, which in principle includes the legal privilege in Article 5:20(2) GALA.¹⁹⁹ The interviewees stated that AFCOS aims to ensure that the guiding principles and rules of the policy of the Tax and Customs Administration with which Dutch undertakings are familiar are also applied in case

189 An in-house lawyer is a lawyer who is bound to his client by a relationship of employment. Case C-550/07, *Akzo Nobel Chemicals*, [2010], ECLI:EU:C:2010:512, § 43-44.

190 HR 15 March 2013, ECLI:NL:HR:2013:BY6101.

191 Case C-550/07, *Akzo Nobel Chemicals*, [2010], ECLI:EU:C:2010:512, § 44.

192 HR 15 March 2013, ECLI:NL:HR:2013:BY6101; O.J.D.M.L. Jansen, *T&C Mededingingswet*, Art. 12g Instellingswet ACM, aant. 4, updated until 1 September 2016 (electronic source).

193 Art. 89b CA.

194 O.J.D.M.L. Jansen, *T&C Mededingingswet*, Art. 12g Instellingswet ACM, aant. 4, updated until 1 September 2016 (electronic source). See also Speech of Monique van Oers on the legal privilege and the NMa practice during a meeting of the Nederlandse Genootschap van Bedrijfsjuristen, 20 January 2011, <<https://www.acm.nl/publicaties/publicatie/11487/Speech-Monique-van-Oers-Legal-Privilege-en-de-NMa-praktijk/>> last visited 31 January 2017.

195 ACM werkwijze geheimhoudingsprivilege advocaat 2014, *Stcrt.* 2014, 3991.

196 Informal talk with employees of the DCB (October 2016).

197 *Ibid.*

198 Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

199 Art. 7(1) Regulation (Euratom, EC) No. 2185/96 jo. 3(2) 2012 Act. However, the primary reason to include Art. 5:20 GALA in the 2012 Act seems to be to ensure that the duty to cooperate in the first paragraph is applicable. See for instance *Kamerstukken II* 2011/12, 33247, 3, p. 7.

of an on-the-spot check. Before the on-the-spot check starts AFCOS endeavours to establish together with OLAF what specific information is wanted and to inform the company of this. Limiting the request to the undertaking's financial administration for instance already lowers the risk that confidential correspondence between a lawyer and his client is part of the information investigated. This is because this kind of correspondence is often not part of the financial administration.²⁰⁰

Furthermore, often prior notification of the intended on-the-spot check is given although this could result in destruction of information in the time between the notification and the actual on-the-spot check. When this risk is very high, OLAF and AFCOS try to put as little time as possible between the notification and the check, but depending on the case this is not always possible.²⁰¹

So, AFCOS tries to ensure that the policy of the Tax and Customs Administration is followed and to avoid that OLAF sees information which falls under the legal privilege. However, if OLAF officials do see privileged information and inspect it, the AFCOS cannot stop them. This is because it is OLAF's investigation and they are the ones responsible for taking the applicable safeguards into account when they conduct their investigation. Hence they are the ones who take the final decision on whether the information is privileged.²⁰²

d. The legal form of the decision by which the action is taken

In principle, all investigatory actions, whether they are based on a provision in the GALA or a specific law²⁰³, are *de facto* measures (*feitelijke handelingen*).²⁰⁴ Contrary to a formal decision, which is a written decision of an administrative authority constituting a legal act under public law,²⁰⁵ a *de facto* measure is not intended to have legal effect.²⁰⁶ During the parliamentary discussions the argument was presented that under certain circumstances actions of supervisors, such as written demands for information, could be classified as formal decisions in the light of Article 1:3 (1) GALA.²⁰⁷ However, in case law this argument has not been followed and all demands, including written ones, are in principle classified as *de facto* measures. The reasoning behind this is that the written claim itself has no legal consequences, since the duty to cooperate follows from the law and not from the claim.²⁰⁸

200 Interview with employees of AFCOS (December 2016).

201 Ibid.

202 Ibid.

203 Interview with employees of AFCOS (December 2016). See ABRvS 8 July 2002, ECLI:NL:RVS:2002:AE7501. In this case one of the powers of inspection (*controlebevoegdheid*) laid down in the Foreign Nationals (Employment) Act (*Wet arbeid vreemdelingen*) was used. Its use was classified as an act without an intended legal effect.

204 *Kamerstukken II* 1994/95, 23700, 5, p. 53; Jonge & Kruijsbergen, supra note 4, pp. 16-17, 42.

205 Art. 1:3(1) GALA.

206 Jonge & Kruijsbergen, supra note 4, p. 42.

207 *Handelingen II* 1995/96, 49, p. 3636.

208 See CBb 2 March 1999, ECLI:NL:CBb:1999:AA3409. This case was about Art. 36 of the Securities Transactions (Supervision) Act 1995. Subsection 1 of this article allows the supervisor to require certain information, and subsection 2 obliges the addressee to cooperate. The CBb decided that the letter in which the demand for information was laid down was not a decision in the light of Art. 1:3 GALA, but a *de facto* measure. Part of the substantiation was based on the parliamentary documentation regarding Art. 5:13 GALA. See also CBb 21 July 1998, ECLI:NL:CBb:1998:ZF3595; ABRvS 15 July 2009, ECLI:NL:RVS:2009:BJ2662; Jonge & Kruijsbergen, supra note 4, pp. 16, 43.

There is no possibility to file an objection (*bezwaarprocedure*) concerning the lawfulness of a *de facto* measure to the administrative body or to appeal to the administrative court.²⁰⁹ However, a person can challenge the lawfulness of a *de facto* measure in front of a civil court by claiming that the actions of the supervisors were wrongful acts.²¹⁰ In this light, the person can claim damages or an injunction concerning the exercise of other powers.²¹¹

e. Autonomous use of the powers and enforcement in case of non-cooperation

The Commission may autonomously conduct interviews in the context of Article-20 on-site inspections²¹² and issue production orders²¹³. When the Commission conducts interviews during an Article-20 inspection with the assistance of the ACM, it may impose a fine if no answers are given or when the answers are incorrect or misleading.²¹⁴ Furthermore, both Article 20(6) Regulation 1/2003 and Article 89b(3) CA state that in case of opposition to an on-site inspection, the ACM will offer the necessary assistance, which includes asking the police for help if necessary. In the hypothetical situation in which the Commission would request the ACM to act on the basis of Article 22(2) Regulation 1/2003 and the ACM faces opposition, it may probably use its powers to impose an administrative fine if no or incomplete information²¹⁵ is provided.²¹⁶ In the national practice, the ACM only uses the power to impose an administrative fine in the context of Article 5:16 GALA or if a seal is broken. With regard to the exercise of other powers, such as the power to enter premises, the police are asked for assistance in case of non-cooperation.²¹⁷

In relation to production orders, when the Commission issues a simple request for information on the basis of Article 18 of Regulation 1/2003 it may impose fines if the information provided is incorrect or misleading.²¹⁸ In case of a request by decision, the Commission may also impose a fine if it is supplied with incorrect, incomplete, or misleading information or if it is not supplied with the required information within the required time limit.²¹⁹ Furthermore, in case of a request by decision, the Commission could also impose periodic penalty payments to compel the addressee to supply complete and correct information.²²⁰

The ECB may conduct interviews autonomously.²²¹ In case of a refusal to cooperate with an interview, enforcement mechanisms are available to the ECB. It exercises its powers in Article 11(1) SSM Regulation on the basis of a decision, which needs to state that any obstruction

209 An objection can be lodged against a formal decision, but not against a *de facto* measure (Art. 1:5 GALA). This is also true for an appeal to the administrative judge (Art. 8:1 GALA).

210 Art. 6:162 Dutch Civil Code (*Burgerlijk Wetboek*); Jonge & Kruijsbergen, supra note 4, p. 44.

211 Jonge & Kruijsbergen, supra note 4, p. 44.

212 Art. 20(2)(e) Regulation (EU) No. 1/2003. It may not do so during Article-21 inspections. Art. 21(4) Regulation (EU) No. 1/2003 does not state that Art. 20(2)(e) is applicable *mutatis mutandis*.

213 Art. 18 Regulation (EU) No. 1/2003.

214 Art. 20(3) jo. 23(1)(d) Regulation (EU) No. 1/2003. No measures can be taken if false answers or no answers are provided during interviews in the light of 19 Regulation (EU) No. 1/2003.

215 The Supreme Court decided in a case concerning Art. 47 of the State Taxes Act, which lays down a duty to provide information when requested, that refusing to provide information should be equated with providing false information. HR 25 January 2002, ECLI:NL:HR:2002:AD8475.

216 Art. 12m(1)(c) Iw ACM. An administrative fine can be imposed in the event of a violation of the duty to cooperate in Art. 5:20(1) GALA.

217 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

218 Art. 23(1)(a) Regulation (EU) No. 1/2003.

219 Art. 23(1)(b) Regulation (EU) No. 1/2003.

220 Art. 24(1)(d) Regulation (EU) No. 1/2003.

221 Art. 11(1)(c) Regulation (EU) No. 1024/2013 (SSM).

of the investigation is a breach of an ECB decision within the meaning of Article 18(7) SSM Regulation, without prejudice to national law as laid down in Article 11(2) SSM Regulation.²²² Article 18(7) states that in the event of a breach of ECB decisions, the ECB may impose sanctions in accordance with Regulation 2532/98. However, Article 11(2) also states that in the event of non-cooperation the national authority offers assistance. Article 1:71AFS states that the DCB is competent to ensure cooperation during investigations and inspections,²²³ and it grants it the power to seal²²⁴ and the powers in Article 5:15-5:17 GALA²²⁵. When the DCB itself interviews a person or issues a production order on the basis of Article 5:16 GALA and faces opposition, it may impose an administrative fine²²⁶ or a periodic penalty payment^{227, 228}.

The ECB may also autonomously issue production orders.²²⁹ When the ECB instructs the DCB to issue a production order on the basis of Article 5:16 GALA, the DCB may impose an administrative fine²³⁰ or a periodic penalty payment²³¹ in the event of a violation of Article 5:20(1) GALA.

ESMA may autonomously conduct interviews²³² and issue production orders²³³. For non-cooperation, ESMA has certain enforcement measures. It can impose a fine in case of incorrect or misleading answers to interview questions or a periodic penalty payment if no or incomplete answers are provided.²³⁴ With regard to production orders ESMA may impose a fine if incorrect or misleading answers are given in reply to a simple request for information.²³⁵ If ESMA requires the information by decision, it may impose a fine in the event of incorrect or misleading answers²³⁶ and a periodic penalty payment if the information provided is incomplete²³⁷.

In the context of on-the-spot checks OLAF is usually accompanied by a national inspector, who is a representative of AFCOS.²³⁸ Neither the national inspector nor OLAF has the power to sanction a person for not providing the information required or for providing false information. Enforcement is in principle a task of the police, whose assistance may be asked.²³⁹ However, it

222 Art. 11(2) Regulation (EU) No. 1024/2013 (SSM) jo. 142(c) Regulation (EU) No. 468/2014 (SSM Framework).

223 Art. 1:71(1) AFS.

224 Art. 1:71(2) AFS.

225 Art. 1:71(3) AFS.

226 Art. 1:80(1)(d) AFS jo. 5 Administrative Fines (Financial Sector) Decree (*Besluit bestuurlijke boetes financiële sector*), *Stb.* 2009, 329.

227 Art. 1:79(1)(d) AFS.

228 Kraaijeveld & Kuile, *supra* note 32, p. 232.

229 Art. 10 Regulation (EU) No. 1024/2014 (SSM).

230 Art. 1:80(1)(d) AFS jo. 5 Administrative Fines (Financial Sector) Decree.

231 Art. 1:79(1)(d) AFS.

232 Art. 23c(1)(c) Regulation (EU) No. 513/2011/ Art. 62(1)(c) Regulation (EU) No. 648/2012 (EMIR).

233 Art. 23b Regulation (EU) No. 513/2011/ Art. 61 Regulation (EU) No. 648/2012 (EMIR).

234 Art. 23c(2) Regulation (EU) No. 513/2011 / Art. 62(2) Regulation (EU) No. 648/2012 (EMIR).

235 Art. 23b(2)(e-f) Regulation (EU) No. 513/2011/ Art. 61(2)(e-f) Regulation (EU) No. 648/2012 (EMIR). In case of a simple request no obligation to answer exists. This means that no fine can be imposed if no answers are provided.

236 Art. 23b(3)(f) Regulation (EU) No. 513/2011/ Art. 61(3)(f) Regulation (EU) No. 648/2012 (EMIR).

237 Art. 23b(3)(e) Regulation (EU) No. 513/2011/ Art. 61(3)(e) Regulation (EU) No. 648/2012 (EMIR).

238 Interview with employees of AFCOS (December 2016). OLAF may also visit an undertaking on its own accord and without the assistance of AFCOS. However, in that case OLAF is not allowed to exercise any powers without the permission of the undertaking. Hence, OLAF officials may not enter a place, conduct interviews etc. without the consent of the undertaking itself.

239 *Kamerstukken II* 2011/12, 33247, 3, pp. 5, 7-8.

also seems possible for OLAF to autonomously conduct interviews outside the context of on-the-spot checks.²⁴⁰

In principle, a violation of Article 5:20(1) GALA can also be classified as a criminal act on the basis of Article 184 of the Dutch Criminal Code (*Wetboek van Strafrecht*), hereafter referred to as the DCC.²⁴¹ However, the decision to prosecute is made by the public prosecutor's office and not by the national competent authorities discussed. Furthermore, criminal prosecution on the basis of Article 184 DCC in case of a violation of Article 5:20(1) GALA is not possible when the ACM faces non-cooperation.²⁴²

4.3.2 The monitoring of bank accounts (real time)

The power to monitor bank accounts (real time) has not been included in the GALA, the Iw ACM, the AFS or the 2012 Act. This means that the national and European authorities do not have this power on the basis of national law. However, on the basis of Article 5:17 jo 5:20(1) GALA²⁴³ and possibly on the basis of 5:16 jo 5:20(1) GALA²⁴⁴ statements of bank accounts can be required if this is in compliance with the conditions in Article 5:13 GALA and privacy regulations.

4.3.3 The right to entry of premises, including searches and seizure

a. Cooperation between the EU and national authorities

When comparing the four national competent authorities, ACM officers have the most powers when ordered to conduct an Article-20 inspection on the basis of Article 22(2) Regulation 1/2003. In this situation, ACM officers have the powers in the GALA, including the power to enter in Article 5:15, the power to inspect business documents (*gegevens*) and records (*bescheiden*) in Article 5:17, the power to take samples in Article 5:18 and the power to inspect vehicles and cargo in Article 5:19.²⁴⁵ In addition, they have the power to seal²⁴⁶ and to enter²⁴⁷ and search dwellings²⁴⁸ without the permission of the occupant. As stated before the Commission does not seem to be allowed to request the ACM to conduct an Article-21 inspection on its behalf, since Article 22(2) Regulation 1/2003 only refers to Article 20.²⁴⁹ This means that with regard to an Article-21 inspection the ACM may only assist the Commission, but then it derives the power to enter from the Regulation itself and not from national law.²⁵⁰ This situation begs the question if the powers to enter and search a dwelling which are available to the ACM on the basis of Dutch law can play a role in case of cooperation with the Commission, and if this is the case in what

240 Art. 9 Regulation (EU) No. 883/2013.

241 *Kamerstukken II* 2003/04, 29708, 3, p. 41. Furthermore, using violence or expressing threats of violence against a national official is a criminal act on the basis of Art. 179 DCC. If the acts are committed against EU officials, the acts are punishable on the basis of Art. 179 jo. 185a DCC. *Kamerstukken II* 2011/12, 33247, 3, pp. 7-8.

242 Art. 12m(4) Iw ACM. See also *Kamerstukken II* 2012/13, 33622, 3, p. 54.

243 Rb. Rotterdam 22 June 2012, ECLI:NL:RBROT:2012:BW9478.

244 See for instance CBb 21 September 2015, ECLI:NL:CBb:2015:287. In this case the AFM required copies of bank accounts on the basis of Art. 5:16 GALA and 1:74 AFS.

245 *Kamerstukken II* 2012/13, 33622, 3, pp. 6-7.

246 Art. 89g(2) CA jo. 12b(1) Iw ACM.

247 Art. 89g(2) CA jo. 12c(1) Iw ACM.

248 Art. 89g(2) jo. 50(1) CA.

249 Colombani 2014, *supra* note 101, p. 1215.

250 Art. 21(4) jo. 20(5) Regulation (EC) No. 1/2003.

kind of situations. Lastly, in case of opposition to an Article 20 or 21 inspection conducted by the Commission it is not completely clear whether assistance by the ACM is offered on the basis of Article 89b(3) CA or Article 20(6) and 21(4) Regulation 1/2003.

The ECB may instruct the DCB to use a national power, if the SSM Regulation does not grant that particular power to the ECB.²⁵¹ Furthermore, if the ECB faces resistance during an investigation or on-site inspection, the DCB is competent to enforce cooperation. Article 1:71 AFS grants the DCB the power to seal and the powers laid down in Article 5:15-5:17 GALA. The powers in Article 5:18 and 5:19 GALA are excluded, most likely because the legislator does not consider them relevant for supervision in the financial sector.²⁵²

If the AFM is requested to assist ESMA during an on-site inspection it exercises the powers granted by the Regulations.²⁵³ The same is true for the situation in which ESMA would request the AFM to conduct an on-site inspection or to use one of the powers in Article 23c(1) Regulation 513/2011/Article 62(1) EMIR on its behalf,²⁵⁴ or delegates one of these powers.

Both OLAF and the AFCOS representative have the powers in Article 5:15 and 5:17-5:19 GALA when conducting an on-the-spot check in the light of Regulation 2185/96.²⁵⁵

b. The content and scope of the powers

The powers laid down in Article 5:15 and 5:17-5:19 GALA as well as the other powers discussed in this report which are codified in specific acts are connected to the duty to cooperate in Article 5:20 (1) GALA.²⁵⁶ They may therefore be exercised against any person, but their use is also limited by the ‘involvement criterion’ as well as by the subsidiarity and proportionality principle which follow from Article 5:13 GALA.²⁵⁷ Furthermore, all investigatory actions based on one of the abovementioned provisions in the GALA or a specific act are, similarly to the powers in Article 5:16 GALA, *de facto* measures and not official decisions.²⁵⁸

The power to enter premises is codified in *Article 5:15(1) GALA* which states that a supervisory officer, taking with him the requisite equipment, may enter any place, except a dwelling, without the consent of the occupant. The scope of Article 5:15 GALA covers to vehicles²⁵⁹, business premises and business sites²⁶⁰. After entering the supervisor is allowed to have a look around,²⁶¹ but he must not search a place meaning that he may not randomly open closets, drawers or other storage places to find something.²⁶² The possibility to bring the necessary equipment is included

251 Art. 9(1) third paragraph Regulation (EU) No. 1024/2013 (SSM).

252 This was the reason the legislator gave to explicitly exclude the powers in Art. 5:18-5:19 GALA in what is now Art. 1:73(1) AFS. *Kamerstukken II* 2003/04, 29708, 3, p. 42.

253 Art. 23d(5) Regulation (EU) No. 513/2011/ Art. 63(5) Regulation (EU) No. 648/2012 (EMIR).

254 Art. 23d(6) Regulation No. 513/2011/ Art. 63(6) Regulation (EU) No. 648/2012 (EMIR).

255 Art. 3(1) 2012 Act; *Kamerstukken II* 2011/12, 33247, 3, p. 7.

256 *Kamerstukken II* 1993/94, 23700, 3, p. 147.

257 *Kamerstukken II* 1993/94, 23700, 3, p. 141. See also Jonge & Kruijsbergen, *supra* note 4, pp. 36-38.

258 See section 1.3.1.d. of this report. See ABRvS 10 July 2013, ECLI:NL:RVS:2013:199. In this case, the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*, ABRvS) stated that the exercise of the power to enter in Art. 5:15 GALA, whether it is with the help of the police or not, in principle is not an official decision, but a *de facto* measure.

259 *Kamerstukken I* 1995/96, 23 700 and 24 040, 188b, p. 5.

260 *Kamerstukken II* 1993/94, 23700, 3, p. 143.

261 Jonge & Kruijsbergen, *supra* note 4, p. 48.

262 *Kamerstukken II* 1993/84, 23700, 3, p. 143.

in Article 5:15 GALA to ensure that supervisors can for instance investigate a certain object or take a sample if they entered a place for this purpose.²⁶³

Dwellings may only be entered with the permission of the occupant on the basis of Article 5:15 GALA.²⁶⁴ The power to enter a dwelling without the permission of the occupant was not included in the GALA, because it is an interfering one which should only be granted by exception and on the basis of a specific law.²⁶⁵ In fact, as we will see later on, the power to enter and search dwellings is granted to the ACM on the basis of the Competition Act and the Act establishing the ACM. However, in this regard the ACM constitutes the exception in Dutch administrative law. It follows from the case *Colas Est* that a company's registered office, branches or other business premises can also fall under the scope of 'home' in Article 8 ECHR.²⁶⁶ One of the reasons that the ECtHR concluded that Article 8 ECHR had been violated was the fact that entering the premises in question was not made dependent on an *ex ante* judicial authorization.²⁶⁷ However, the Dutch courts do not seem to have interpreted the *Colas Est* case in such a way that a prior judicial authorization is required before certain business premises can be entered. These premises still fall under the scope of Article 5:15 GALA.²⁶⁸

Article 5:17(1) GALA covers the power to inspect business documents and records. This includes documents containing the administration of an undertaking as well as digital information on for instance a computer or hard drive. Only business information may be demanded; no documents or records of a personal nature.²⁶⁹ In addition, the supervisor may copy and print all documents and records, including digital information, and if the copies cannot be made on the spot he may take the information away for a short time.²⁷⁰ This information has to be returned as soon as possible and therefore Article 5:17 GALA does not include the power to seize (*inbeslagneming*) the documents and records.²⁷¹ Furthermore, Article 5:17 GALA includes the competence to order a person to stop (*staandehouding*).²⁷²

The duty to cooperate in Article 5:20(1) GALA also applies in relation to Article 5:17 GALA. However, when a criminal charge exists against a person and the request for information is of a speculative nature or it appears that the authority is not sure the information even exists, this person is relieved of his duty to cooperate.²⁷³ A supervisor is not allowed to simply ask for the entire administration of an undertaking. He has to specify the part of the administration on which

263 Ibid.

264 Art. 1 General Act on Entry into Dwellings (*Algemene wet op het binnentreden*) also applies, which includes the obligation to produce identification and give notice of the purpose of entering before the supervisor enters the dwelling. *Kamerstukken II* 1993/84, 23700, 3, p. 143.

265 *Kamerstukken II* 1993/94, 23700, 3, p. 143.

266 *Soci t  Colas Est and Others/France*, Decision of 16 April 2002, ECHR, 37971/97, § 41.

267 *Soci t  Colas Est and Others/France*, Decision of 16 April 2002, ECHR, 37971/97, § 46. Jonge & Kruijsbergen, supra note 4, p. 50.

268 Jonge & Kruijsbergen, supra note 4, p. 50; Rb. Den Haag 9 April 2004, ECLI:NL:RBSGR:2003:AF7087; CBb 8 July 2015, ECLI:NL:CBb:2015:191. In the latter case, it was decided that means of transportation or locations rented by legal persons do not fall under Art. 8 ECHR.

269 *Kamerstukken II* 1993/94, 23700, 3, p. 144.

270 Art. 5:17(2-3) GALA. The supervisory official needs to provide a written receipt before he takes the information and documents away.

271 *Kamerstukken II* 1993/94, 23700, 3, p. 145; Jonge & Kruijsbergen, supra note 4, p. 70.

272 *Kamerstukken II* 1996/1997, 25280, 3, p. 98; Hof Leeuwarden 24 September 2003, ECLI:NL:GHLEE:2003:AL7459.

273 Jonge & Kruijsbergen 2014, supra note 4, p. 73. See also Blomberg 2013, supra note 110, p. 60.

the supervision focuses.²⁷⁴ In addition, the supervisor also has to state for which purpose and on the basis of which legal task he wishes to inspect certain information.²⁷⁵

The District Court of The Hague has decided that forensic images may fall under the scope of Article 5:17 GALA. A forensic image is a copy of an entire hard drive, including deleted files, former versions of files etc. Such a forensic image may therefore give the supervisor access to information to which the owner of the information himself might no longer have access. Consequently, a forensic image cannot always simply be classified as *a copy* in the light of Article 5:17 GALA. The District Court of The Hague decided that the supervisor should provide the undertaking with a copy of the forensic image if it contains data to which the owner no longer has access. In addition, the supervisor should in any case give the undertaking the name of the provider of the software with which the forensic images can be inspected. Furthermore, forensic images are allowed if it is possible for the undertaking to be present when the forensic images are investigated and searched. If the undertaking declines this invitation, the supervisor must inform the undertaking of the search terms he or she uses. That way the undertaking can determine whether the forensic image contains personal or privileged information and it can request this information to be returned to the undertaking.²⁷⁶

The employees of AFCOS stated during the interview that in relation to forensic images and investigating and copying documents and records, the policy of the Tax and Customs Administration on how to treat and approach companies when exercising administrative competences is important. Before using any of these competences, it should for instance in as much detail as possible be specified which information is needed. This is to avoid that too much information, including digital information, is taken away during an on-the-spot check. Furthermore, OLAF searches for email communications, because often that is where evidence of fraud can be found. However, it is not always possible to demand and investigate email communications from a personal email address. OLAF is the party who needs to make the decision whether to investigate emails sent from and received at a personal email address and also carries the responsibility of this decision. If the representatives of AFCOS notice that OLAF officers exceed the limits of their competences they will inform them of this. However, if OLAF still decides to investigate the information, the AFCOS representative cannot prevent this.²⁷⁷

In a 2014 decision (*besluit*) the ACM introduced the procedure for the investigation of digital data (*Werkwijze voor onderzoek in digitale gegevens 2014*).²⁷⁸ This decision further regulates the use of the powers in Article 5:17 GALA for the ACM. Article 2.1(1) of the procedure demands that supervisors focus on the purpose and object of the investigation when they secure and select digital data. A description of the purpose and object of the investigation also needs to be provided to the person against whom the powers in Article 5:17 GALA are exercised.²⁷⁹ In addition, if

274 Blomberg 2013, supra note 110, p. 48.

275 *Kamerstukken I* 2013/14, 33622, C, p. 8.

276 Rb. Den Haag 9 April 2003, ECLI:NL:RBSGR:2003:AF7069. In this case, the supervisory authority was the Netherlands Competition Authority which is one of the predecessors of the ACM, but there is no reason to assume that the rules regarding forensic images do not apply in relation to other administrative supervisory bodies as well.

277 Interview with employees of AFCOS (December 2016).

278 ACM *Werkwijze voor onderzoek in digitale gegevens 2014*, *Stert.* 2014, 3993.

279 Art. 2.1(3) ACM procedure for the investigation of digital data 2014.

digital data are collected, for instance in the shape of a forensic image, it is possible that data are taken away which are not reasonably necessary for the purpose and object of the inspection.²⁸⁰ In the light of Article 5:13 GALA the ACM procedure for the investigation of digital data 2014 states that when a supervisor tries to determine which information is reasonably necessary for the inspection, he will only study the collected information for as long as is necessary to determine whether the data fall within the scope of the purpose and object of the inspection.²⁸¹ The addressee may be present when the supervisor inspects the data for this purpose.²⁸² Afterwards, if it is reasonable to assume that the forensic images do not only contain business data,²⁸³ the addressee is given the opportunity to claim that certain data are personal and fall outside the scope of Article 5:17(1) GALA.²⁸⁴ If the supervisor agrees, these data are excluded from the inspection.²⁸⁵ Lastly, information which falls under the legal privilege is excluded from the data set.²⁸⁶ The data which are left may be inspected by the ACM officials in the light of Article 5:17 GALA.

Article 5:18(1) GALA includes the power to inspect (*onderzoeken*), measure, weigh and take samples of property.²⁸⁷ It does not include the power to search which would allow the supervisor to look for something of which he does not know where it is yet.²⁸⁸ Furthermore, for the purpose of exercising the powers in Article 5:18(1) GALA the supervisor may open packages.²⁸⁹ If any of the powers cannot be performed on the spot, the supervisor may take the goods away for a short time.²⁹⁰ It is also important to note that Article 5:18(3) GALA allows the person concerned to request that a second sample is taken. This sample can later on be used for an additional countercheck. Unless another law states that no second sample may be taken or that this is technically impossible, the supervisor will honour such a request.²⁹¹

Article 5:19 GALA is a more specific version of Article 5:18 GALA. A separate and specific provision was deemed necessary, because it concerns relatively interfering powers which demand explicit safeguards. For this reason, the proportionality principle is also explicitly repeated in Article 5:19 GALA.²⁹² On the basis of Article 5:19 GALA a supervisor may inspect, but not search,²⁹³ means of transport, including vehicles, vessels and aircrafts, which fall under the scope of his supervision (task).²⁹⁴ This applies for instance when a supervisor checks whether a vehicle fulfils the conditions set for the transport of dangerous material.²⁹⁵ Furthermore, if a supervisor

280 *Kamerstukken I* 2013/14, 33622, C, p. 8.

281 Art. 2.2(1) ACM procedure for the investigation of digital data 2014.

282 Art. 2.2(2) ACM procedure for the investigation of digital data 2014.

283 Whether this is reasonable to assume also depends on the legal provision which is being enforced. Explanation to Art. 2.3 of ACM procedure for the investigation of digital data.

284 Art. 2.3(1) ACM procedure for the investigation of digital data 2014.

285 Art. 2.3(2) ACM procedure for the investigation of digital data 2014.

286 Art. 2.4 ACM procedure for the investigation of digital data 2014 jo. 5(2) ACM procedure concerning a lawyer's legal privilege 2014.

287 Corporeal objects capable of human control are property (Art. 3:2 Civil Code). See also *Kamerstukken II* 1993/94, 23700, 3, p. 145.

288 *Kamerstukken I* 1995/96, 23700 and 24040, 188b, pp. 5-6.

289 Art. 5:18(2) GALA.

290 Art. 5:18(4) GALA.

291 Jonge & Kruijsbergen, *supra* note 4, p. 74.

292 *Kamerstukken II* 1993/94, 23 700, 3, p. 145.

293 Jonge & Kruijsbergen, *supra* note 4, p. 75.

294 Art. 5:19(1) GALA; *Kamerstukken II* 1993/94, 23700, 3, p. 146.

295 *Kamerstukken II* 1993/94, 23700, 3, p. 146.

can reasonably assume that a means of transport carries cargo which falls under the scope of his supervision, he may inspect the cargo. The powers in Article 5:19 GALA may also be exercised when the owner or another individual involved are not present, if attempts to find them have been made, but failed.²⁹⁶ In addition, to ensure that the driver of a vehicle owns the statutorily required documents the supervisor may inspect the documents of the driver.²⁹⁷

Both the DCB and the ACM have the *power to seal*. When the Commission orders the ACM to conduct an Article-20 on-site inspection on its behalf,²⁹⁸ ACM officials may seal objects, such as rooms, closets, and business premises if this is reasonably necessary for the *purpose* of exercising the powers in Article 5:17 GALA.²⁹⁹ In other words, objects and business premises may be sealed if the information or documents cannot immediately be investigated, copied or taken away. This power was granted to the ACM, because it prevents information in the office of the undertaking under investigation from being changed or destroyed. In addition, this power can in some instances be an alternative to the more intrusive option of taking the information and documents away on the basis of Article 5:17(3) GALA. Furthermore, this power provides an alternative to the time-consuming process of imposing an administrative fine or periodic penalty payment in the event of non-cooperation or insufficient cooperation.³⁰⁰ The DCB's power to seal follows from Article 1:71(2) AFS and implements Article 12(5) SSM Regulation.³⁰¹ The latter provision states that if a person opposes an inspection by the ECB, the national competent authority shall afford the necessary assistance in accordance with national law and to the extent necessary for the inspection; this assistance will include the power to seal any business premises and books or records.

As stated, the ACM has the power *to enter a dwelling* without the permission of the occupant.³⁰² After entering, the supervisors may investigate the objects they see when walking around, but they may not search the dwelling.³⁰³ ACM officers may only enter a dwelling for *the purpose of* exercising the powers in Article 5:17 GALA.³⁰⁴ They do not need to be accompanied by an investigative judge. This safeguard was not included, because it does not exist in criminal law either.³⁰⁵ Only a search needs to take place under the supervision of the investigative judge.³⁰⁶

The power to enter dwellings prevents that important (digital) information and documents remain unavailable to the ACM, because they are, intentionally or not, kept in dwellings. Furthermore, companies, especially small ones, often have an in-home office and it can be

296 Ibid.

297 Art. 5:19(3) GALA.

298 Art. 22(2) Regulation (EC) No. 1/2003.

299 Art. 89g(2) CA jo. 12b(1) Iw ACM.

300 *Kamerstukken II* 2012/13, 33622, 3, pp. 7, 47-48.

301 *Kamerstukken II* 2014/15, 34049, 3, p. 11.

302 Art. 89g(2) CA jo. 12c(1) Iw ACM.

303 However, the supervisor is allowed to enter closed parts of the dwelling. In other words, he may open locked doors to other parts of the dwelling. *Kamerstukken II* 2012/13, 33622, 3, p. 49.

304 However, the explanatory memorandum to the *Stroomlijningswet* does not exclude the possibility that after entering a dwelling for the purpose of Art. 5:17 GALA, the powers in Art. 5:18 GALA are also used. *Kamerstukken II* 2012/13, 33622, 3, p. 8.

305 *Kamerstukken I* 2013/14, 33622, C, p. 15.

306 Art. 51(4) CA.

difficult for supervisors to establish the boundary between the living area and office space. They might also have to cross the living area to get to the office.³⁰⁷

The power to enter dwellings was already included in the Competition Act in 2007³⁰⁸ as a result of the guiding principle in national competition law that the competences of the national competition authority should match the competences of the Commission as closely as possible. Granting the power to enter dwellings provided the national competition authority with the same power as the Commission has on the basis of Article 21 Regulation 1/2003.³⁰⁹

The search of a dwelling without permission of the occupant is allowed only if the use of this power is reasonably necessary for the exercise of the powers in Article 5:17 GALA.³¹⁰ In practice, the investigative judge always accompanies the ACM officers during a search to ensure that everything takes place according to the rules.³¹¹ Without the presence of the investigative judge, the ACM officers will not enter the dwelling unless the occupant gives his or her permission.³¹² The power to search dwellings was included in the Competition Act because of the same guiding principle that national competition law, including the competences it grants to supervisors, should be in line with European competition law as closely as possible. This means that the powers of the national competition authority should match the competences of the Commission as closely as possible. The reason to avoid any divergence between national and European competition law and the competences of the national competent authorities and the Commission is to prevent that different rules and powers are applied in purely national cases and in cases in which interstate trade plays a role.³¹³

c. Safeguards

All competences discussed in the GALA and specific acts may be exercised without a concrete suspicion that certain rules have been violated. However, often the powers in the specific acts, such as the Competition Act, may only be exercised for a specific purpose or on specific occasions. An example of the former is the power to enter or search a dwelling, which may only be used for the purpose of exercising the powers in Article 5:17 GALA.³¹⁴

Judicial authorization

To exercise any of the powers in the GALA, the national supervisor does not need to request a judicial authorization first. It is interesting to note that Article 13(1) SSM Regulation states that if national law demands it, prior authorisation of a judicial authority needs to be requested before an on-site inspection may take place or assistance may be offered in case of resistance. The reason that the Dutch legislator has not implemented this obligation in the area of banking supervision, is that the inspection powers of the Dutch authorities are sufficiently limited by Article 5:13 GALA. Furthermore, possible violations of Article 5:13

307 *Kamerstukken II* 2012/13, 33622, 3, pp. 8, 48.

308 Wet van 28 juni 2007, houdende wijziging van de Mededingingswet als gevolg van de evaluatie van die wet, *Stb.* 2007, 284.

309 *Kamerstukken II* 2005/06, 30071, 15, pp. 3-4; *Kamerstukken II* 2006/07, 30071, 37, pp. 2-3.

310 Art. 89g(2) jo. 50(1) CA.

311 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016). See also Art. 51(4) CA.

312 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

313 *Kamerstukken II* 2006/07, 30071, 15, pp. 3-4; *Kamerstukken II* 2006/07, 30071, 37, pp. 2-3.

314 Art. 89g(2) CA jo. 12c(1) Iw ACM and Art. 89g(2) jo. 50(1) CA.

GALA may be raised in the judicial proceedings against the penalty imposed on the basis of the information collected during the inspection. The court will also examine whether the use of the coercive measures has been excessive.³¹⁵

However, the ACM needs to request an *ex ante* judicial authorization before exercising certain powers. Firstly, it needs to obtain authorization from the investigative judge at the District Court of Rotterdam to enter a dwelling.³¹⁶ The investigative judge will assess the proportionality of the measure and consider whether entering a dwelling is at that point in time reasonably necessary for the exercise of the powers in Article 5:17 GALA.³¹⁷ The latter criterion is once more underlined by the fact that the authorization is only valid for three days.³¹⁸ Secondly, the ACM also needs to request an *ex ante* judicial authorization from the investigative judge to search a dwelling.³¹⁹ With regard to both powers, the investigative judge, who in principle deals with criminal cases, applies a less strict proportionality test than the one applicable in criminal cases. The test is less strict, because the Commission itself has already conducted a proportionality assessment before starting an investigation. The investigative judge weighs the right to privacy against the question whether indeed a suspicion exists that a norm or rule has been violated and whether the information which is relevant for the investigation is indeed present in the dwelling. If the latter two questions are answered in the affirmative, the right to privacy is usually set aside and the powers may be exercised.³²⁰ The judicial authorization may also be requested as a precautionary measure.³²¹

Thirdly, if the Commission faces opposition when conducting an Article-20 on-site inspection and the inspection includes a search, ACM officials may only offer assistance after obtaining the authorization of the investigative judge of the District Court of Rotterdam.³²² The investigative judge will consider whether or not the contemplated compulsory measures are arbitrary or disproportionate in relation to the object of the inspection.³²³ He or she conducts the same proportionality test as the test that is applied for a request for authorization to enter or search a dwelling.³²⁴ In addition, the investigative judge is allowed to ask the Commission for explanations that are necessary for the assessment of the proportionality of the intended measure. The investigative judge may also check whether the order of the Commission is authentic, but its legality may only be tested by the Court of Justice of the EU. Furthermore, the investigative judge may not question the necessity of the inspection or demand documents or information from the file of the Commission.³²⁵ Lastly, it is important to note that Article 20 Regulation 1/2003 does not

315 L. Wissink et al, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', (2014) 10 *Utrecht Law Review*, no. 5, p. 110.

316 Art. 12d(1) Iw ACM.

317 *Kamerstukken II* 2012/13, 33622, 7, p. 21.

318 Art. 12e(3) Iw ACM; *Kamerstukken I* 2013/14, 33622, C, p. 15.

319 Art. 51(1) CA.

320 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

321 Art. 12d(1) Iw ACM; Art. 51(1) CA. With regard to entering a dwelling, the parliamentary documentation states that precautionary authorization is requested during a pending investigation in which it is not yet clear whether it will be necessary to enter a dwelling. The investigative judge assesses on the basis of the nature and content of the pending investigation whether the possible use of the competence is reasonably necessary. *Kamerstukken II* 2012/13, 33622, 7, p. 40.

322 Art. 89c(1) CA. *Kamerstukken II* 2003/04, 29276, 3, p. 11.

323 Art. 89c(2) CA.

324 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

325 S.B. Noë, *T&C Mededingingswet*, Art. 89c Mededingingswet, aant. 3, updated until 1 September 2016 (electronic source).

explicitly include the power to search a place, which raises the question what the Dutch legislator means by *search* in Article 89c(1) CA. In the parliamentary documentation the Dutch legislator states that if an undertaking opposes the inspection of books and records, the Commission on the basis of the case of law of the Court of Justice of the EU³²⁶ has the right to track down the necessary information with the help of the national authorities.³²⁷ In some cases such a situation could justify a *search* as it is known in Dutch criminal law and in these cases the ACM needs to request an *ex ante* judicial authorization first.³²⁸ This means that the measure to ‘search a place’ in Article 89c(1) CA seems to be linked to the situation in which the Commission faces opposition during an Article-20 inspection³²⁹ and searching for the information in cooperation with the ACM is necessary and proportional.³³⁰

Fourthly, if the Commission conducts an inspection as referred to in Article 21(1) Regulation 1/2003, it needs to gain prior authorization from the investigative judge at the District Court of Rotterdam as well.³³¹ In practice it is the ACM who requests this authorization.³³² The investigative judge considers the request in the light of Article 21(3) Regulation 1/2003,³³³ which states that he or she can assess whether the Commission’s decision is authentic and whether the coercive measures envisaged are arbitrary or excessive particularly taking into account the seriousness of the suspected violation, the importance of the evidence sought, the involvement of the undertaking concerned and the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. Furthermore, the investigative judge may ask the Commission, directly or through the ACM, for detailed explanations on these matters for the purpose of the proportionality check.³³⁴ In practice the investigative judge conducts the same proportionality test as when he considers a request for authorization to enter or search a dwelling.³³⁵ The investigative judge may not call the necessity of the inspection into question nor demand to be provided with information from the Commission’s file. The lawfulness of the decision of the Commission can only be reviewed by the Court of Justice of the European Union.³³⁶ To sum up, an *ex ante* judicial authorization needs to be requested 1) if the ACM wants to enter or search a dwelling, 2) when the ACM needs to offer assistance to the Commission in case of opposition during an Article-20 on-site inspection, which includes a search, and 3) when the Commission wants to conduct an Article-21 inspection. With regard to all situations in which an *ex ante* judicial authorization is requested, the investigative judge may hear public prosecutors before making his decision, since they have experience with the use of powers such as entering dwellings.³³⁷ Furthermore, if the

326 It refers to Case 46/87 and 227/88 (Joined cases), *Hoechst AG vs Commissie*, [1989], ECLI:EU:C:1989:337, § 32.

327 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

328 *Ibid.*

329 Whether the legislator thinks that a search is also possible in case of opposition to an Article-21 inspection does not become clear. Art. 89c(1) CA focuses on Article-20 inspections.

330 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

331 Art. 89d(1) CA.

332 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

333 Art. 89d(2) CA.

334 S.B. Noë, *T&C Mededingingswet*, Art. 89d Mededingingswet, aant. 3, updated until 1 September 2016 (electronic source).

335 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

336 S.B. Noë, *T&C Mededingingswet*, Art. 89d Mededingingswet, aant. 3, updated until 1 September 2016 (electronic source).

337 Art. 12d(2) Iw ACM; Art. 51(2) CA; Art. 89c(2) CA; Art. 89d(2) CA.

request for an authorization is denied, the ACM has 14 days to appeal to the District Court of Rotterdam.³³⁸

Right to a lawyer

As stated, the right to a lawyer is codified in Article 2:1(1) GALA. With regard to the applicability of this provision, the points made in Section 1.3.1.c are also relevant. The need for a lawyer may arise if officers wish to enter a building.

When the Commission conducts an Article 20 or 21 inspection with the assistance of the ACM, the safeguards for the defence which exist under Union law apply.³³⁹ In the hypothetical situation where the Commission orders the ACM on the basis of Article 22(2) Regulation 1/2003 to conduct an Article-20 inspection, the ACM officers need to act in compliance with national law, including Article 2:1 GALA.

In practice, when they arrive, the ACM and Commission explain to the undertaking what the reason for their visit is and what the undertaking is suspected of. This information is also provided in writing. The officers then explain what the course of action will be and which rights and duties the undertaking has. This includes advising the undertaking to call a lawyer if one is not present yet. The officers then wait for the arrival of the lawyer unless this takes unreasonably long. When entering or searching dwellings they will only wait for a short time, since they aim to leave a dwelling as quickly as possible and because an investigative judge is already present in case of a search. The decision to wait is made in consultation with the occupant. However, the ACM always tries to ensure that there has been telephone contact between the person involved and his or her lawyer before the search begins.³⁴⁰

When the lawyer arrives, he may be consulted, but the ACM and Commission do not have to wait for the end of this consultancy to start their investigations. In other words, the ACM and Commission may immediately start with the inspection of documents for instance. A lawyer can stop the inspection and copying of documents and records, if he or she thinks that they contain privileged information. This information is then set aside.³⁴¹

Since there is no experience yet with investigations by the Enforcement and Sanction Division of the ECB³⁴² and with investigations by ESMA of CRAs and TRs in the Netherlands, it is difficult to describe what form the right to a lawyer takes in practice. As stated, it follows from the interviews with the AFM that the right to a lawyer as regulated by Union law is most likely applicable.³⁴³

It follows from the interviews that, in principle, it is always possible and allowed to have a lawyer present when powers are exercised in the supervision stage, but AFCOS does not specifically notify the undertaking of this possibility. A lawyer or advisor may be present during the exercise of any of the administrative powers and an undertaking may request the OLAF inspectors to communicate with it through its lawyer. At the request of the undertaking the start of the on-

338 Art. 12d(3) Iw ACM; Art. 51(3) CA; Art. 89c(3) CA; Art. 89d(3) CA.

339 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

340 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

341 *Ibid.*

342 Informal talk with employees of the DCB (October 2016).

343 Interview with Sander van Leijenhorst, Senior Supervisor AFM, and Ellen Boelema, Strategic Policy Advisor AFM (November 2016).

the-spot check is also delayed until the lawyer is present, unless such a delay may endanger the intended investigations.³⁴⁴

Legal privilege

Article 5:20 (2) GALA which lays down the duty of professional secrecy also applies in relation to Article 5:15 GALA and the other powers discussed.³⁴⁵

As stated before when the Commission conducts interviews during an Article-20 inspection with the assistance of the ACM, the safeguards for the defence which exist under Union law apply.³⁴⁶ In the hypothetical situation that the ACM were to conduct an Article 22(2) jo 20 inspection for the Commission, Article 5:20(2) GALA applies.

Furthermore, Article 12g Iw ACM extends the scope of a lawyer's legal privilege to include the correspondence between a lawyer and the market organisation that is in the possession of the market organisation or its *de facto* director.³⁴⁷ In other words, with the adoption of Article 12g the *place* where the documents are when their inspection is required has become irrelevant to the question whether they fall under the scope of the legal privilege. This extended legal privilege applies in relation to Article 5:17 GALA.³⁴⁸ This extension of the scope of the legal privilege was already applicable in competition cases. The legislator introduced Article 51(old) CA to ensure compliance with the case law of the Court of Justice of the EU. The goal was to prevent that documents which could not play a role in an investigation by the Commission, could play a role in supervision regarding compliance with Dutch competition rules.³⁴⁹

In addition, in principle external lawyers and in-house lawyers fall under the scope of Article 12g Iw ACM.³⁵⁰ However, the judgment of the Court of Justice of the European Union in *Akzo Nobel*³⁵¹ and the explanation given to it by the Dutch Supreme Court³⁵² also apply. Consequently, Article 12g Iw ACM covers in-house lawyers when ACM officials act on the basis of Article 89g CA and therefore exercise national competences. However, when ACM officials assist the Commission with the enforcement of EU competition law and exercise their competences on the basis of Regulation 1/2003 the legal privilege does not extend to in-house lawyers.³⁵³

The parliamentary records do not specify which information falls under the scope of Article 12g Iw ACM. They only state that this legal privilege is not unlimited. For instance, the fact that records or copies (*afschriften*) of information of which the original version is in the possession

344 Interview with employees of AFCOS (December 2016).

345 *Kamerstukken II* 1993/94, 23700, 3, p. 148. See section 1.3.1c of this report.

346 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

347 Art. 12g(2) Iw ACM. It also covers those who fall under Art. 51(2)(2°) DCC. These are the individuals who gave the order for the offence to be committed, who were in charge, or who had actual control of the prohibited conduct or act. In these situations the criminal act is committed by a legal person.

348 *Kamerstukken II* 2012/13, 33622, 3, pp. 10, 49.

349 *Kamerstukken II* 1995/96, 24707, 3, p. 82.

350 *Kamerstukken II* 2012/13, 33622, 3, p. 50.

351 Case C-550/07, *Akzo Nobel Chemicals*, [2010], ECLI:EU:C:2010:512, § 44.

352 HR 15 March 2013, ECLI:NL:HR:2013:BY6101.

353 O.J.D.M.L. Jansen, *T&C Mededingingswet*, Art. 12g Instellingswet ACM, aant. 4, updated until 1 September 2016 (electronic source). See also Speech of Monique van Oers on the legal privilege and the NMa practice during a meeting of the Nederlandse Genootschap van Bedrijfsjuristen, 20 January 2011, <<https://www.acm.nl/publicaties/publicatie/11487/Speech-Monique-van-Oers-Legal-Privilege-en-de-NMa-praktijk/>> last visited 31 January 2017.

of the market organisation were sent to a lawyer does not automatically include this information under the scope of Article 12g(1) Iw ACM.³⁵⁴

However, Article 12g Iw ACM probably has the same scope as the old provision in the Competition Act.^{355,356} One argument to substantiate this is that Article 12g Iw ACM was adopted for the purpose of streamlining the additional protection already offered in certain laws, such as the Competition Act, and to extend it to the other areas in which the ACM is responsible for supervision.³⁵⁷ Furthermore, similar to Article 12g Iw ACM the old article in the Competition Act also referred to ‘exchanged documents’ (*gewisselde geschriften*) which included hard copies or digital information exchanged between a lawyer and his client. The scope of the legal privilege therefore includes internal documents of which the sole purpose is to ask legal advice on competition matters, the lawyer’s advice, internal reporting and summaries of the advice of the lawyer.³⁵⁸

Lastly, as mentioned before, the ACM has adopted a procedure concerning a lawyer’s legal privilege. This procedure states that if the ACM officers do not inspect the documents and records at the same time as collecting them, the person against whom the powers in Article 5:17 GALA are exercised is allowed to be present during their inspection later on.³⁵⁹

d. Autonomous use of the powers and enforcement in case of non-cooperation

The Commission may autonomously conduct an Article-20 on-site inspection and exercise the powers in Article 20(2) Regulation 1/2003. It may also autonomously conduct an Article-21 inspection.³⁶⁰ As stated before, the power to search is not explicitly included in Article 20 and 21 Regulation 1/2003, but the Dutch legislator is of the opinion that in case of opposition to an Article-20 inspection a search for the requested information could be necessary.³⁶¹

If the Commission faces opposition during an Article 20 or 21 on-site inspection, the ACM needs to offer the necessary assistance to ensure that the Commission can conduct its inspection.³⁶² If necessary, the ACM officials will ask the help of the police.³⁶³ In addition, the Commission may also impose a fine if undertakings do not subject to a decision as referred to by Article 20(4) Regulation 1/2003 or if they produce the required books or records related to the business in an incomplete manner during Article-20 inspections.³⁶⁴ Periodic penalty payments can be imposed if the undertaking refuses to submit to an inspection as ordered by a decision taken pursuant to Article 20(4) Regulation 1/2003.³⁶⁵ However, non-cooperation hardly ever occurs during

354 *Kamerstukken II* 2012/13, 33622, 3, p. 50.

355 Art. 51 CA (old).

356 This was confirmed during the interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

357 *Kamerstukken II* 2012/13, 33622, 3, pp. 10, 49-50.

358 Speech of Monique van Oers on the legal privilege and the NMa practice during a meeting of the Nederlandse Genootschap van Bedrijfsjuristen, 20 January 2011, <<https://www.acm.nl/nl/publicaties/publicatie/11487/Speech-Monique-van-Oers-Legal-Privilege-en-de-NMa-praktijk/>> last visited 31 January 2017.

359 Art. 4(1) jo. (2) ACM procedure concerning a lawyer’s legal privilege 2014.

360 Art. 21(4) Regulation (EC) No. 1/2003 states that the Commission may exercise the powers in Art. 20(2)(a-c) during an Article-21 inspection.

361 *Kamerstukken II* 2003/04, 29276, 3, p. 11.

362 In case of an Article-20 inspection, Art. 89c(1) CA applies.

363 Art. 89b(3) CA jo. 20(6) jo. 21(4) Regulation (EC) No. 1/2003; *Kamerstukken II* 2003/04, 29276, 3, pp. 10-11.

364 Art. 23(1)(c) Regulation (EC) No. 1/2003.

365 Art. 24(1)(e) Regulation (EC) No. 1/2003.

investigations by the Commission.³⁶⁶ Lastly, the Commission may impose a fine if a seal has been broken.³⁶⁷

When the Commission requests the ACM to act on the basis of Article 22(2) Regulation 1/2003 and the latter faces opposition when trying to exercise its powers in Article 5:15 and 5:17 GALA, it can ask the police for assistance.³⁶⁸ However, often the mere fact that the supervisors may ask the police for assistance is sufficient to ensure cooperation.³⁶⁹ Furthermore, if the ACM faces opposition when exercising its powers in Article 5:15-5:19 GALA it may probably also impose an administrative fine.³⁷⁰ In case of a violation of the duty to cooperate in relation to Article 5:17 GALA a periodic penalty payment can also be imposed.³⁷¹

If the ACM faces resistance when entering or searching a dwelling, it may request the assistance of the police.³⁷² Furthermore, it may impose an administrative fine in case of a violation of Article 5:20(1) GALA.³⁷³ In addition, the ACM may impose an administrative fine when they are confronted with resistance while sealing a place³⁷⁴ or when a seal is broken or damaged.³⁷⁵

The ECB may conduct on-site inspections and exercise the power to investigate and copy books and records autonomously.³⁷⁶ The SSM Regulation does not give the ECB the power to seal. When the ECB faces opposition when conducting an on-site inspection on the basis of a decision it can impose a sanction in accordance with Regulation 2532/98.³⁷⁷ The same goes for the situation in which the ECB wishes to examine and copy books and records on the basis of a decision and faces opposition.³⁷⁸ However, this competence to impose a sanction in case of opposition to an investigation or on-site inspection is without prejudice to national law as laid down in Article 11(2) of the SSM Regulation.³⁷⁹ Article 1:71 AFS states that the DCB officials are competent to demand cooperation during investigations and on-site inspections and for this purpose they also have the competences laid down in Article 5:15-5:17 GALA. This means for instance that if the ECB officers are denied entrance somewhere, the DCB on the basis of Article 5:15(3) GALA may ask for the assistance of the police. In addition, the DCB may also seal business premises, books or documents.³⁸⁰ There is no separate sanction for when a seal is broken or damaged.

366 Interview with Edwin van Dijk, former Team Manager Section Competition ACM (October 2016).

367 Art. 23(1)(e) Regulation (EC) No. 1/2003.

368 See Art. 5:15(3) and Art. 12b(2) Iw ACM.

369 *Kamerstukken II* 2012/13, 33622, 3, p. 48.

370 Art. 12m(1)(c) Iw ACM.

371 Art. 12m(3) Iw ACM.

372 With regard to entering a dwelling see Art. 9 General Act on Entry into Dwellings. Except for Article 2 and 3, this Act is applicable to the competence to enter a dwelling. See Art. 12d(4) Iw ACM; *Kamerstukken II* 2012/13, 33622, 3, pp. 9-10. With regard to searching a dwelling see Art. 50(2) CA.

373 Art. 12m(1)(c) Iw ACM.

374 *Ibid.*

375 Art. 12m(1)(d) Iw ACM.

376 See Art. 11(1)(b) and 12 Regulation (EU) No. 1024/2013 (SSM).

377 Art. 12(3) jo. 18(7) Regulation (EU) No. 1024/2013 (SSM) jo. 143(2)(b) Regulation (EU) No. 468/2014 (SSM Framework).

378 Art. 11(2) jo. 18(7) Regulation (EU) No. 1024/2013 (SSM) jo. 142(c) Regulation (EU) No. 468/2014 (SSM Framework).

379 Art. 142(c) and 143(2)(b) Regulation (EU) No. 468/2014 (SSM Framework).

380 Art. 1:71(2) AFS.

Furthermore, an administrative fine³⁸¹ or periodic penalty payment³⁸² can be imposed by the DCB if its officers are confronted with a refusal to cooperate when exercising their powers.

ESMA may also autonomously conduct on-site inspections and exercise the power to seal and to investigate and copy books and records.³⁸³ AFM will offer the necessary assistance if ESMA officers find that a person opposes an inspection. If necessary and where appropriate, the AFM will ask the assistance of the police or an equivalent enforcement authority.³⁸⁴ Assistance in case of opposition will probably be provided on the basis of the Regulations, since neither Article 23d(7) Regulation 513/2011 nor Article 63(7) EMIR refers to national law. In addition, Regulation 513/2011 and EMIR also state that if national law stipulates that judicial authorization is required before the AFM offers assistance in case of opposition, such an authorization will be applied for.³⁸⁵ However, this obligation is not implemented in Dutch law. Furthermore, ESMA can impose a periodic penalty payment to compel a person to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision taken pursuant to Article 23c Regulation 513/2011/ Article 62 EMIR or to submit to an on-site inspection ordered by a decision taken pursuant to Article 23d Regulation 513/2011/ Article 63 EMIR.³⁸⁶

OLAF cannot exercise the powers in Article 5:15, 5:17-5:19 GALA autonomously, in the sense that its inspectors are usually accompanied by a representative of AFCOS during an on-the-spot check.³⁸⁷ If AFCOS and OLAF face opposition during an on-the-spot check, for instance when they are not allowed to enter, they can ask the assistance of the police on the basis of Article 5:15(3) GALA. Police officers have the power to use violence or other coercive measures.³⁸⁸ In case of opposition during the exercise of one of the other powers in the GALA, neither AFCOS nor OLAF has enforcement powers. However, the interviewees stated that situations of non-cooperation hardly ever occur. Usually, talking to the company under investigation solves most issues. What the possibilities of the AFCOS are if talking to the company does not work is still unclear. Furthermore, if there would be enforcement powers, it also needs to be established when and how these should be used.³⁸⁹

In principle, a violation of Article 5:20(1) GALA can also be classified as a criminal act on the basis of Article 184 DCC.³⁹⁰ However, the decision to prosecute is made by the public prosecutor's office and not by the national competent authorities discussed. Furthermore, criminal prosecution

381 Art. 1:80(1)(d) AFS jo. 5 Administrative Fines (Financial Sector) Decree.

382 Art. 1:79(1)(d) AFS.

383 See Art. 23c-23d Regulation (EU) No. 513/2011/ Art. 62-63 Regulation (EU) No. 648/2012 (EMIR).

384 Art. 23d(7) Regulation (EU) No. 513/2011/ Art. 63(7) Regulation (EU) No. 648/2012 (EMIR).

385 Art. 23d(8) Regulation (EU) No. 513/2011/ Art. 63(8) Regulation (EU) No. 648/2012 (EMIR).

386 Art. 36b(1)(c-d) Regulation (EU) No. 513/2011/ Art. 66(1)(b)(ii-iii) Regulation (EU) No. 648/2012 (EMIR).

387 Interview with employees of AFCOS (December 2016).

388 *Kamerstukken II* 1994/95, 23700, 5, p. 50; *Kamerstukken II* 2011/12, 33247, 3, p. 5.

389 Interview with employees of AFCOS (December 2016).

390 *Kamerstukken II* 2003/04, 29708, 3, p. 41. Furthermore, using violence or expressing threats of violence against a national official is a criminal act on the basis of Art. 179 DCC. If the acts are committed against EU officials, the acts are punishable on the basis of Art. 179 jo. 185a DCC. *Kamerstukken II* 2011/12, 33247, 3, pp. 7-8.

on the basis of Article 184 DCC in case of a violation of Article 5:20(1) GALA is not possible when the ACM faces non-cooperation.³⁹¹

4.3.4 Access to traffic data and recordings of telecommunications

The power to record telecommunications and to access traffic data exists in the area of criminal law and can be exercised by the public prosecutor.³⁹² However, none of the national competent authorities discussed in this report has the power to access traffic data or the recordings of telecommunications when in one way or another they assist their European counterpart.³⁹³ With regard to access to traffic data, the legislator has stated that this power severely interferes with an individual's rights, most importantly the right to privacy. It therefore needs to be accompanied by strong safeguards.³⁹⁴

4.4 EX POST JUDICIAL PROTECTION BY NATIONAL COURTS

4.4.1 Direct and indirect judicial review

As stated in Section 1.3.1.d of this report there is no possibility to file an objection concerning the lawfulness of a *de facto* measure to the administrative body or to appeal to the administrative court.³⁹⁵ However, a person can challenge the lawfulness of a *de facto* measure before a civil court by claiming that the actions of the supervisors were wrongful acts.³⁹⁶ To bring such a claim, no internal administrative appeals or other procedures need to be exhausted first. In general, the civil court acts with reticence regarding claims on the basis of Article 6:162 of the Civil Code, because the decision about the lawfulness of the sanction imposed, which might partially be based on information collected during investigatory actions, rests with the administrative court.³⁹⁷

The lawfulness of an investigatory action can be indirectly assessed by the administrative court in proceedings against the sanction decision if this decision is partially based on information gained during investigatory actions.³⁹⁸ However, in principle, the procedure for lodging an objection needs to be exhausted first before a person has access to the administrative court.³⁹⁹ An objection is lodged with the same administrative body as the body that took the sanction decision.⁴⁰⁰ The administrative body will reassess all parts of its decision and examine its lawfulness as well as

391 Art. 12m(4) Iw ACM. See also *Kamerstukken II* 2012/13, 33622, 3, p. 54.

392 For recording telecommunications see for instance Art. 12m DCCP. For access to traffic data see for instance Art. 126n DCCP jo. 2 Telecommunications Data (Disclosure Demand) Decree (*Besluit vorderen gegevens telecommunicatie*), *Stb.* 2004, 394.

393 None of the applicable national laws, including the Telecommunications Act, grants this power to the ACM, AFM, DCB or AFCOS. The Telecommunications Act only allows access to data in case of a demand pursuant to the Code of Criminal Procedure or in case of a request pursuant to the Intelligence and Security Services Act 2002. See Chapter 13 of the Telecommunications Act.

394 *Kamerstukken II* 2015/16, 34455, 3, pp. 19-20; *Kamerstukken II* 2015/16, 34455, 11, p. 13.

395 An objection can be lodged against a formal decision, but not against a *de facto* measure (Art. 1:5 GALA). The same goes for an appeal to the administrative judge (Art. 8:1 GALA).

396 Art. 6:162 Dutch Civil Code; Jonge & Kruijsbergen, *supra* note 4, p. 44.

397 Blomberg 2013, *supra* note 110, p. 61.

398 Blomberg 2013, *supra* note 110, pp. 60-61; *Kamerstukken I* 2013/14, 33622, C, pp. 7-8.

399 Art. 7:1(1) GALA. Exceptions are listed in Art. 7(1)(a-g) GALA and 7:1a GALA.

400 Art. 6:4(1) GALA.

its efficiency (*doelmatigheid*).⁴⁰¹ The objection needs to be lodged within six weeks. This term starts on the day following the day on which the decision is notified in the manner prescribed by the GALA.⁴⁰²

After the procedure for lodging an objection is exhausted, the person concerned may appeal to the administrative court. The time limit for this is again six weeks.⁴⁰³ Usually, this appeal is directed at the decision taken at the end of the objection procedure.⁴⁰⁴ However, if the administrative court sets this decision aside, it should also resolve the issue before it as much as possible.⁴⁰⁵ For this purpose the court has the power for instance to settle the case, which allows the court to decide that its decision replaces the decision of the administrative body in the objection procedure. In this decision it can revoke the sanction decision of the administrative body against which the objection procedure was lodged.⁴⁰⁶

In the appeal procedure the administrative court will only assess the lawfulness of the decision.⁴⁰⁷ It can for instance examine whether the investigatory power was exercised in conformity with Article 5:13 GALA and whether it was exercised in an excessive manner.⁴⁰⁸ However, the investigatory action will only be considered in as far as it played a role in the decision to impose the sanction.⁴⁰⁹

Lastly, it is interesting to note that a person or undertaking may also intentionally provoke the imposition of an administrative fine or periodic penalty payment by refusing to cooperate.⁴¹⁰ Against such a sanction decision an objection can be filed and an appeal to the administrative court is possible as well in which the lawfulness of the investigatory action can be addressed.⁴¹¹

4.4.2 Sanctioning decision taken at the EU level

OLAF itself does not have the power to impose a sanction. It can only refer the results of its investigation to the appropriate national authorities, which can also be the public prosecutor's office, which may then decide what to do with it.

If ESMA, the Commission and the ECB impose a sanction which is partially based on information collected with the use of national investigatory actions, the question arises to what extent and how the lawfulness of these investigatory actions can be addressed. Wissink, Duijkersloot and Widdershoven state that if the ECB imposes a sanction, it is highly unlikely that the Union court can and will assess the proportionality of the investigatory powers exercised in the Netherlands. It is more likely that it will assume on the basis of the rule of non-inquiry which is based on

401 F.C.M.A. Michiels & R.J.G.M. Widdershoven, 'Handhaving en rechtsbescherming', in F.C.M.A. Michiels & E.R. Muller (eds.), *Handhaving: Bestuurlijk handhaven in Nederland* (2013), p. 92.

402 Art. 6:7 jo. 6:8 GALA.

403 Michiels & Widdershoven 2013, supra note 403, p. 94.

404 Michiels & Widdershoven 2013, supra note 403, p. 95.

405 Art. 8:41a GALA; Michiels & Widdershoven 2013, supra note 403, p. 95.

406 Art. 8:72(3)(b) GALA; Michiels & Widdershoven 2013, supra note 403, p. 95.

407 Michiels & Widdershoven 2013, supra note 403, p. 94.

408 Wissink et al. 2014, supra note 317, p. 110.

409 Blomberg 2013, supra note 110, p. 60-61; Jonge & Kruijsbergen, supra note 4, p. 44.

410 This applies if the administrative body in question may in fact impose such measures for non-cooperation.

411 *Kamerstukken I* 2013/14, 33622, C, pp. 7-8.

mutual trust that the investigatory powers were exercised in the correct manner. Consequently, whether the investigatory act is excessive would not be examined at all.⁴¹²

4.4.3 Suspensive effect of remedies

According to Article 6:16 GALA, neither the procedure for lodging an objection nor an appeal procedure before the administrative judge has suspending effect, unless provided otherwise by or pursuant to statutory regulation.

Article 12p Iw ACM makes such an exception. This provision states that when the ACM imposes an administrative fine by decision and an objection is lodged, the execution of this decision is suspended by 24 weeks. This exception can be explained by the fact that on the basis of the Competition Act relatively heavy fines can be imposed which may result in disproportionately high financial burdens for the undertakings. These could even lead to bankruptcy.⁴¹³ However, an appeal procedure before the administrative court has no suspending effect.⁴¹⁴

Article 1:85(1) AFS states that the submission of an objection or appeal against the imposition of an administrative fine suspends the obligation to pay the fine until the period for appeal has expired or, if an appeal has been lodged, until a decision has been given on the appeal. This means that the obligation to pay an administrative fine is suspended when an objection is lodged *and* when an appeal procedure is started. The rule in Article 1:85(1) was included in the AFS at a time when a change in the system for imposing fines was anticipated. This change would allow the imposition of more severe fines with far-reaching consequences.⁴¹⁵

Furthermore, if no separate statutory regulation exists which makes an exception to Article 6:16 GALA, a person may in the course of objection proceedings or an appeal before the administrative court initiate interim relief proceedings in which he or she can request the suspension of the execution of a sanction decision.⁴¹⁶

4.5 CONCLUSIONS – IDENTIFICATION OF BEST PRACTICES AT THE NATIONAL LEVEL

- No actual practice exists yet with regard to the cooperation between ESMA-AFM and the ECB-DCB. With regard to OLAF-AFCOS and the Commission-ACM, up until now cooperation has always taken the form of a joint operation in the sense that both EU officers and national officers are present and/or participate in an investigation or inspection. The Commission has not yet requested the ACM to conduct on-site inspections on its behalf and OLAF has always been accompanied by an AFCOS representative⁴¹⁷. Furthermore, only in relation to cooperation between AFCOS and OLAF have national powers been exercised in practice, since the Commission has not yet issued an Article 22(2) Regulation 1/2003 request.
- ACM and AFCOS have the supervision powers in Article 5:15-5:19 GALA when cooperating with their European counterpart. The DCB only has the powers in Article 5:15-5:17 GALA,

412 Wissink et al. 2014, supra note 317, pp. 110-111.

413 Michiels & Widdershoven 2013, supra note 403, p. 121.

414 *Kamerstukken II* 2012/13, 33622, 3, p. 55.

415 *Kamerstukken II* 2005/06, 29708, 34, p. 26.

416 Art. 8:81 GALA; Michiels & Widdershoven 2013, supra note 403, p. 96.

417 However, as stated before, if the undertaking or person in question gives consent OLAF may also conduct interviews, enter a place, inspect documents etc. without the assistance of AFCOS.

because the powers in Article 5:18 and 5:19 GALA are not considered necessary for supervision in the financial sector. The decision to exclude Articles 5:18 and 5:19 GALA was not the result of applicable EU rules.

- Both the DCB and the ACM have been granted powers that are additional to those in the GALA. The DCB's power to seal in Article 1:71(2) AFS was introduced because of Article 12(5) SSM Regulation. Granting the ACM the power to enter and search dwellings was partially based on the guiding principle that national competition law should as much as possible be in line with European competition law and that the powers of the national competent authority should match those of the Commission.
- In comparison to the other authorities, the ACM is the only authority that has to deal with an extended legal privilege. Before Article 12g Iw ACM was adopted, the Competition Act already contained a provision extending the scope of the legal privilege. This Article 51(old) CA was adopted to ensure compliance with the case law of the Court of Justice of the EU. The ACM is also the only authority which needs to request an *ex ante* judicial authorization in certain situations. The condition of an *ex ante* judicial authorization is based on Regulation 1/2003.
- With regard to the question whether OLAF misses any particular competences, such as the power to enter a dwelling, the interviewees answered that this is most likely not the case. OLAF seems quite content with the competences that it has on the basis of the 2012 Act and with the cooperation with AFCOS. Furthermore, considering the current political climate, additional competences like entering dwellings for OLAF might even have an adverse effect. Most discussions with OLAF primarily focus on the policy of the Tax and Customs Administration on how Dutch undertakings should be approached and treated. The discussion does not focus on the content and scope of the powers in the GALA.⁴¹⁸

⁴¹⁸ Interview with employees of AFCOS (December 2016).

5. ITALY

S. Allegrezza

5.1 INTRODUCTION

The Italian counterparts of the four enforcement agencies considered in this research make up a fragmented and complex picture. In the following parts we will try to explain their role and their powers when they act as a counterpart for the European authorities. The first obstacle we faced in our analysis is the lack of specific provisions in the national law concerning which powers are allowed and which are excluded when the national agencies or authorities are cooperating with their European counterparts. The Italian system does not provide for comprehensive administrative law covering all the activities of the fields that are relevant for this research. It rather adopts a fragmented sectoral approach, providing specific rules for every single field in which national counterparts are operating. The complexity of the analysis is mainly due to the fact that the sectoral legal frameworks are composed of different sets of rules with several cross-references. Furthermore, the division of the tasks among the agencies is not precisely defined by the law. Last but not least, the practice is often unclear and the data not always accessible because of the lack of clear databases.

5.2 OVERVIEW OF NATIONAL COUNTERPARTS OF THE FOUR AUTHORITIES

a) The counterpart of OLAF: COLAF (Comitato per la lotta contro le frodi nei confronti dell'Unione europea)

The Italian Anti-fraud Committee (COLAF – Comitato per la lotta contro le frodi nei confronti dell'Unione europea) was established by Article 76 of Law n. 142/1992 and confirmed by Article 54 of Law n. 234/2012. According to Article 3§4 of reg. 883/13 concerning investigations conducted by OLAF, the COLAF has been designated as the central anti-fraud Coordination service for Italy.

The COLAF operates according to Presidential Decree No. 91 of May 14th 2007, Article 3 and Law No. 234 of Dec. 24th, 2012, Article 54 – at the Department for European Policies.

It has several tasks: it provides advice and coordination at national level against fraud and irregularities in the fields of taxation, the Common Agricultural Policy and structural funds; it monitors the flow of information on undue European funds and on their recovery in case of misuse under Regulations (CE) 1828/06 and (CE) 1848/06 and further modifications; it reports to the European Commission according to Article 325 TFEU. The COLAF has no direct operational authority.

The Committee is chaired by the political authority responsible for European Affairs (the Minister or Secretary of State) or by his/her delegate. It is composed of the Head of Department

for European Policies; the Chief of the Financial Police Anti-fraud Unit; the Directors General of the Department for European Policies; the Directors General of the Ministries responsible for combating tax and agricultural fraud and the misuse of European funds, who are appointed by the Chair; and Members appointed by the national Conference of Regions, Cities and Local Authorities.

The mixed composition of the Committee reflects the involvement of different agencies, bodies and police corps cooperating to support OLAF at the national level.

The COLAF has no direct investigative authority, its function being limited to coordination. Investigative powers are conferred on the ‘Nucleo della Guardia di Finanza per la repressione delle frodi nei confronti dell’UE’, a special Unit of the Italian Financial Police that operates – according to Law No. 234 of December 24th 2012, Article 54 – set up at the Department for European Policies to counter fraud against the European Union’s budget. The COLAF may also rely on the tax police and on the customs police. It is not always clear how the distribution of competences actually works: it mostly depends on the specific case and on the division of competences between the different police corps in Italy. It is relevant to highlight the fact that in Italy administrative investigations in fraud cases can rely on the powers of the judicial police in combating fraud. When a request comes from OLAF, the same set of powers applies.

There are no specific provisions relating to cooperation with OLAF and ordinary rules relating to national cases apply accordingly (the privilege against self-incrimination, the right of access to a lawyer, professional secrecy, etc.).¹

No specific threshold is provided to open administrative investigations but onsite inspections might require « fondati sospetti » of a breach,² which means « concrete elements of suspicion » able to justify doubts about the truthfulness of the documents or the statements of the parties concerned.

In principle, there is no duty for administrative bodies (the tax office, the customs office, etc.) to postpone, suspend or withdraw an administrative investigation if they receive notice of a criminal investigation based on the same facts because of the *una via* principle.

Nevertheless, one might take into consideration that it is often the case that once cooperation is required by OLAF, the case is already the subject of a criminal investigation and the relevant rules apply accordingly. In these cases, the administrative investigation becomes a criminal investigation and is subject to the rules on criminal procedure.

b) The counterpart of the EU Commission in competition cases: AGCM (Autorità Garante della Concorrenza e del Mercato)

The Italian Competition Authority (ICA – Autorità Garante della Concorrenza e del Mercato – AGCM) was established in Italy by Law no. 287 of 1990 (‘Norme per la tutela della concorrenza

1 A. Perduca & F. Prato, ‘Le indagini per l’ufficio europeo per la lotta antifrode (OLAF) e i rapporti con l’autorità giudiziaria’, (2006) *Cassazione Penale*, no. 12, pp. 4242-4251; V. Pacileo, ‘I rapporti dell’OLAF con le autorità giudiziarie nazionali: forme e modalità di assistenza’, www.csm.it; G. De Amicis, ‘Il ruolo dell’OLAF e di Eurojust negli interventi a tutela degli interessi finanziari comunitari: quale collaborazione?’, in G. Grasso & R. Sicurella (eds.), *Per un rilancio del progetto europeo: esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale* (2008); F. Ruggieri (ed.), *La giustizia penale nella Convenzione: la tutela degli interessi finanziari dell’Unione europea* (2003); L. Camaldo & A. Bana, *Sequestro, confisca e recuperi a tutela degli interessi finanziari dell’Unione, la legislazione comunitaria e l’attuazione nei paesi membri* (2010); L. Camaldo (ed.), *La circolazione e il contrabbando di prodotti contraffatti o pericolosi: la tutela degli interessi finanziari dell’Unione Europea e la protezione dei consumatori* (2013).

2 Art. 33 D.P.R. 600/1973.

e del mercato').³ The Italian Competition Authority is an independent administrative agency established by Law no. 287/90. The procedural rules and the investigative powers of the Authority are laid down in the Law and in Decree No. 217/98. It is an independent collegial administrative body, in that decisions are based on competition law without interference from the Government.

The collegium is composed of three members nominated by the Presidents of the two Chambers of Parliament for a period of seven years and any decision should be adopted by a simple majority. The office has 262 employees.

Having citizens' welfare as its aim, the Authority enforces rules against anti-competitive agreements among undertakings, abuses of a dominant position as well as concentrations (e.g., mergers and acquisitions, joint ventures) which may create or strengthen dominant positions detrimental to competition. Moreover, the Authority may send official opinions to the Government, Parliament, the Regions and Local Authorities whenever existing or proposed legislative and administrative measures restrict competition. The Italian Competition Authority is also in charge of several other competencies, including protecting consumers from misleading advertising, comparative advertising which may discredit competitors' products or cause confusion, as well as unfair commercial practices among undertakings. Finally, the Authority enforces rules against conflicts of interest for government officials.

Italian Law no. 287 of 1990 governing competition in Italy, in particular its title I, 'shall be interpreted in accordance with the principles of the European Community competition law' (Article 1§1).

There is no specific threshold to open an investigation.

After assessing the elements in its possession and those brought to its notice by the public authorities or by any other interested party, including bodies representing consumers, the Authority shall conduct an investigation to ascertain any infringements of competition law (Article 12§2 L.287/1990). The Authority may also instigate a general fact-finding investigation at its own initiative, or at the request of the Minister of Trade and Industry, or of the Minister of State Shareholdings, in areas of business in which the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted (Article 12§2 L.287/1990).

When it comes to interaction with the European Commission, Law no. 287 of 1990 states that where the Competition Authority determines that competence should be attributed to the EU Commission, 'it shall inform the Commission of the European Communities and forward to it any relevant information at its disposal' (Article 1§2). When the AGCM receives a notification from the Commission that a formal procedure is to be commenced, 'it shall suspend any investigation (...) save for any aspects entirely of domestic relevance.' (Article 1§3).

As a consequence, there is no further national investigation once the European investigation is ongoing.

Rules on the national investigations of the AGCM are provided by Regulation 217/1998 (dal D.P.R. 30 aprile 1998, n. 217, recante 'Regolamento in materia di procedure istruttorie di competenza dell'Autorità').

3 M. De Benedetto, *L'autorità garante della concorrenza e del mercato: organizzazione, poteri, funzioni* (2000); C. Lacava, *L'Autorità garante della concorrenza e del mercato: l'organizzazione, il funzionamento, il personale, la finanza* (1996), pp. 333-367; C. Rabitti Bedogni & P. Barucci, *20 anni di antitrust: l'evoluzione dell'Autorità garante della concorrenza e del mercato* (2010).

As for the national investigation led by the AGCM, in the event of an alleged infringement of sections 2 or 3 the Authority shall notify the undertakings and entities concerned that an investigation is being opened. The owners or legal representatives of such undertakings or entities may submit representations in person or through a special attorney by the deadline set at the moment of notification, and may make submissions and opinions at any stage during the course of the investigation, as well as further representations before the investigations are completed (Article 14§1 L 287/1990).

The Authority may, at any stage in the investigation, request undertakings, entities and individuals to supply any information in their possession and exhibit any documents of relevance to the investigation; it may conduct inspections of the undertaking's books and records and make copies thereof, availing itself of the cooperation of other government agencies where necessary; it may produce expert reports and economic and statistical analyses, and consult experts on any matter which is of relevance to the investigation (Article 14§2 L 287/1990).

Any information or data regarding the undertakings under investigation by the Authority are wholly confidential and may not be divulged even to other government departments (Article 14§3 L 287/1990).

The range of persons that may participate in the proceeding is wide. First of all, it includes the persons concerned (both legal entities and individuals). Furthermore, persons representing public or private interests, and associations representing consumers who might be directly, immediately and currently damaged by any infringements forming the subject matter of the investigation or by any measures adopted are also entitled to participate in the proceedings if they submit reasoned requests to intervene within 30 days of the date of publication in the bulletin containing notices of the commencement of investigations (Article 7 Reg. 217/98). All parties taking part in the investigation may have access to documents and produce written submissions, documents, arguments and opinions.

The persons concerned receive a formal notification of the commencement of the investigation and they may make representations in person or through a special attorney by the deadline set at the moment of notification, and may make submissions and opinions at any stage during the course of the investigation, as well as further representations before the investigations are completed (Article 14 L. 287/1990). In the course of the hearings, the interested parties may be represented by their legal representative or by a person holding a special power of attorney for that purpose. They may also be assisted by consultants of their choice, even though this shall not entail a suspension of the hearing (Article 7 Reg. 217/98).

c) The counterpart of the ECB: Banca d'Italia (Italian Central Bank)

The Bank of Italy is in charge of the supervision of the banking and financial system together with the Commissione nazionale per la borsa e il mercato (Consob, see *infra*).⁴ With regard

⁴ See AA.VV., *La Banca d'Italia*, (2010); F. Cannata et al. (eds.), *L'analisi d'impatto della regolamentazione in Banca d'Italia* (2010); O. Capolino, 'La vigilanza bancaria: prospettive ed evoluzione dell'ordinamento italiano', in R. D'Ambrosio (ed.), *Scritti sull'Unione bancaria* (2016), pp. 55-79; A. Pisaneschi, 'Banca centrale europea, vigilanza bancaria e sovranità degli Stati', (2014) *federalismi.it*, no. 17, p. 11; M. Porzio (ed.), *Testo unico bancario: commentario* (2010); R. D'Ambrosio, *La responsabilità della BCE e delle autorità nazionali competenti nell'ambito del Meccanismo di vigilanza unico*, (2015); AA.VV., *Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione dei poteri* (2014); M. Mancini, *Dalla vigilanza nazionale armonizzata alla Banking Union*, (2013).

to the different types of stock market trading companies (SIMs, SGRs, SICAVs and SICAFs), the Consolidated law on Finance (TUF) gives the Bank of Italy the task of supervision for risk containment, stability and sound and prudent management, while Consob is responsible for the transparency and fairness of these entities' behaviour concerning investment products.

The financial system transfers financial resources from savers through markets and intermediaries to those who need them to make investments. Banks take part in this process on the one hand by collecting savings with deposits and other financial instruments and, on the other, by selecting creditworthy projects and initiatives. If this financial circulation does not function correctly, it affects the economy and employment. For this reason Article 47 of the Constitution of the Italian Republic covers, among other things, the protection of savings and the regulation and control of credit provision.

The Bank of Italy's banking and financial supervisory powers have their legal basis in the Consolidated Law on Banking (Testo unico bancario – TUB) and internal circulars. The TUB, built on the principles of and the allocation of powers, sets out the basic rules and standards and defines the competences of the credit authorities (Interministerial Committee for Credit and Savings – CICR, the Ministry of Economy and Finance and the Bank of Italy). Specifically, it allocates authority to issue secondary rules and regulations on technical matters and to adopt prudential measures.

Other significant rules on the organization, competences and operations of the Bank of Italy and other supervisory authorities are found in Articles 19 to 29 of Law 262/2005, the so-called 'Savings Protection Law'.

The Banca d'Italia's powers are exercised with the aim of: protecting sound and prudent management on the part of financial intermediaries; overall stability; the efficiency and competitiveness of the financial system; and the transparency and fairness of the transactions and services provided by banks, banking groups, financial firms, EMIs and payment institutions.

The Bank of Italy is also committed to combating money laundering and the financing of terrorism: it issues secondary legislation, oversees compliance and adopts corrective measures and sanctions for supervised entities. The Financial Intelligence Unit (FIU), which is an independent body that functions with full autonomy within the Bank of Italy, collects suspicious transaction reports, analyses them and forwards them to the relevant authorities.

The broad scope of the tasks entrusted to the Bank of Italy and the even higher level of interconnectedness between the different authorities means greater recourse to formal cooperation agreements. The most relevant one is the agreement between the Bank of Italy, Consob and IVASS (Istituto per la vigilanza sulle assicurazioni) in the field of financial supervision.

The Bank of Italy is also responsible for protecting the customers of banks and financial intermediaries, a fundamental part of banking and financial supervision that runs alongside and in tandem with its other supervisory tasks. For this aim it also cooperates with the Italian Antitrust authority. When needed, it can rely on the support of the Italian Financial Police (Guardia di Finanza).

The Consolidated Law on Banking and the Consolidated Law on Finance empower the Bank of Italy to regulate numerous aspects of banking and financial activities in order to guarantee stability, efficiency and competition in the financial system.

The Bank of Italy's legal instruments can take many forms (supervisory rules, regulations, circulars) and are usually of a distinctly technical and financial nature. The Bank of Italy also issues communications on specific issues pertaining to regulated subject matters, which are not to be included in legal instruments but may contain additional information and clarifications.

The Bank of Italy is the designated National Competent Authority (NCA) under the Single Supervisory Mechanism (SSM). Personnel of the Bank of Italy participate in the JSTs established by the ECB when requested.

There is no specific rule at the national level in order to regulate cooperation with the SSM when it comes to the supervision of significant banks. In these cases, they follow the rules of the SSMR and SSMFR. When it comes to the supervision of less significant banks, in principle Banca d'Italia applies rules provided in the CRR and the implementation of the CRD IV plus the national law dedicated to banking activities and supervision (Testo unico bancario TUB), in particular national investigatory and sanctioning rules.

There is no specific threshold for opening an investigations in cooperation with the ECB. When Banca d'Italia is required by the ECB to carry out investigative measures (Article 9§1 Reg. 1024/2013) or to open a procedure (Article 18§5 Reg. 1024/2013 both European and ordinary national rules apply).

Banca d'Italia carries out informative supervision and investigative supervision.

The planning of external 'targeted' investigations is made at the beginning of every year by the Director of the Supervisory Unit (processo di pianificazione).⁵ If any irregularities are discovered in the course of informative or investigative supervision, the Bank of Italy has the power to impose financial penalties, which are paid to the appropriate provincial office of the State Treasury. The exercise of such power complements other supervisory instruments and helps to deter practices that are contrary to the principles of sound and prudent management, transparency and the fair treatment of customers. The imposition of sanctions is governed by the measures of 27 June 2011 and 18 December 2012.

Normally, if not exclusively, sanctions originate from inspections, an instrument accorded by law to the Bank of Italy to gather information and data on site concerning the situation and operations of intermediaries.

The reports drafted by the inspectors at the end of the inspection contain observations and criticisms that are made known to the leading officials of the inspected bank within 90 days of the conclusion of the inspection. From that time onwards the bank has 30 days to prepare its own counter-observations and to specify the measures it intends to take in response to the inspectors' criticism.

Persons against whom a verification of a sanctionable administrative violation has been made must also be notified within 90 days. In the more important cases, the decision to open a proceeding may be made by a collective body within the Bank – the Group for the Examination of Irregularities.

⁵ Guida per l'attività di vigilanza, Banca d'Italia, circolare n. 269, 7/5/2008 p. III, s. II, p. 4.

Legal rulings have deemed the legal deadline for the notification of the verification of a violation (90 days) to be absolute, subject to no possible extensions or exceptions. This is the deadline beyond which the public administration's power to take punitive action lapses.

Until 1 February 2013, the 90 days for notification commenced, for the Bank of Italy, upon the conclusion of the inspection. Now, under new provisions of the Supervision Area, the term begins on the date of the closure of the preliminary phase of the assessment of the inspection report (a movable term), certified by the signature of the Managing Director of the Banking and Financial Supervision Area. This date is communicated to the supervised intermediary in the letter specifying the charges.

When the formal charges are lodged, the investigation-prosecution stage begins. The parties accused have 30 days from the date of the accusation to present their counter-arguments; this deadline may be extended, at their request, by 15 to 30 days. In practice, however, this is whenever possible, within a reasonable period of time. Counter-arguments submitted after this deadline are also taken into consideration. During this phase the persons involved may request access to files or a personal hearing, in compliance with the rules on transparency and right to a hearing.

Recently, the Bank's internal procedures have been revised and some phases have been streamlined in order to speed up the process. However, there is a limit to the shortening of the time required to examine the counterarguments – which may well be voluminous, technically complex and relating to the positions of many different individuals – without unduly limiting the rights of defence.

After evaluating the defensive counter-arguments, the Supervision Area closes the investigation-prosecution stage and addresses a proposal to the Governing Board of the Bank, observing the distinction between this stage and the decision stage. In the more important cases the proposal is accompanied by the prior opinion of another collegial body, namely the Committee for the Examination of Irregularities.

The Governing Board may accept the proposal and impose the sanctions; it may reject it, specifying the reasons; or it may request an additional investigation.

The Bank of Italy, in a provision of its own, has fixed the maximum duration of the stage that begins with the notification of the verification and ends with the decision of the Governing Board at 240 days, in addition to the 90 days within which the notification must be made and, obviously, the term within which the supervised intermediary must present its counter-arguments.

Italy's Legislative Decree 72/2015 and the 2014 European Delegation Law, approved on 2 July 2015, conferred the functions of the National Resolution Authority on the Bank of Italy. The Bank has accordingly established a Resolution and Crisis Management Unit, which carries out the preliminary and operational tasks envisaged by the Single Resolution Mechanism, cooperates with the SRB's offices, and manages the liquidation procedures for banks and investment firms.

There is no duty for Banca d'Italia to drop, suspend or postpone the administrative proceedings because of the absence of the *una via* principle in the Italian legal system. The two proceedings can run in parallel and impose sanctions of a different nature.

d) The counterpart of ESMA: Consob (Commissione Nazionale per le Società e la Borsa)

The Commissione Nazionale per le Società e la Borsa (Consob) is the public authority responsible for regulating the Italian financial markets in conjunction with Banca d'Italia. It is mainly

regulated by the Testo Unico della Finanza (TUF – Consolidated Financial Law, Legislative Decree no. 58 of 24 February 1998).⁶

Financial activity is governed by regulations and is subject to more extensive and far-reaching controls than those applied to firms operating in other sectors, because of its specific features and the high level of interconnection among the operations of banks, non-banking intermediaries, electronic money institutions (EMIs), payment institutions, SIMs, SGRs, SICAVs and SICAFs. The weakness of a single intermediary or instability in one market can rapidly be transmitted to others.

An effective supervisory system must therefore be based on rules and control instruments that cover the entire financial system. The first line of defence is constituted by clear rules that are similar for all intermediaries performing the same kinds of activities; the second provides for appropriate supervision of individual intermediaries, i.e. microprudential supervision, and of the risks in the financial system overall, known for this reason as macroprudential supervision.

Its activity is aimed at the protection of the investing public. In this connection, the Consob is the competent authority for ensuring transparency and correct behaviour by financial market participants; the disclosure of complete and accurate information to the investing public by listed companies; the accuracy of the facts represented in the prospectuses related to offerings of transferable securities to the investing public; and compliance with regulations by auditors entered in the Special Register. 1. Consob is the competent authority in accordance with Article 22 of (EC) Regulation 1060/2009 of the European Parliament and Council of 16 September 2009 relative to credit ratings agencies, and it exercises the powers envisaged by the said Regulation.⁷

Consob conducts investigations with respect to potential infringements of insider dealing and market manipulation law.

When it comes to European Cooperation, Consob carries out the tasks of ESMA⁸ for the Italian financial market, but it shares some functions with Banca d'Italia. According to Art. 4 §2-bis TUF, Consob and the Bank of Italy can enter into cooperation agreements with the competent authorities of the EU member states and with ESMA, which may provide for the mutual delegation of supervisory duties. Consob and the Bank of Italy may use ESMA to resolve disputes with supervisory authorities from the other Member States in cross-border situations. Consob shall be the point of contact for the receipt of requests for information from the competent authorities of EU member states regarding investment services and activities performed by authorised persons and regulated markets. Consob shall cooperate with the Bank of Italy concerning aspects for which the latter is responsible. The Bank of Italy shall submit information simultaneously to both the competent authority of the EU member state issuing the request and to Consob.

6 G. Romagnoli, *Consob: profili e attività* (2012); W. Troise Mangoni, *Il potere sanzionatorio della Consob: profili procedurali e strumentalità rispetto alla funzione regolatoria* (2012); N. Abriani (ed.), *Testo unico finanziario* (2016); D.I. Pace, *Ammissione, sospensione, esclusione dai mercati regolamentati: poteri della Consob e delle società di gestione dei mercati* (2012); F. Cintioli, 'Regolazione e regolatori nazionali nei settori del credito e dei mercati finanziari', (2016) *GiustAmm.it*, no. 1, p. 8.

7 Art. 4 bis § 1 TUF.

8 Art. 4-quater § 2. Consob is the competent authority, pursuant to Article 22, paragraph 1, of the regulation referred to in section 1, for the coordination of cooperation with and the exchange of information with the European Commission, the European Securities and Markets Authority (ESMA), the competent authorities from other Member States, the European Banking Authority (EBA) and the relevant members of the European system of central banks, pursuant to Articles 23, 24, 83 and 84 of the regulation referred to in section 1.

Consob also cooperates at the national level. Various regulatory authorities and market bodies contribute to the organization and operation of the Italian financial market. The overall consistency and effectiveness of their actions are ensured by cooperation that takes the form of proposals, opinions, understandings and information sharing. For this aim, Consob cooperates with public authorities. The following are some examples.

Consob may submit proposals to the Ministry of the Economy and Finance for the imposition of penalties on corporate officials of the companies subject to its supervision. It may render an opinion on the regulations issued by the Ministry (integrity and experience requirements for intermediaries' corporate officials and financial salesmen, the discipline of the statutory audit and related supervisory activities etc.).

Consob shares information with the Bank of Italy, the Pension Fund Regulatory Authority (Covip), the Insurance Industry Regulatory Authority (Ivass, the former Isvap, so as to permit the performance of their respective tasks in the supervision of intermediaries). It gives its agreement to or its opinion on measures in the field of securities intermediation falling within the scope of authority of the Bank of Italy, Covip and Ivass.⁹

When it comes to other public authorities, Consob cooperates with them by sharing information within the limits permitted by professional secrecy. In particular this occurs in relation to market bodies because statutory provisions entrust Consob with their supervision. There are also some forms of cooperation aimed at ensuring conditions which are conducive to the smooth operation and development of the securities markets. Consob cooperates with the judicial authorities by providing information that they have requested and reporting potentially criminal actions that emerge in the performance of its activities. The said authorities may not invoke professional secrecy in their mutual relations.¹⁰

There can be a derogation from the pertinent rules when Consob is required to cooperate with ESMA. When ESMA requires cooperation under Art. 23c of Regulation 1060/2009, Consob applies the existing rules on internal investigations. As a consequence, there is no special threshold to open an investigation because there is no such requirement even when it comes to ordinary Consob proceedings.

Concerning professional secrecy, Article 44 TUF provides that all information and data in the possession of Consob by virtue of its supervisory activity shall be covered by professional secrecy, also with respect to governmental authorities, except for the Minister of the Economy and Finance. Those cases in which the law provides for investigations of violations subject to criminal sanctions shall be unaffected.

In the performance of their supervisory functions employees of Consob are public officials and are required to report any irregularities which they may discover exclusively to Consob, even where such irregularities appear to be criminal offences. Employees of Consob and consultants and experts engaged by Consob shall be bound by professional secrecy.

As for national criminal proceedings, according to Article 187-duodecies TUF administrative and appeal proceedings concerning market abuse or insider trading may not be suspended on the grounds that criminal proceedings – whose charges correspond to the breaches in the administrative proceedings – are still pending.

⁹ Art. 4 bis § 2 TUF.

¹⁰ Art. 4 § 1 TUF.

Specific rules deal with cooperation between Consob and the judicial authorities.¹¹ Upon receiving notice of market abuse or insider trading, the public prosecutor shall inform the Chairman of Consob thereof without delay. The Chairman of Consob shall forward to the public prosecutor all documentation gathered during its own inquiries accompanied by a reasoned report in cases where there are grounds for suspecting that a crime may have been committed.

Consob and the judicial authorities shall cooperate with each other, including through the exchange of information, in order to facilitate the investigation of violations, including in cases where such violations do not amount to crimes. To this end Consob may utilize documents, data and information obtained by the Finance Police in the manner and form established in the first subsection of Article 63 of Presidential Decree 633/1972 and the third subsection of Article 33 of Presidential Decree 600/1973.

The Italian legislator has recently (April 2016) introduced a specific rule on the exchange of information. According to Article 4 §13-bis TUF, for the purpose of cooperation, by means of an exchange of information, the competent authorities of EU Member States and ESMA, Consob and the Bank of Italy may establish, together with the Ministry of Justice, also on the basis of a memorandum of understanding, certain procedures for obtaining information with regard to criminal sanctions applied by the Judicial Authority concerning the offences contemplated under Article 2638 and Articles 166, 167, 168, 169, 170-bis and 173-bis of the Civil Code, for successive communication to ESMA, pursuant to Article 195-ter, paragraph 1-bis.

Under paragraph 13-ter, for the same purposes as paragraph 13-bis and without prejudice to the prohibition pursuant to Article 329 of the Code of Criminal Procedure, Consob and the Bank of Italy may request information from the relevant judicial authority regarding specific criminal procedures concerning the offences contemplated by paragraph 13-bis[96]

Consob can also participate in criminal proceedings by exercising the rights and powers granted by the Code of Criminal Procedure to those bodies and associations representing the interests damaged by the crime.¹² Consob may also intervene as a civil claimant and request damages by way of compensation for the damage cause to the integrity of the market by the crime and the amount thereof will be equitably assessed by the court, taking account of the seriousness of the crime, the personal situation of the guilty party or the amount of the proceeds from the crime or the profit therefrom.

A specific provision deals with the potential *bis in idem*: when a pecuniary administrative sanction pursuant to Article 187-septies has been imposed on the offender or the entity for the same facts, the collection of the pecuniary penalty and the pecuniary administrative sanction deriving from the crime shall be limited to the portion thereof exceeding what the administrative authority has collected.

11 Art. 187-decies TUF.

12 Art. 187-undecies TUF.

5.3 ANALYSIS OF THE POWERS OF THE RELEVANT NATIONAL AUTHORITIES

5.3.1 The interviewing of persons (which includes oral/written questioning) and production orders

a) COLAF

According to Article 32 D.P.R. 600/73 and Article 51 D.P.R. n. 633/72, the financial police may invite taxpayers, company managers or any person exercising a business to attend an interview. As for the production order, Article 32 D.P.R. 600/73 and Article 51 D.P.R. n. 633/72 allow the financial police to request the disclosure of relevant data or documents.

In principle it is not mandatory for the invited person to cooperate in the interview or to submit the documents required and if that person does not cooperate the relevant documents or data cannot be evaluated *pro reo* in the case of an administrative fine.

When the level of suspicion suggests that a criminal investigation should be commenced, the relevant rules of the Code of Criminal Procedure will apply and cooperation with the investigative authorities (in several cases the same authorities that were in charge of the administrative investigation) then becomes an obligation (Art. 371-bis Penal Code).

b) AGCM

According to Art. 14§2 L. 287 del 1990, the Authority may request, at any stage of the investigation, undertakings, entities and individuals to supply any information in their possession and produce any documents which are of relevance to the investigation.

Providing information is a duty and there can be no exception under the right not to incriminate oneself: the Authority may fine anyone who refuses or fails to provide the information or to produce the documents required without justification. This fine may be up to 50 million lire (25.822,84 Euros), which can be increased up to 100 million lire (51.645,69 Euros) in the event of untruthful information or documents, in addition to any other penalties provided by Italian legislation (Art. 14§5 L. 287/1990). Liability for supplying information and disclosing the documentation requested from undertakings or entities shall lie with the undertakings and their representatives, and in the case of entities, with or without legal personality, liability shall lie with their legal representatives according to the law or to internal compliance programmes (Art. 9§6 Reg. 217/1998).

The interview and production orders are *de facto* measures which do not require any judicial authorization and they cannot be challenged before the courts. Their legality can only be challenged at the end of the proceedings if a fine is imposed. Appeals may be brought before the Administrative Tribunal in Rome (Tribunale Amministrativo Regionale – TAR).

Specific provisions regulate formal requirements. The request for information and the disclosure of documents must be made in writing and served on the parties with no judicial authorisation being necessary. The Board of the AGCM must briefly indicate:

- a) the facts and the circumstances in relation to which clarification is requested;
- b) the purpose of the request;
- c) the deadline for a reply or the disclosure of documents, consistent with the urgency of the case and the nature, quantity and type of information requested, and taking into account the time which is required to obtain such documents and information;

- d) the procedures to be followed for disclosing the documents, and the individual or individuals to whom the documents may be disclosed or to whom the information may be provided;
- e) the penalties which will be applicable in the event of a refusal to supply the information or to disclose the requested documents, or for any omissions therein or a delay in disclosing them, and the penalties for the disclosure of inaccurate, untrue or false documents or information (Art. 9 Reg. 217/1998).

This is not the only way to obtain information. The Authority may also orally request information and the disclosure of documents during the course of hearings or inspections. In such a case, the party concerned shall be notified thereof and a written record will be made with the same content as a written request.

The original or certified copies of all the documents requested for disclosure shall be supplied, indicating the proprietors or the legal representatives of the undertakings concerned. The disclosure of documents and the verbal disclosure of information shall be recorded in written minutes (Art. 9 Reg. 217/1998). In the exercise of their functions, officials of the Authority shall be considered to be 'public officials' and they are sworn to secrecy (Arts 14§3 and 4 L. 287/1990).

Any information or data regarding the undertakings under investigation by the Authority are completely confidential, they may not be divulged even to other government departments and shall only be used for the purposes for which they have been requested, notwithstanding the obligation to report any matters governed by Article 331 of the Code of Criminal Procedure, and the obligation to cooperate with the institutions of the European Union (Art. 12 reg. 217/98).

Besides interviews and requests to disclose documents, the AGCM Board, in relation to any matter of relevance to the investigation, shall authorize the production of expert reports and statistical and economic analyses, and may consult experts of their choice. The measures by means of which expert testimony and analyses are requested, and the results thereof, shall be served on the parties to which the investigation refers for the purpose of enabling them to exercise the right to have access to documents and to produce written submissions, documents, arguments and opinions (see Art. 7§2 Reg. 217/98).

As for the above rights, the parties directly involved in procedures concerning agreements, abuses of a dominant position, and concentrations have a right of access to any documents produced or permanently retained by the Authority in the course of these proceedings. The right of access shall be exercised by submitting a reasoned request in writing, which the official responsible for the case shall act upon within 30 days, thereby notifying the Board thereof. The Board shall oversee the procedures for exercising the right of access and the costs of reproducing the documentation (Art. 13§11 and 13§12 Reg. 217/98).

Whenever the documents contain personal, commercial, industrial and financial information of a confidential nature relating to the individuals or to the undertakings involved in the proceedings, the right of access is permitted, wholly or partly, only to the extent that this is strictly necessary to enable them to make representations in respect thereof (Art. 13 Reg. 217/98).

There can be no access to documents containing commercial secrets. Whenever these constitute evidence of an infringement of the law or contain essential information for the defence of the undertaking concerned, access may be granted to them but only in respect of such essential information for defence purposes (Art. 13§3 Reg. 217/98). Divulging those documents is not allowed. Parties wishing to safeguard the confidentiality or secrecy of the information supplied

shall submit a specific request to the AGCM containing details of the documents or parts thereof for which they consider that access should be withheld, specifying the reasons for this request. The office will then notify its reasoned decision of acceptance, denial or deferral to the party concerned.

Specific restrictions relate to the investigative documents drafted by the AGCM. Access shall not be granted to notes, proposals and any other documents drafted by the office as part of the study or preparation of official documents relating to the case.

Access may be wholly or partly restricted concerning minutes and records of the Board's meetings and documents pertaining to relations between the Authority and the institutions of the European Union, and between the Authority and the Authorities of other States or other international organizations when disclosure has not been specifically authorized (Art. 13§3 Reg. 217/98).

c) Banca d'Italia

The interviewing of bank managers, auditors and executives by Banca d'Italia is called 'confronto' and is meant to simplify the exchange of information between the supervisor and the supervised entity. There are three types of 'confronto': 1. to gather information: in this case the persons invited to attend an interview are required to provide an explanation or further information to the inspectors; 2. An open-ended interview: to discuss problematic issues which appeared during previous supervisory phases; 3. a follow-up interview: the inspectors might ask about the implementation of measures previously required by Banca d'Italia.

In these cases, the managers, the internal auditors and the banking executives may be summoned by Banca d'Italia for the 'confronto'. There is no need for judicial authorisation.

Production orders are regulated by Art. 54 TUB. They may be issued by Banca d'Italia in order to fulfil its functions as the banking supervisor.

The inspectors may ask the bank to disclose and produce certain documents and the bank cannot refuse to do so. There is no specific protection for the right not to incriminate oneself and professional privileges for those persons subject to a 'confronto' are never mentioned.

Providing Banca d'Italia with all the relevant information is a specific obligation for the supervised entities. Any refusal to answer or to disclose documents is a criminal offence under Art. 2638 c.c. The presence of a lawyer is not explicitly mentioned. In principle this is not forbidden but it occurs very rarely.

Banca d'Italia also has these powers with regard to Italian branches of a EU bank.

The same rules apply when Banca d'Italia is required to cooperate with the ECB. ECB officials are allowed to be present during the investigative measures.

d) Consob

Consob and Banca d'Italia have the authority to convene the directors, auditors and staff of the supervised entity within the framework of their supervisory powers.¹³ In this framework, specific reporting requirements are established in order to allow supervisory functions. According to Article 8, the Bank of Italy and Consob may require, according to their duties, authorised intermediaries to communicate data and information and to transmit documents and records in the manner and within the time limits that they establish. The Bank of Italy and Consob, according to their respective competences, may request information from the staff of such entities. If the

13 Art. 7 TUF.

production order is not executed, Consob may proceed with a dawn raid in order to obtain such information (see under *c*).

Specific powers are conferred in relation to the administrative sanction procedure for market abuse and insider trading. According to Article 187-*octies* TUF, Consob shall investigate those violations utilizing several powers in relation to any person who could be acquainted with the facts. Among them the law provides for the power to require information, data or documents in any form whatsoever, establishing the time limits for their receipt and the power to conduct a personal hearing.

The persons convened cannot refuse to cooperate or to answer questions because cooperating with the supervisor represents an obligation. In case of a breach of this duty, the persons in question might be prosecuted for the criminal offence of ‘obstructing supervisory functions’.¹⁴

There is formally no protection for the right not to incriminate oneself but usually the Consob staff, if they realise that the person being interviewed is making a self-incriminating statement, will interrupt the questioning. The rationale behind this practice is to facilitate the exchange of information with criminal law enforcement.

The presence of a defence lawyer is not required by law nor is it contemplated, but it is tolerated in order to ease the use of the interview as evidence in a criminal trial (in Italy that implies that the defendant should always have the right to request the presence of a lawyer). In practice, leading managers are usually accompanied by lawyers whose presence is allowed by Consob inspectors. They may assist but they usually do not intervene during the interview. Their presence is a means of ensuring the right not to incriminate oneself.

The decision to invite such persons cannot be subject to an autonomous appeal.

There is no need for previous judicial authorisation.

5.3.2 The monitoring of banking accounts

a) COLAF

Not applicable

b) AGCM

Not applicable

c) Banca d’Italia

The ordinary supervisory powers of Banca d’Italia do not include this authority. However, in its role of combating money laundering, Banca d’Italia may rely on its Financial Information Unit (FIU) that has the authority to monitor banking transactions. Italy’s Financial Information Unit (FIU) is an independent and autonomous body set up within the Bank of Italy pursuant to Legislative Decree 231/2007 and has been operational since 1 January 2008. It is the central body

14 Art. 170 bis TUF

charged with combating money laundering. It operates independently being the only unit of its kind in the country with specific expertise in financial analysis.

The structure and operation of the FIU are governed by a Regulation of the Governor of the Bank of Italy, first issued on 21 December 2007 (*Gazzetta Ufficiale* No. 7, 9 January 2008) and renewed after the unit was reorganised on 18 July 2014 (G.U. No. 250, 27 October 2014). It was adopted for the unit in order to keep the task of financial analysis separate from that of investigative analysis, emphasising the independent role of prevention and the FIU's function as a 'buffer' designed to preserve a sound economic and financial system. The legal status of the FIU, which is not a separate entity, stems from its institutional function as a centre for collecting, coordinating and channelling data and information of significant public interest.

The Director is appointed by means of a measure approved by the Directorate of the Bank of Italy, upon a proposal by the Governor. The Director has full authority and liability over the Unit, while the Bank of Italy provides the necessary financial resources, as well as premises, equipment, personnel and technical resources. A Committee of Experts, composed of the Director and four members nominated by the Ministry of the Economy and Finance after consulting the Governor of the Bank of Italy, acts in an advisory capacity (Article 6.1-4, Legislative Decree 231/2007).

The FIU collects information on potential cases of money laundering and the financing of terrorism, analyses the financial data, and decides whether the information should be passed on to the investigative authorities (the Special Foreign Exchange Unit of the Finance Police and the Anti-Mafia Investigation Bureau); it works closely with the judicial authorities. In particular, it examines the compulsory suspicious transactions reports filed by banks and financial institutions, as well as the monthly aggregate reports transmitted by financial intermediaries in accordance with Articles 6 and 40-41 of Legislative Decree 231/2007. It may request additional information from reporting banks, consult files to which it has access by law or by arrangement with other national bodies, and it may exchange information with its foreign counterparts (FIUs). The Unit can also inspect entities subject to anti-money-laundering obligations to examine reported and unreported transactions (Article 47.1.a) and verify compliance with 'active cooperation' requirements (Article 53.4).

The FIU can freeze suspicious transactions for up to five working days at the request of the Finance Police Unit, the Anti-Mafia Bureau, the judicial authorities, or on its own initiative, provided that this does not interfere with any ongoing investigations. Suspension orders are issued in close cooperation with the investigative authorities (Article 6.7.c). Depending on the outcome of its analysis, the FIU forwards suspicious transaction reports for further investigation to the Special Finance Police Unit and the Anti-Mafia Bureau, notifies the judicial authorities of potential criminal offences, and files all reports classified as unfounded (Articles 9 and 47). Breaches of suspicious transactions reporting requirements are identified through on-the-spot checks of entities and on the basis of available information. Where appropriate, the FIU opens the procedure for the issuing of sanctions by the Ministry of the Economy and Finance (Article 60).

The FIU relies on cooperation and information exchange at the national and international level in order to perform its duties effectively and more generally to ensure the efficiency and efficacy of the anti-money-laundering system as a whole. Cooperation may take different forms: supervisory authorities may waive the rule of professional secrecy when working together and with the FIU, the Finance Police and the Anti-Mafia Bureau in order to facilitate the tasks of all concerned; supervisory authorities (as well as government departments and professional associations) may be required to provide information to the FIU; and the FIU and the investigative and judicial

authorities may collaborate in numerous areas to identify and examine anomalous financial flows and transactions.

d) Consob

Not applicable

5.3.3 The right to enter premises ('droit de visite'), including searches, seizure, sealing, taking samples and forensic images

a) COLAF

According to Article 33 D.P.R. 600/73 and Article 52 D.P.R. n. 633/72 the financial police may proceed with onsite inspections of premises belonging to the persons or legal entities concerned with the authorization of a judicial authority. This authorization is usually a decision by the public prosecutor and such a decision may be made even when it derogates from the rules of the Code of Criminal Procedure.

According to Article 52 D.P.R. n. 633/1972, judicial authorisation is only required when the business premises include a private domicile. Access to a private home is precluded when there are no serious grounds to believe that a TVA breach has been committed and such access may only be used with the aim of obtaining business records, commercial registries, or any other document that might form evidence of such a breach. Judicial authorization is also required to open closed mailboxes, locked boxes or safes. Professional secrecy and specific protection for law firms (including the need to alert the local bar association) will apply.

In any case, an on-site inspection should be carried out with the presence of one member of the management structure

Seizures are only permitted when it is not possible to copy a document or when the persons concerned refuse to undersign the report contesting the execution of the on-site inspection.

b) AGCM

Antitrust dawn raids are carried out in Italy under administrative investigation powers only. Dawn raids relating to the application of EU and Italian competition rules are carried out by the Italian Competition Authority (AGCM).

The investigative powers granted to the Authority in the field of competition law are now mirrored in the area of unfair commercial practices and misleading and comparative advertising by virtue of Legislative Decree nos. 145 and 146/2007.

The main goal is to gather evidence, in particular documents. The term 'document' refers to any graphic, photographic or cinematographic, electro-magnetic or any other kind of representation of the contents of documents, including internal and unofficial documents, which have been produced and are used for the purposes of the undertaking's operations, independently from the level of responsibility or rank as a representative of the undertaking of the author of the document, as well as any other document that is produced by or is stored on a computer (Art. 10§4 Reg. 217/98).

A company is under a duty to cooperate with the Italian Competition Authority's officials and to provide documents and information that are not misleading.

The Italian Competition Authority may impose fines of up to €25,822 against companies that refuse or fail, without objective justification, to provide the information or produce the documents

requested by the Authority in the exercise of its investigative powers. The same applies by analogy to companies refusing to submit themselves to onsite inspections.

In national cases, the AGCM Board shall authorize inspections of the premises of any party deemed to be in possession of company documents which are of relevance to the investigation. All documents shall be requested in advance when a government department is to be inspected.

Officials of the Authority charged by the official responsible for the case to perform an inspection shall exercise their powers upon the presentation of a written warrant specifying the subject matter of the investigation and the penalties for any unjustifiable refusal, failure or delay in supplying the information or disclosing the documents requested in the course of the inspection, and for supplying untrue or inaccurate information or false documents (art. 10 reg. 217/98).

Confidentiality and professional secrecy are strictly limited. According to Art. 10§3 Reg. 217/98 'In no instance shall the following be considered justifiable grounds for a refusal or failure to supply all the information and documents requested for the purposes of the penalties:

- a) confidentiality, or the exercise of powers and authority imposed by company regulations or internal instructions, including oral instructions;
- b) the need to protect the party concerned from the risk of fiscal or administrative penalties;
- c) the need to protect company or industrial confidentiality, unless the Authority acknowledges particular requirements of this kind that have already been brought to its attention.

A dawn raid may only be carried out in the event that the Italian Competition Authority has sufficient evidence of the existence of an infringement. These elements are set out in the Authority's decision to open an investigation, which is usually served on the parties at the outset of an onsite inspection.

An inspection can only be commenced after the following documents are presented by the officials:

- o the decision of the Italian Competition Authority to open an investigation
- o the decision of the Italian Competition Authority to order the raid on the premises of the specific company
- o the decision of the Italian Competition Authority to delegate specific officials to carry out the raid
- o the personal documents of the officials, and
- o in the case of a raid on behalf of the European Commission, the relevant Commission decision and, where it accompanies the Commission on an inspection of residential premises, the Court order.

Under Law no. 287/90 and Decree No. 217/98 (art. 10§5) the Italian Competition Authority does not have the power to search residential premises in investigations relating to Italian competition law.

The officials are vested with the following powers:

- a) to demand access to all the premises, land and vehicles of the party under inspection, excluding their place of residence or domicile which are extraneous to the operations of the undertaking which are being investigated;
- b) to check all the documents;
- c) to make copies of all the documents;
- d) to request information and explanations to be given verbally.

The Italian Competition Authority's officials do not have any coercive powers, they cannot force the parties to cooperate. However, they carry out searches of business premises without previous notice with the assistance of the Tax Police (Guardia di Finanza). This is explicitly provided for by the law: 'Pursuant to section 54(4) of Law no.52 of 6 February 1996, the Authority may also employ the services of the Guardia di Finanza (the Customs and Excise Police) (Art. 8§4 Reg. 218/1998)'.

The Police have the power to search for evidence even without the consent or the cooperation of the company in question. Only in some specific circumstances (searching a person, documents covered by legal privilege, objects that are closed or locked, such as closed doors, strongboxes, bags or drawers) is a prior court order necessary.

However, where the Authority accompanies the European Commission on an inspection of residential premises, it can search residential premises, provided that a specific court order has been issued. A court order is only necessary in the case of an inspection carried out by the EU Commission at premises other than the company's premises (such as directors' and managers' residential dwellings).

The search is limited to documents relevant to the presumed facts indicated in the decision to open formal proceedings. The Authority can also order the production of specific documents and information during the inspection.

A written record, using the procedures provided in Section 18, shall be drawn up of all the activities performed in the course of the inspection, with particular reference being given to any statements taken down and documents acquired by the inspectors (Art. 10§7 Reg. 217/98).

The company concerned enjoys several rights. It has the right to receive a copy of the AGCM decision to open the investigation within which the purpose of the dawn raid is set out. The decision identifies all the undertakings involved.

A company's legal advisers may assist it during a raid. In the course of inspections, the parties concerned may be assisted by consultants and advisers of their choice, even though this shall not entail a suspension of the inspection. An inspection cannot be delayed by the company's request to await the arrival of their legal advisers.

c) Banca d'Italia

According to Articles 54 and 68 TUB, Banca d'Italia has the power to carry out inspections on the premises of the supervised entities or on premises provided for the use of the above-mentioned entities. On those occasions, they may issue production orders on site asking for the disclosure of documents that are necessary for the supervision.

When there is a need to proceed to an inspection in another EU Member State, Banca d'Italia may ask to the corresponding supervisor to carry out the inspection on its behalf (Article 68§2). Upon the request of foreign EU supervisory authorities, Banca d'Italia may carry out inspections on the premises of companies having their parent company in another Member State (Article 68§3).

It is also possible that Banca d'Italia may allow inspections to be carried out concerning a parent company in Italy when it has branches in other countries which are being investigated by foreign banking supervisors (Article 688 §3-bis)

No specific provision is provided with regard to ECB inspectors, but the just mentioned provision should offer a possible solution to allow ECB inspectors to participate.

Inspections represent a very relevant tool for Banca d'Italia's supervision. They are executed in the premises of the bank by inspectors nominated by the Director of the Supervision Unit. Usually inspections are only used when suspicions of possible breaches have appeared from an analysis of the documents transmitted by the bank to the supervisor. Inspectors are considered to be civil servants and are subject to strict confidentiality (Art. 7 TUB). They only report to the Governor of Banca d'Italia, even when the violations found represent a criminal offence. This provision represents a derogation from the ordinary duty established by the Code of Criminal Procedure that imposes a duty on every civil servant to report every criminal offence to the police or to the prosecutor.

If the supervised bank is a non-Italian bank but an EU bank, an inspection is only possible upon the request of a foreign supervisor.

There are two types of inspections: a general inspection or a sector-based inspection. The first includes the general supervision of the whole bank; the second focuses on a specific field of the bank's activity.

During the inspection the inspectors might request the bank to produce and disclose specific documents.

The Bank of Italy has two independent departments for off-site and on-site inspections. On-site inspections are performed on the basis of an annual plan for inspections and are based on confidential banking information and documents collected during the inspection by supervisors. Supervisors provide for three different types of inspections: 1) a wide-spectrum investigation; 2) a targeted/thematic inspection; 3) a follow-up inspection.

The first mentioned inspection focuses on an analysis of the overall business, with specific reference to the risks which are relevant for the supervisory authority. Targeted inspections relate to specific areas of activity, areas of risk or operational or technical aspects.

Once the inspection has taken place, a summary report (with an indication of the findings and observations) is delivered to the management of the bank for appropriate counter-arguments and subsequent interventions to be made. In cases required by law, interested persons will be notified of this report when it relates to the presence of administrative offences which are punishable (Bank of Italy, 2013).

Usually banks never refuse to cooperate with Banca d'Italia because this lack of cooperation might lead to a criminal offence (impeding public regulatory authorities in the exercise of their functions (Article 2638 c.c.)

When the supervised entity does not cooperate, Banca d'Italia may request cooperation from the Italian Financial Police (Guardia di Finanza). Upon such a request the Special Monetary Police Unit of the Guardia di Finanza may proceed to financial investigations and on-site inspections. The request to cooperate shall indicate the main scope, the facts, the type and the modalities of the activity required. When the request follows an inspection by Banca d'Italia, it should indicate the name of the chief inspector of the investigative unit and the specific need for and the nature of the required activity.

d) Consob

According to Article 10 TUF, Consob may conduct inspections as a supervisory measure. In this case, the Bank of Italy and Consob may carry out inspections of authorised intermediaries and require the production of documents and the adoption of any measures deemed necessary, in harmony with the provisions of Community law.

The Bank of Italy and Consob may carry out inspections, require documents to be produced and order any actions which are deemed necessary, even when those concerned have outsourced essential or important business functions and their staff.

As for the procedure, each authority shall notify the inspections it undertakes to its counterpart, which may then request it to carry out on-the-spot verifications of matters within the scope of its authority.

When there is the need to carry out on-the-spot verifications of branches of Italian investment companies, asset management companies and banks established within the territory of another EU Member State, the Bank of Italy and Consob may request the competent authorities of the other EU state to execute the measure or agree on other methods of verification.

The competent authorities of another EU country, after notifying the Bank of Italy and Consob, may, directly or by way of persons engaged by them, inspect the Italian branches EU investment companies, banks, EU management companies and EU AIFMs which they have authorised. Where the competent authorities of another EU country so request, the Bank of Italy and Consob, within the scope of their respective authority, may carry out on-the-spot verifications directly or agree on other methods of verification. The Bank of Italy and Consob may conclude agreements with the competent authorities of non-EU countries concerning procedures for the inspection of branches of investment companies and banks established in their respective territories.

The same and additional provisions will apply when it comes to the sanctioning procedure for market abuse and insider trading. According to Article 187-octies TUF, the Consob may, in relation to any person who may be acquainted with the facts, may carry out on-site inspections.

When authorized by the Public Prosecutor, Consob may seize property which is then confiscated or it may conduct searches using coercive powers conferred upon the Guardia di finanza.¹⁵ In fact, in the exercise of its powers, Consob may avail itself of the cooperation of the Finance Police which shall carry out the requested inquiries relying on the investigatory powers that they enjoy in connection with the assessment of VAT and income taxes. All of the information and data obtained by the Finance Police shall be covered by professional secrecy and be communicated without delay and exclusively to Consob.¹⁶

In specific cases, when Consob requires persons other than authorised intermediaries to be investigated, judicial authorization is required also to proceed to the inspection stage.¹⁷

Consob may further have access¹⁸ to the information contained in the tax records database.

According to Article 187-octies §7, the provisions thereof are without prejudice to the application of Articles 199, 200, 201, 202 and 203 of the Code of Criminal Procedure insofar as they are compatible. That means that all forms of privileges and secrecy apply.

15 Art. 33 of Presidential Decree 600/1973 and Art. 52 of Presidential Decree 633/1972.

16 Art. 187-octies § 12-13 TUF.

17 Art. 187-octies § 3 TUF.

18 Art. 187-octies § 2 TUF.

During these investigations, a *procès-verbaux* (minutes) will be taken noting the data and information obtained or the factual findings discovered, the seizures carried out and the statements given by the interested persons, who shall be requested to sign the *procès-verbaux* and shall be entitled to a copy thereof.

In the event of a seizure, the interested persons may file an opposition to this seizure with Consob. The decision on the opposition shall be adopted with a measure stating the grounds for this decision and it must be issued within 30 days from the date of filing the opposition proceedings in question.

As for section a), cooperation with Consob is a duty and a breach of this duty represents an administrative offence. Article 187-quinquiesdecies is entitled ‘Safeguarding the supervisory functions of the Bank of Italy and of the Consob’ and it states that ‘Apart from the cases provided for in Article 2638 of the Civil Code (see the part on banking supervision), any person who fails to comply with a request from the Bank of Italy and Consob within the prescribed time limits or delays the performance of their functions shall be punished by a pecuniary administrative sanction of between € 10,000 and € 200,000’.

5.3.4 Access to traffic data and recordings of telecommunications

a) COLAF

Not applicable

b) AGCM

Not applicable

c) Banca d’Italia

Banca d’Italia does not have this authority.

d) Consob

According to Article 187-octies TUF, the Consob may, in relation to any person who could be acquainted with the facts, require existing telephone records to be produced, establishing the time limits for their receipt. In specific cases, when Consob requires that persons other than authorised intermediaries be investigated, then judicial authorization is required in order to obtain existing telephone records.¹⁹

Consob has the power, with the authorization of the Public Prosecutor’s Office, to require the telephone provider to furnish it with the traffic records referred to in Legislative Decree 196/2003.

5.4 EX POST JUDICIAL PROTECTION BY NATIONAL COURTS

a) COLAF

Being that COLAF is a composite puzzle of different authorities, it is not possible to describe a common legal framework for judicial review.

When it comes to fiscal breaches, the appeal should be lodged before the Territorial Tax Commissions and up to the Corte de’ Conti.

When it comes to a criminal case, ordinary appeals in criminal matters will apply.

¹⁹ Art. 187-octies § 3 TUF.

b) AGCM

Specific rules apply to judicial review. Pursuant to Article 33 of Law no. 287/90, the addressees of an Italian Competition Authority decision may apply to the Administrative Court (Tar Lazio) for the annulment of the decision within 60 days of the date of notification. The TAR's judgments may be appealed before the Council of State (Consiglio di Stato).

In competition cases, the average duration of the judicial proceedings before either court is 12 months. The operative part of the court's decision is published within a week of the date of the hearing.

As a general rule, a company can only appeal against Authority decisions that directly affect its rights. This is normally not the case with respect to a decision to open an investigation and to order a raid, so that any pleading in relation to the official's abuse of power can only be submitted during the appeal against the final decision.

c) Banca d'Italia

Investigatory measures are not autonomously subject to judicial review. They may be challenged only by lodging an appeal against the main decision. In this respect, there are two different avenues: when the final decision by Banca d'Italia is an administrative measure, the judicial review is carried out by the Regional Administrative Tribunal in Rome (Tribunale amministrativo regionale – Lazio) and the appeal is sent to the Council of the State (Consiglio di Stato).

When the final decision is an administrative sanction, it will be subject to the authority of the civil courts.

d) Consob

Administrative measures or decisions are subject to judicial review by the Regional Administrative Tribunale (TAR) of Rome which has full jurisdiction.

Administrative sanctions are subject to judicial review by the Court of Appeal. According to Article 187-septies, an appeal can be brought against the decision to apply the sanction before the Court of Appeal at the location of the appellant's headquarters or residence. If the appellant does not have its registered office or residence in the State, the court of appeal of the place where the violation occurred shall have jurisdiction. When these criteria do not apply, the Court of Appeal of Rome shall have jurisdiction. The appeal shall be notified, under penalty of forfeiture, to the Authority that issued the provision within 30 days of the notification of the contested measure, or 60 days if the applicant resides abroad, and is filed with the clerk of the court, together with the documents, within the deadline of 30 days from notification. An appeal does not generally suspend the enforcement of the provision. If there are serious grounds, however, the Court of Appeal may order a suspension and this decision is unchallengeable. The President of the Court of Appeal shall designate the Judge-Rapporteur and by means of a decree he/she will determine the date of the public hearing to discuss the appeal. This decree shall be notified to the parties by the clerk of court at least 60 days before the hearing. The Authority shall file memorandums and documents within ten days before the hearing. If the appellant does not appear at the first hearing without providing a legitimate excuse, the judge shall declare, by means of an order which is subject to an appeal before the Court of Cassation, that the appeal cannot proceed and the appellant will be ordered to pay the costs of the procedure. At the hearing the Court of Appeal, even on its own motion, will have all the evidence that it deems necessary, and the parties will be personally heard if they have so requested. Then the parties shall proceed to an oral discussion of the case. The judgement is filed with the clerk of court within 60 days. When at least one of

the parties requests the advanced publication of the order with respect to the judgement, the order is published by filing it with the clerk of court no later than seven days from the discussion hearing[930].

In its decision, the Court of Appeal can dismiss the appeal, thereby ordering the appellant to pay all the costs of the procedure, or it can allow it, thereby annulling the order entirely or in part, or reducing the amount or terms of the sanction[931].

5.5 CONCLUSIONS – IDENTIFICATION OF BEST PRACTICES AT THE NATIONAL LEVEL

As it has been shown above, the high degree of sectorial fragmentation, which characterises the Italian legal order, makes it impossible to come up with general conclusions, as well as to identify commonly applicable ‘best practices’. The Italian counterparts of the four EU institutions under study stem from different historical contexts and rationales, have different natures, serve different purposes and, therefore, are subject to different rules and principles. In order to ensure compliance with EU law, the Italian legislator has opted, instead of a radical reshaping of national enforcement mechanisms, for minimal legislative intervention, merely adapting existing institutions and rules.

The described fragmented result is not necessarily problematic, on condition that differences are sufficiently justified (either by factual or normative reasons) and that the different regimes are coherently structured, in order to avoid conflicts arising from overlaps or legal gaps. Despite imperfections that are inevitable to any legal system, we argue that the Italian system respects *a priori* these two conditions.

That being said, problems may arise in the interpretation and application of general principles of law, especially with regard to human rights. The heterogeneity of regimes related to the national enforcement of EU law entails visibly the risk that, in comparable situations, fundamental principles can be applied – or not applied – in a different manner, thus resulting in unequal treatments (at least at the administrative level). A common understanding of procedural safeguards, typified in a common set of – even diversified – rules, seems to be missing. In that sense, the choice of Consob to follow the guidelines of the ECtHR, even without a previous specific legal reform, should be applauded as exemplary and followed by the other administrative authorities.

6. THE UNITED KINGDOM

P. Alldridge

6.1 INTRODUCTION

A (UK) law enforcement authority will have a general power to act/assume jurisdiction, and in any given case a request from an EU body would be enough to allow it to act, so authorities apply the general rules applicable to them. So far as concerns obligations of law enforcement authorities to act, it is in English Law difficult, but not impossible, to compel an authority to act, where it sits, unreasonably, on its hands.¹

National thresholds for opening investigations (usually suspicion based upon reasonable grounds) also apply in proceedings at the prompting of EU authorities. A referral by EU authorities will be enough.

What follows needs to be read with the following caveats: (i) the result of the UK's referendum on EU membership will bear upon these issues. It is very unlikely that the UK outside the EU would ever agree to any kind of vertical subordinacy to the EU in any area. It is not yet clear, however, by what legal mechanism the UK Government proposes to effect its withdrawal from the EU.² The most probable would be to 'freeze' UK law as at a given date, with some sort of 'sift' taking place afterwards to determine which regimes to retain and how to replace the others. The order in which different areas are to be addressed, and the schedule for these operations, are matters only for speculation.

(ii) It is also the case that the law is in a constant state of flux. So far as concerns investigatory powers interception of communications, the legislation in force in the UK since 2000 (the Regulation of Investigatory Powers Act 2000) is in the process of being replaced by the Investigatory Powers Act 2016. What follows is written on the basis of it being in force. In fact, complicated provisions are ringing it into force by parts.

(iii) (unsurprisingly, perhaps), the 'home country control rule'³ has dominated in the UK.

Two general sets of observations apply to all the agencies under consideration, and might differentiate England and Wales from the other jurisdictions under question. First, in England and Wales, when dealing with financial crimes, there is no clear institutional division between the investigative and the prosecuting function. The argument for strict separation between investigation and prosecution was made by the Philips Commission in 1981 and accepted in the

1 *R v MPC ex p Blackburn* [1968] 2 QB 118, *R (on the application of Bermingham) v Director of the SFO* [2006] EWHC 200 (Admin); [2007] QB 727.

2 And see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

3 P. Schammo, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision', (2012) 32 *Oxford J Legal Studies*, p. 771.

Prosecution of Offences Act 1985, establishing the Crown Prosecution Service, but was never accepted for financial crime.⁴

Second, in England and Wales, the right to bring a prosecution was, historically, a private one. Even with the establishment of the Crown Prosecution Service, the right of private prosecution by individuals was not abolished. Typically, regulatory agencies are given the power to conduct investigations into crimes within their purview. The right of (essentially) private prosecution was then held to give regulatory agencies power to prosecute. This right was then held⁵ to apply to any body corporate and various other government agencies have the right. That is, the Crown Prosecution Service (the major arm of the State charged with prosecution) does not hold a monopoly on prosecutions. The fact that agencies other than the Crown Prosecution Service have power to prosecute, and, where the infraction is within their sphere of competence, would be expected to investigate and prosecute (Competition and Markets Agency for the cartels offence, Financial Conduct Authority for insider dealing, and so on). These agencies consequently hold both civil and criminal enforcement powers. Various aspects of procedural law operate so that it is easy to move from a criminal enquiry to a civil one, but difficult to transform a civil into a criminal one.

Thus, the distinction between maintaining day-to-day supervision of something, on the one hand, and investigating, on the other, is more blurred than elsewhere. Agencies have enforcement departments, separate from those doing day-to-day regulation, but the agency is the same entity. The distinction between a criminal and a civil investigation is significant because of differences in the powers involved, but also because when a person under investigation is given assurances that a criminal prosecution will not be brought and in response furnishes evidence, that evidence may not be used in a criminal prosecution.

6.2 OVERVIEW OF THE NATIONAL PARTNERS

6.2.1 Institutions

The ‘equivalent’ regulatory agencies are as follows:

⁴ And see P. Alldridge, *Taxation and Criminal Justice* (2017), chapter 5.

⁵ *R v Rollins* [2010] UKSC 39.

EU Agency	European Central Bank (ECB)	DG Comp	ESMA	OLAF Protection of the European Union Financial Interests Directorate
UK Agency	Bank of England/ Prudential Regulation Authority (PRA) ⁶ Financial Conduct Authority (FCA) ⁷	Competition and Markets Authority (CMA)/Financial Conduct Authority.	Financial Conduct Authority (FCA) For financial services the CMA and the FCA have 'concurrent powers' and the FCA is a 'concurrent regulator'. ⁸	National Police Coordinators Office for Economic Crime, liaising with: Serious Fraud Office (SFO)/ National Crime Agency(NCA)/ Financial Conduct Authority (FCA)/ HM Treasury/ HM Revenue and Customs (HMRC)
Legislative framework for relevant investigation and enforcement powers ⁹	Financial Services Act 2012 Banking Act 2009 Financial Services and Markets Act 2000	Competition and Markets Act 1998 (abuse of dominant position, antitrust) Enterprise Act 2002 (cartels)	Financial Services and Markets Act 2000 Financial Services Act 2012	Criminal Justice Act 1987 Financial Services and Markets Act 2000

None of the correspondences is exact, and there are overlaps between the jurisdictions of the UK authorities. In particular, so far as concerns competition in financial markets the FCA and CMA hold a wide concurrent jurisdiction. CMA and FCA are non-ministerial departments, as is the Serious Fraud Office.

The overall approach of English law (implied but not expressed) to powers in respect of evidence is that there should be no uninvestigatable illegality. If a particular method of investigation will yield evidence of illegality, then its availability to the relevant authorities may be circumscribed, and may not be available in many cases but will not be denied categorically.

- 6 The Bank of England held sole regulatory powers over UK banks until the establishment of what was then called the Financial Services Authority. In 2012 this jurisdiction was given to the Prudential Regulation Authority (PRA) which was created as a part of the Bank of England by the Financial Services Act 2012. This was as part of the UK's response to the financial crisis of 2007/8. The PRA is responsible for the prudential regulation and supervision of around 1,700 banks, building societies, credit unions, insurers and major investment firms. The PRA is a wholly-owned subsidiary of the Bank of England, and is not an arm or government. When it investigates it uses the powers under to investigate a matter under Part XI of FSMA.
- 7 A. Georgosouli, 'The FCA-PRA coordination scheme and the challenge of policy coherence', (2013) 8 *Capital Markets Law Journal*, no. 1, p. 62-76. E.J. Pan, Structural reform of financial regulation, (2011) 19 *Transnational Law and Contemporary Problems*, no. 3, p. 796.
- 8 FG15/8 - FCA's powers and procedures under the Competition Act 1998.
- 9 Core legislation named. The practice is that once such an Act is in place it is amended textually, rather than replaced, by subsequent changes.

6.2.2 Co-operation with DG Comp

The most formal links with the EU are in respect of competition law, and here the distinction between the article 101/102 investigation of a corporation and the investigation of personal liability for cartel offences is significant. The CMA directly applies EU competition law (Art. 101, Art. 102 TFEU), and investigates autonomously, but with the active assistance of national authorities.¹⁰ In any case concerning Article 101/102 before a court in the United Kingdom, and when the coherent application of the article so requires, the European Commission has the right to submit written observations to the court.¹¹ With the court's permission, the European Commission may also submit oral observations.¹² The administrative proceedings and the imposition of fines are subject to the same rules as those applicable to purely domestic cases. DG Comp has no formal role so far as concerns the cartel offence, imposing criminal liability. The CMA has joint responsibility with the Serious Fraud Office (SFO) for the investigation and prosecution of offences involving cartels under the Enterprise Act 2002.

6.2.3 Banking

Banking regulation at the institutional level, (banking solvency and so on), is a matter for the central bank (Bank of England) and its constituent regulator, the Prudential Regulation Authority (PRA). The monitoring of specific accounts, when done, is done by other regulators or police forces.

6.2.4 Protection of the financial interests of the EU¹³

The AFCOS, in accordance with Article 3(4) of Regulation 883/2013, to facilitate effective cooperation and exchange of information, including information of an operational nature, with OLAF the National Police Coordinators Office for Economic Crime – Economic Crime Directorate, part of the City of London Police, which is the national policing lead for fraud and is dedicated to preventing and investigating fraud at all levels. The choice of a police rather than a judicial or administrative authority not really a legislative choice. It would have been made at some level in the Home Office – probably the Home Secretary, on advice from civil servants, which, on a question like this, would have been unlikely to be challenged.

Cooperation with OLAF is not regulated by English law, but where an investigation is conducted by the Serious Fraud Office: 'The Director (of the SFO) may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.'¹⁴ Representation from OLAF might be such persons. Various other agencies play roles under the rubric of prevention of fraud. Even leaving aside the National Police Coordinators Office for Economic Crime, the relationship between the FCA, National Crime Agency and the SFO in the investigation of financial crime is

10 <http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf>.

11 Competition Act 1998 s.000.

12 Competition Act 1998 s.000.

13 And see HM Treasury, *European Union Finances 2015: statement on the 2015 EU Budget and measures to counter fraud and financial mismanagement*, Cm 9167, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483344/EU_finances_2015_final_web_09122015.pdf>.

14 CJA 1987 s. 1(4).

a difficult one. The SFO is under-resourced and seemingly under constant threats of abolition.¹⁵ In principle, it has first choice whether to investigate and prosecute any alleged offence, and if it does not, the matter falls to the FCA as regulator, or (where it is not a “serious fraud” within the meaning of the relevant legislation),¹⁶ the ‘regular’ Crown Prosecution Service. In the case of LIBOR manipulation, for example, the SFO was informed of the matter in 2010 and declined to prosecute. Two years later, the matter got significant press coverage, with, oddly, most of the blame for inaction being allocated to the FCA. In the ensuing *brouhaha* further funding was granted to the SFO, earmarked specifically to LIBOR prosecutions. Prosecutions were then brought, some, but by no means all, of which were successful.¹⁷ Tax authorities (HMRC) hold (almost)¹⁸ all the powers of the powers of the police in the investigation of crime. FCA and PRA are funded from levies upon the bodies they regulate. The National Fraud Authority has a co-ordinating role and ‘works closely’¹⁹ with various agencies, none of which is EU. Allocation of roles where jurisdictions overlap is usually governed by memoranda of understanding.²⁰

6.2.5 Links with/triggers from EU bodies

The usual mechanism by which the EU body will enlist the UK body is by (formal or informal) request. Conversations with members of the FCA, for example, indicated that the informal contact was the norm. The ECB does not impact so significantly upon banking regulation in the UK, because the currency is different.

6.3 ANALYSIS OF THE INVESTIGATORY POWERS

6.3.1 Interviewing of persons (which includes oral/written questioning)

All the relevant investigating national institutions²¹ have power to compel answers to questions. The relevant powers are:

Banking

The advent of the Prudential Regulation Authority bifurcated the regulator, but PRA exercises the same power (i.e. that under FSMA s 165, as to which see below).

Competition

Where the CMA wishes to question an individual under formal powers, the CMA will provide the relevant individual with a formal written notice. The CMA can require any individual ‘who has a connection’²² with a business which is a party to the investigation’ to answer questions

15 *The Rolls Royce scandal SFO v Rolls Royce* [2017]. Case No: U20170036 is an important test.

16 Criminal Justice Act 1987 s. 1(3) – serious or complex.

17 *R v Hayes* [2015] EWCA Crim 1944.

18 They do not have power to detain upon arrest, or to fingerprint.

19 <<https://www.gov.uk/government/organisations/national-fraud-authority/about>>.

20 E.g. FSMA 2000 s. 3E

21 I.e., not the National Police Coordinators Office for Economic Crime, but investigating officials and police officers, whether SFO or FCA.

22 Competition Act 1998 s 26A(6) describes the meaning of ‘connection with’ an undertaking, being an individual who ‘is or was (i) concerned in the management or control of the undertaking, or (ii) employed by, or otherwise working for, the undertaking’.

on any matter relevant to the investigation. Where the CMA wishes to question an individual, the CMA will provide the relevant individual with a formal notice requiring them to answer questions at a specified place and time or immediately on receipt of the notice. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal notice to answer the CMA's questions.

Financial markets

The FSMA 2000 s. 165 powers are discussed below. There is no explicit reference in the statute to interviews, and the procedure will frequently start informally, but the production power includes power to require answers to written questions.

Fraud

CJA 1987 gives the SFO power to compel answers to its questions, even after charge.²³

6.3.2 Production orders

The relevant powers are:

Fraud

Where there is suspicion of one or more of a small group of offences (terrorism, laundering, tax evasion, section 63 of the Serious Organised Crime and Police Act 2005 empowers the Director of Public Prosecutions to issue production orders. These do not extend to material carrying legal professional privilege, or banking confidentiality. Where the enquiry is conducted by the Serious Fraud Office, the Director of the SFO may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person whom he has reason to believe has relevant information to attend before the Director at a specified time and place and answer questions or otherwise furnish information with respect to any matter relevant to the investigation.²⁴ It is a criminal offence punishable by a fine or six months' imprisonment to fail to comply.²⁵

Banking and financial services

The FCA's powers to gather information are set out in FSMA 2000 s 165.²⁶ The FCA and PRA can require authorised persons to provide information or documents that are 'reasonably required' in connection with the exercise by either regulator of its statutory powers. 'Documents' means any way of recording information - anything readable, plus tapes, films, recordings etc. 'Information' is not defined, but the FSA relied on this provision to include replies to oral and written questions. There does not need to be a formal investigation instituted, nor does there need to be a regulatory concern about the firm asked to provide information. The information or documents must be provided or produced – (a) before the end of such reasonable period as may be specified; and

23 *R v Director SFO ex p Smith* [1993] AC 1.

24 CJA 1987 s. 2(2)

25 CJA 1987 s. 2(13).

26 While it is a theoretical possibility that there could be a challenge on the basis of jurisdiction to the exercise of the power to request (which requires reasonable grounds), in practice (because the claimant will frequently not be in a position to know whether or not the authority has reasonable grounds and will in any event wish to appear co-operative) challenges are not made.

(b) at such place as may be specified.²⁷ The power applies only to information and documents reasonably required in connection with the exercise by either regulator of powers given it by FSMA.²⁸

Competition

Competition Act 1998 s 26 gives the CMA the power to require the production of information and documents when conducting a formal investigation into agreements etc. preventing, restricting or distorting competition, or abuse of dominant position. Requests in writing may be made to obtain information from a range of sources, such as the business(es) under investigation, their competitors and customers, complainants, and suppliers. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request. It is a criminal offence punishable by fine and/or imprisonment to provide false or misleading information, or to destroy, falsify or conceal documents.²⁹ Similar provisions apply to the cartel offence³⁰

6.3.2.1 Triggers

As stated at the outset there are, outside the area of competition law, no legal mechanisms whereby EU agencies may compel an English administrative agency to act. The remedy in the event of non-co-operation would be infraction proceedings.

6.3.2.2 Protections

a) Access to legal advice

The general view of English law is that with very narrow exceptions, a person should have access to his/her legal advisor at all times when being questioned by authorities. That is to say, access to legal advice is not only a function of a potential penalty in criminal proceedings, but also of a much wider idea of what it is to be a legal actor. At the police station access to legal advice may only be deferred when the person under investigation is (i) under arrest and (ii) further stringent conditions are satisfied.³¹

The usual way in which this protection is expressed when granting statutory powers is that the responses must be made as soon as is reasonable. Any delay while legal advice is sought, confidentially given, and acted upon is reasonable. There are also individual (though technically unnecessary) provisions in the *régimes* under consideration and they extend the privilege to banking confidentiality. Thus any person being formally questioned or interviewed by the FCA or CMA may request to have a legal adviser present to represent their interests.³² In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation.³³

27 S. 165(2).

28 S. 165(4).

29 Subject in each case to certain defences or conditions set out in the Competition Act 1998 s. 000.

30 Enterprise Act 2002 s. 199.

31 Police and Criminal Evidence Act 1984 s. 56 and Code C.

32 FSMA s. 413; Competition Act 1998 s. 28.

33 Competition Act 1998 s. 29.

b) Privilege against self-incrimination

For present purposes, all that is necessary to note is that & The SFO case is exceptional, and the powers were granted because of the difficulties in investigating and prosecuting economic crime to which the SFO was created. In the wake of the *Saunders* litigation³⁴ and the legislative response (Youth Justice And Criminal Evidence Act 1999) there are, in English law, three categories of administrative requests for information:

- (i) those to which the privilege against self-incrimination provides a response;
- (ii) those which must be complied with, but where the evidence is not admissible at subsequent trials.³⁵
- (iii) those which must be complied with, but where the evidence is admissible at subsequent trials. The judge at a subsequent trial always retains the right not to admit the evidence.³⁶

c) Legal professional privilege

In general, in English Law, communications between lawyers and clients are privileged and do not need to be disclosed.³⁷ There is some question as to when privilege actually is available, and for current purposes the most significant one relates to ‘in-house’ lawyers, communications to whom are not, in EU competition law, privileged, but which, in English law, are.³⁸ The ‘crime/fraud’ exception applies where there is evidence that the lawyer is complicit in the illegality, but the usual Catch 22 is that the principal place to look for evidence of the lawyer’s complicity will be in the file, which, absent other evidence, is privileged.

6.3.3 Sanctioning

PRA and FCA³⁹ have power to fine, as does CMA⁴⁰

6.3.4 The monitoring of banking accounts (real time)

Powers to monitor bank accounts as deposits and withdrawals occur follow from the production order powers but, anecdotally, the FCA and CMA have not in the past monitored banks accounts in this way. SFO has.

34 *Saunders v United Kingdom* (1996) 23 EHRR 313 AHJ; B. Swart & P. Alldridge, ‘The privilege against self-incrimination in pro-active policing’, in S. Field and C. Pelsler (eds.), *Invading the Private – State Accountability and New Investigation Methods in Europe* (1998).

35 The list in Schedule 3 to the Youth Justice And Criminal Evidence Act 1999.

36 Police and Criminal Evidence Act 1984 s. 78.

37 E.g. CJA 1987 s. 2(9).

38 Compare *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102; [1972] 2 All ER 353 and Case C-550/07, *Akzo Nobel Chemicals Ltd v European Commission*, [2010], ECLI:EU:C:2010:512; [2011] All ER (EC) 1107. The effect of this distinction are (i) fewer written internal communications, and (ii) greater salary differentials between ‘in-house’ lawyers and members of law firms (and this has a gender dimension).

39 FSMA 2000 s. 63A.

40 Competition Act 1998 s. 36.

6.3.5 The right to enter premises, including searches and seizure

The default position in English Law is that entry to private premises or land requires a warrant from a Justice of the Peace.⁴¹ Additional powers are granted to regulatory agencies, as follows.

6.3.5.1 Banking

PRA and FCA have power to search,⁴² using such force as is reasonably necessary. A magistrates' warrant is still necessary. The courts have emphasised many times that the issue of a search warrant is never a routine operation. The authorities have failed many times to fulfil the statutory criteria for searches.⁴³

6.3.5.2 Competition

CMA has similar powers, with similar constraints.^{44,45}

6.3.5.3 Financial services

The FCA has the power to apply to a justice of the peace for a warrant to enter premises where documents or information is held.⁴⁶ The circumstances under which the FCA may apply for a search warrant include: (1) where a person on whom an information requirement has been imposed fails (wholly or in part) to comply with it; or (2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed.

A warrant authorises a police constable or an FCA investigator in the company, and under the supervision of, a police constable, to do the following, amongst other things: enter and search the premises specified in the warrant and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued or to take, in relation to any such documents or information, require any person on the premises to provide an explanation of any document or information that appears to be relevant or to state where it might be found any other steps which may appear to be necessary for preserving them or preventing interference with them. A firm must allow the FCA to enter its premises with or without notice during ordinary business hours.

6.3.5.4 Fraud

Power to enter and seize documents is granted to the SFO by CJA 1987. This requires a warrant from a Justice of the Peace, certifying that there are reasonable grounds for the appropriate

41 Police and Criminal Evidence Act 1984 s. 8 et seq. The courts continually emphasise that the issuing of a warrant is never a routine matter: *R (on the application of Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin); [2009] 1 WLR 2091.

42 FSMA s. 176.

43 *R v Chief Constable of Lancashire ex p Parker* [1993] QB 577; *R (on the application of Anand) v Revenue and Customs Commissioners* [2012] EWHC 2989 (Admin); [2013] CP Rep 2; [2013] Lloyd's Rep FC 278. See J. Fisher, 'Unwarranted conduct', (2012) 8 *Tax J*, p. 1145.

44 Competition Act 1998 s. 28.

45 Anyone who fails to cooperate with the investigation (e.g. does not respond to a notice or refuses to provide requested information or documents), obstructs CMA officials or hides, destroys or falsifies relevant documents may be guilty of an offence under the Enterprise Act 2002. These offences are punishable by a fine and, in some cases, imprisonment, or both.

46 FSMA s. 176.

suspicious.⁴⁷ Where a search warrant is refused by a court, this can be appealed by the relevant authorities.

6.3.5.5 Search powers and privilege

What when there is a search of premises and material is seized, or electronic material accessed, some of which is subject to legal professional privilege and some not?⁴⁸ In *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office*,⁴⁹ the procedure set out in the SFO's Handbook for isolating material potentially subject to LPP, for the purpose of making it available to an independent lawyer for review, was held to be lawful. The purpose is to ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer to establish whether privilege exists'.⁵⁰ The court⁵¹ ruled that the SFO may use in-house technical experts to isolate privileged files, rather than external contractors. The use of the SFO's in-house lawyers as 'independent' lawyers to determine whether material was subject to LPP would be unlawful. However, using them to determine whether material may or may not be subject to LPP at the preliminary stage before sending them out independently to be assessed was not.⁵²

6.3.6 Access to traffic data and recordings of telecommunications

The Investigatory Powers Act 2016 now sets out a very wide range of powers. Although principally written for police and intelligence services, many of the powers described in the Act are available under stated circumstances to 'relevant public authorities'. The authorities are listed in Schedule 4. They include the Financial Conduct Authority, the Competition and Markets Authority but not the Prudential Regulatory Authority. Under Part 3 various powers are granted which permit access to telecommunications data. The major constraints on this intrusive procedure are the requirements for high level (usually the Home Secretary) approval and for its use to be reported to a Judicial Commissioner.

Recordings of telecommunications are dealt with in Part 1 Investigatory Powers Act 2016, which did not change substantially the previous law. Executive Warrants may, when exacting conditions are satisfied, be issued for the interception of telecommunications. The recordings are not admissible in any subsequent legal proceedings.

6.4 PRIORITIES OF PROCEEDINGS

Normally⁵³ criminal proceedings take precedence over other proceedings arising from the same events, but a judge, whether in criminal or administrative proceedings, has power to stay them at

47 CJA 1987 s. 2(4)-(8)

48 SFO.

49 *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin).

50 *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), para 34.

51 Building on the 'Chinese wall' idea in *Bolkiah v KPMG (A Firm)* [1999] 2 AC 222.

52 *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), paras 31-34, 37 and 40-41.

53 'Strong presumption against a stay', *Bittar v Financial Conduct Authority*, *Vogt v Financial Conduct Authority*, *Moryoussef v Financial Conduct Authority (Deutsche Bank Ag, Interested Party)* [2016] UKUT 265 (TCC).

any time in the interests of justice. There are exceptions for some administrative cases.⁵⁴ In the most recent cases the courts – which have a wide discretion in deciding whether or not to stay one set of proceedings in order to prioritize another arising from the same facts. The primary concern is that the courts do not want the criminal proceedings to be prejudiced, either by the publication of a finding adverse to a criminal defendant,⁵⁵ or by doing something that might diminish a defendant’s ability to defend him/herself in criminal proceedings. Faced by criminal and administrative proceedings, with limited assets available, a defendant may choose to use all his assets to defend the criminal case (to stay out of prison), knowing that if s/he loses the criminal case the administrative proceeding will not matter, and that if s/he wins the criminal case his/her costs may well be paid by the State.

This is of most importance in competition investigations. In certain cases, parallel investigations may be progressed where the Serious Fraud Office is leading the criminal investigation and CMA the competition enquiry. Procedures are adopted to ensure that the two investigation teams maintain a dialogue and ensure that an investigation under competition law prohibition does not prejudice a parallel criminal investigation.

EU authorities are not allowed to execute the measures autonomously but are allowed to be present during investigations?

6.5 EX POST JUDICIAL PROTECTION BY NATIONAL COURTS

The assumption of jurisdiction by the regulator will usually be because the administrative agency believes or reasonably believes something. It is possible to challenge an assumption of jurisdiction or the exercise of any of the powers to which reference has been made, by arguing that the official did not have the requisite reasonable grounds *et cetera*. However, in order to be successful, the applicant would have to satisfy the high ‘Wednesbury’⁵⁶ threshold – that is, that the actions of the official (including the his/her view of the facts, where that is a precondition to jurisdiction) must be ones which no reasonable official properly directing him/herself as to the applicable test, could have arrived at.

Investigatory actions are subject to consideration by the courts, privately where intrusive surveillance is used and the judicial commissioner informed, and otherwise, usually retrospectively, by actions for trespass, breach of privacy &c. Official action beyond the scope of a warrant, or without authority, will be actionable. At any subsequent criminal trial, the fact that the evidence is obtained unlawfully is a reason which might trigger its exclusion from evidence.⁵⁷

Must internal administrative appeals need not necessarily have been exhausted, before access to a court is open.

54 *R v Hertfordshire CC ex p Green* [2000] 2 AC 412 being one.

55 This is a function partly of jury trials, and partly of which evidence might be admissible at a criminal trial. The bad publicity which might flow from a finding that B had acted dishonestly made prior to the criminal trial could give rise to a risk of prejudice at the jury, particularly if the civil proceedings were to be heard shortly before the criminal proceedings, and if the finding of fact in the civil proceedings were based on evidence not admissible at the criminal trial. *Re D P R Futures Ltd* [1989] 1 WLR 778; (1989) 5 BCC 603; [1989] BCLC 634; (1989) 133 SJ 977. *R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524; [1992] BCLC 938; (1993) 5 Admin LR 337.

56 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

57 Police and Criminal Evidence Act 1984 s. 78.

6.6 CONCLUSIONS – IDENTIFICATION OF BEST PRACTICES AT THE NATIONAL LEVEL

The approach is, broadly speaking, that there is no investigatory power a regulatory agency might be able to make a theoretical case for in a

That is, if the UK is faced with a choice between, on the one hand, denying to an investigating agency access that might generate evidence of illegality, or, on the other hand granting the agency extensive powers in the expectation that, whether through the constraints upon their exercise or other practicalities they will not be used frequently. Whether that is an example to follow or not, I do not know.

7. POLAND

C. Nowak & M. Błachucki

7.1 INTRODUCTION

At the outset of the analysis it must be noted that specific provisions regarding the vertical cooperation of Polish administrative authorities with their EU counterparts, which are the subject of this research project, are rather scarce. Therefore, the research required, to a large extent, an analysis of the general rules provided for in the Code of Administrative Procedure¹ of 1960. In addition, there have been relatively few cases involving such formal cooperation in practice in Poland, which has made it difficult to assess the possible legal framework of cooperation. At the same time, informal cooperation is much better developed, even in the absence of a specific legal basis. An additional hurdle was the lack of transparency in the administrative practice of the financial supervision authority (KNF). KNF publishes hardly any decisions.² At the same time, the Polish competition authority (UOKiK) either publishes all decisions on a website or they are readily available on demand.³ Finally, there are significant differences (in terms of competences, legal status or the level of independence and judicial control) between the relevant Polish authorities responsible for cooperation with their EU counterparts in fraud, financial and competition matters.

7.2 OVERVIEW OF NATIONAL COUNTERPARTS OF THE FOUR AUTHORITIES

7.2.1 Legal architecture of the national counterparts

(1) Fraud

The national AFCOS, i.e. the national counterpart of OLAF, is the Ministry of Finance (*Ministerstwo Finansów*), more specifically the Department for the Protection of the EU Financial Interests (*Departament Ochrony Interesów Finansowych Unii Europejskiej*). The Department is supervised by the Plenipotentiary of the Government for Combating Financial Irregularities to the Detriment of the Republic of Poland or the European Union. Pursuant to the Regulation of the Council of Ministers of 1 July 2003,⁴ the plenipotentiary is always the General Inspector of Fiscal Control, who is at the same time a Secretary or Undersecretary of Finance.

1 Act of 14 June 1960 – Administrative Procedural Code, Journal of Laws of 2013, item 267.

2 The KNF website provides a great deal of information but it does not offer any links to decisions issued by the authority. Requesting to view any decisions from KNF is equally futile. According to our interviewees from KNF, the authority has a very stringent policy towards publishing any decisions.

3 The UOKiK website offers free and full access to all decisions of the authority. Furthermore, it provides for access to judicial case law and makes it possible to cross-check any administrative decisions issued.

4 Journal of Laws of 2003, No. 119, item 1113.

According to Regulation 883/2013, the Department is responsible for the coordination of information exchange with OLAF with regard to investigations conducted by OLAF (except for customs cases and cases concerning direct expenses from the EU budget). The Department serves as a contact point for OLAF, coordinating the exchange of information between OLAF and the competent authorities in Poland, mainly institutions in charge of sectoral programmes. The Department operates on the basis of administrative law only. It is responsible for auditing and controlling expenditure from the EU budget and controlling the return of funds to the EU budget. The Department functioning as AFCOS also provides assistance to OLAF, at its request, with regard to on-the-spot controls and inspections carried out on the territory of Poland under Regulation 2185/1996.

(2) Financial market

The Polish counterpart of ESMA is the Financial Supervision Authority (*Komisja Nadzoru Finansowego*), which has been established to exercise supervision – inter alia – over the financial markets, including banking supervision, the supervision of the capital market, the insurance market, the pension market, credit rating agencies,⁵ as well as the supervision of trade repositories.⁶ The FSA enjoys a high level of independence with formal guarantees against any intervention from the government.

The Authority is the competent body for matters related to the supervision of the financial market. It is composed of a Chairperson, two Vice-Chairpersons and five members – who are: (1) the Minister competent for financial institutions or such minister's representative; (2) the Minister competent for the economy or such minister's representative; (3) the Minister competent for social security or such minister's representative; (4) the Governor of the National Bank of Poland or the Deputy Governor of the National Bank of Poland delegated by the Governor; (5) a representative of the President of the Republic of Poland. The activities of the Authority are supervised by the Prime Minister.

Pursuant to Art. 17d of the Act on Financial Market Supervision, referring inter alia to the supervision of rating agencies, the Authority cooperates – inter alia – with the European Commission, the European Banking Authority and ESMA and provides these institutions with all the information necessary for the exercise of their duties.

Additionally, pursuant to Art. 22a of the Act on Capital Market Supervision, referring inter alia to the supervision of trading repositories, the Authority may transfer to ESMA all information which is necessary for this institution to perform its tasks and competences provided for in Regulation No. 1095/2010.

(3) Competition

The President of the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów – UOKiK*) is the Polish counterpart of DG Competition. The President of the Office is the central government administration authority which is competent for the protection of competition and consumers, appointed and supervised by the Prime Minister. The OCCP used to

⁵ Act of 21 July 2006 on Financial Market Supervision, Journal of Laws of 2016, item 174.

⁶ Act of 29 July 2005 on Capital Market Supervision, Journal of Laws of 2016, item 1289.

be an independent authority, but it has now been deprived of formal guarantees of independence. Such a change in the legal status of the competition authority was part of a policy choice by the government to transform existing formally independent authorities into dependent authorities subordinated to the Prime Minister or relevant ministries (this was also the case for the energy regulator and the railways regulator).⁷ This choice was driven by a purely political agenda and the aim to centralize all public administration authorities in Poland.

Pursuant to Art. 29 of the Act on Competition and Consumer Protection,⁸ the President of the Office is: (1) an authority performing the tasks imposed upon the authorities of the Member States of the European Union pursuant to Articles 104 and 105 of the TFEU. In particular, the President of the Office is the competent competition authority within the meaning of Article 35 of Regulation No. 1/2003/EC; (2) a single liaison office within the meaning of the provisions of Regulation No. 2006/2004/EC and, within the scope of the statutory competences of the President of the Office, the competent authority referred to in Article 4 paragraph 1 of Regulation No. 2006/2004/EC. That means that the President of the UOKiK is the competent competition authority for cooperation in the proceedings of the Commission or the national competition authorities of other Member States, as well as cooperation within the Network of European Competition Authorities (ECN).

The Office of Competition and Consumer Protection has been established to assist the President in the performance of his statutory tasks.

A general provision on cooperation in exchanging information between the President of UOKiK and the European Commission is provided for in Art. 73 of the Act on Competition and Consumer Protection. In principle, information obtained in the course of proceedings may not be used in any other proceedings conducted on the basis of separate provisions, with the exception of the sharing of information with the European Commission and the competition authorities of the European Union Member States under Regulation No. 1/2003/EC and the sharing of information with the European Commission and the competent authorities of the European Union Member States under Regulation No. 2006/2004/EC. Moreover, Art. 105i of the Act on Competition and Consumer Protection provides for a legal basis to conduct on-the-spot inspections and searches at the request of DG Comp or any other NCA (National Competition Authority) from the EU.

(4) Banking law

Regarding the ECB within the framework of the SSM System, it should be mentioned at the outset that Poland does not have the euro as its currency. Therefore, it is not a participating member of the SSM System. Moreover, as yet Poland has not concluded a close cooperation agreement with the ECB. However, Poland participates in other elements of the European System of Financial Supervision, in particular the recommendations of the European Systemic Risk Board are implemented. Last but not least, KNF may transfer all necessary information to EBC provided that separate provisions oblige the authority to do so (Art. 17.3 of the Act on Financial Market Supervision).

⁷ The change was later reversed in relation to the telecommunications regulator. However, it was not a voluntary change but was the result of framework Directive 2002/21/EC which obliges Member States to guarantee the independence of telecom regulators.

⁸ Act of 16 February 2007 on competition and consumer protection, Journal of Laws of 2015, item 184.

- a) How do these authorities give effect to their duties of cooperation under EU law: are there specific provisions for direct enforcement cooperation, or do national authorities simply apply the general rules (for comparable cases under national law)?

There are no general rules regarding international cooperation in administrative matters, or more specifically, horizontal and vertical cooperation within the EU. Only recently has a draft law amending the Code of Administrative Proceedings been prepared and it includes a set of provisions providing for a general legal framework for such cooperation (the new section of the Code is entitled ‘European administrative cooperation’). However, currently, due to the lack of such rules, the authorities have to refer to the provisions of particular legal acts or to general rules laid down in the Code of Administrative Procedure, combined with EU provisions. An analysis of relevant statutes shows that each normative act regulating the activities of KNF, UOKiK and the Ministry of Finance states that those authorities are obliged to cooperate with their counterparts and to implement cooperation obligations of the Republic of Poland stemming from European and international legislation. However, these are only general clauses which do not create a legal basis for any legal actions. Therefore the Antimonopoly Act provides for limited powers regarding cooperation with DG Comp (mainly in the area of the exchange of information and assistance during inspections – see below). Additionally, the Act on Financial Market Supervision empowers KNF to exchange information with ESMA or ECB. However, this is only possible if separate provisions (namely European legislation) allows for such an exchange. It may be concluded that even though Polish administrative law statutes generally recognize the competences and obligations of the relevant authorities to cooperate with their European counterparts, they hardly ever provide for detailed rules for such cooperation and they usually refer to applicable European acts.

- b) To which extent are national thresholds for opening investigations also applied in proceedings for EU authorities? How is this done precisely?

In general terms, each action undertaken by the administrative authorities must be conducted in the context of administrative proceedings, formally opened (on the basis of a decision/order on opening proceedings) and then closed. Alternatively, the authorities may open so-called ‘investigative proceedings’ (preliminary proceedings) before the regular administrative proceedings. The investigative proceedings are a simplified form of proceedings, aimed at establishing the basic facts of a case, further enabling the authorities to decide whether the institution of administrative proceedings is necessary. The institution of investigative proceedings also requires the issuing of an administrative decision/order. In practice, once there is a need to assist an EU institution, the Polish authorities formally open the proceedings.

Only in *competition cases*, with regard to cooperation with EU institutions or an institution of an EU Member State, is it allowed to conduct an evidentiary action without proceedings being formally opened (this specifically refers to the searching of premises – see below). Therefore, a contrario, all other actions undertaken within the framework of cooperation require proceedings to be opened on the basis of a formal decision.

When EU authorities act autonomously they are not bound by Polish legal requirements. For example, when DG Comp initiates proceedings which involve Polish undertakings, the authority is not bound by Polish regulations even if certain investigatory actions take place in Poland. However, should EU authorities seek administrative assistance from the Polish authorities, then the relevant Polish legal requirements apply. For example, should DG Comp request the UOKiK to conduct a search on its behalf, such action may be taken provided that the legal requirements laid down in the Polish Act on Competition and Consumer Protection have been complied with.

- c) Are administrative proceedings precluded/to be postponed once national criminal proceedings have started?

According to Polish law, administrative proceedings are separate and independent from criminal proceedings. Therefore, there is no general rule on precluding the institution of administrative proceedings when criminal proceedings are pending or are likely to be opened. Administrative proceedings may be conducted independently from and/or in parallel with criminal proceedings. In fact, parallel proceedings do take place in practice. This is the case for bid rigging which is, at the same time, an antimonopoly delict sanctioned by the Antimonopoly Act and a crime penalized by the Criminal Code. Therefore in many cases the Polish competition authority and the public prosecutor have conducted parallel proceedings in bid-rigging cases.⁹ Furthermore, in order to increase the efficiency of such proceedings an official Memorandum of Understanding¹⁰ has been agreed upon by the competition authority and the General Public Prosecutor's Office. It does not create a basis for the exchange of any evidence but it does allow for the coordination of proceedings and the better allocation of resources.

The only formal link between criminal and administrative proceedings is the obligation laid down in Art. 304 § 2 of the Code of Criminal Procedure¹¹ which applies to public institutions, pursuant to which: 'State or local government institutions which in connection with their activities have been informed of an offence prosecuted *ex officio*, shall be obligated to immediately inform the state prosecutor or the Police thereof'. In addition, they are obliged to take specific steps, which cannot be delayed, until the arrival of officials from an authority authorized to prosecute such offences, or until that authority issues a suitable ruling in order to prevent traces and evidence of an offence being destroyed. The effectiveness of this obligation is doubtful, however. For example, it may be the case that before reaching the MoU the competition authority does not inform the public prosecutor's office about bid rigging cases. Our interviews with employees of the Financial Supervision Authority suggest that this authority only occasionally informs the public prosecutor's office about possible criminal law violations. However, our interviewees point out that the public prosecutor's office very rarely takes any formal actions after having received such information.

9 Please note that parties to criminal proceedings will be natural persons and parties to antimonopoly proceedings will be undertakings.

10 Polish text of the MoU is accessible at <<https://pk.gov.pl/aktualnosci-prokuratury-krajowej/porozumienie-prokuratury-generalnej-i-urzedu-ochrony-konkurencji-i-konsumentow--2-604.html>> (last visited 15 January 2013).

11 Act of 6 June 1997 – Criminal Procedural Code, Journal of Laws of 2007, No. 89, item 555.

To which extent evidence produced during administrative proceedings may be used in criminal cases is the subject of some controversy. Given that the criminal procedure sometimes requires a higher standard of procedural safeguards to be guaranteed for interested persons (such as complete privilege against self-incrimination or LPP) there might be some rare borderline instances when materials collected within administrative proceedings may not be admissible in criminal proceedings and all of the procedural actions involving the accused are to be repeated with the necessary notification of his/her rights. However, such instances would be quite rare in practice.

In practice, in PIF cases administrative proceedings regarding an irregularity are more likely to be opened first and the conclusions of the administrative proceedings will allow the administrative authority to formulate a notification of a suspicion of a crime, which would provide a ground for opening criminal proceedings by a competent authority (the public prosecutor or the police). Sometimes, if the case refers to a tax offence, the criminal (pre-trial) proceedings are conducted by a financial authority, which is in fact a different section of the very same administrative institution (the fiscal control office) which conducts administrative proceedings.

Regarding competition cases, if the President of the UOKiK discovers within the administrative proceedings that there is a suspicion of a crime having been committed, he notifies the competent authorities thereof. He has no competence to conduct a criminal investigation on his own. Furthermore, criminal and antimonopoly proceedings may take place in parallel. The best example is bid rigging cases (mentioned earlier)..

The President of the UOKiK has, however, an additional competence to submit motions to the courts to establish the punitive liability of legal persons (undertakings)¹² in cases where an offence against fair competition has been committed for the benefit of a legal person by an individual. Aside from the President, the right to file a motion to establish the punitive liability of corporations belongs only to the prosecutor and the victim. It should be mentioned, though, that in the Polish legal system the liability of corporations is indeed of a punitive character, but is not criminal, even though corporations enjoy a set of rights similar to the rights of the accused in criminal proceedings and the case is recognized by a criminal court. To the best of our knowledge, the UOKiK has never exercised this competence in practice.

Also, concerning the financial market, the Financial Supervision Authority is not competent in criminal proceedings and has to request the competent authorities to open proceedings.

d) Whatever else you think is of relevance to the overall research project.

Under Polish law there are no general obstacles against using evidence produced in administrative proceedings in criminal proceedings. The criminal court has an obligation to review that evidence directly and to assess it on an independent basis. If new rules on cooperation between OLAF and its national counterparts are to be implemented, then similar rules should be applied. There should be a clear basis for the exchange of evidence between OLAF and its counterparts, irrespective of the type of proceedings in which that evidence was obtained at an earlier point in time. At the

¹² Art. 27 para. 2 of the Act on the Liability of Collective Entities for Acts Prohibited with a Penalty.

same time, there should be an unequivocal obligation that any evidence transferred should be assessed according to its admissibility on the basis that procedural guarantees proscribed in the laws of the transferring country are at least equal to guarantees foreseen in a new regulation.

Another important notion may be drawn from our observations that any new regulation to be implemented on cooperation between OLAF and its national counterparts should be as comprehensive as possible. Our analysis shows that national provisions on cooperation are often scarce. Therefore any new rules on cooperation at the EU level should be complete in order to serve as a blueprint for national regulations.

7.3 ANALYSIS OF THE INVESTIGATORY POWERS

7.3.1 The interviewing of persons and production orders

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
Can these measures also be applied *vis-à-vis* ‘persons concerned’/defendants? Which (legal/natural) persons can refuse to cooperate, because of possible interferences with the privilege against self-incrimination?

Interviewing of persons

In fraud cases, competition cases and financial cases, the interviewing of persons is possible and is provided for in the Code of Administrative Procedure and sectoral acts. The authorities may interview witnesses or parties to the proceedings. The interview may take the form of the oral questioning of the person or of his/her representative, of written explanations or of an electronic document. However, the administrative authority may also require the person in question to make a personal appearance where this is necessary due to the nature of the case. Generally, the Polish public administration authorities rely heavily on documents supplied by the parties or which have been seized during searches. The interviewing of witnesses or other parties is fairly rare in administrative proceedings. This was confirmed by our interviewees from UOKiK and KNF.

Concerning witnesses, a witness may be an individual who is interviewed in his/her personal capacity or as a representative of a legal person. Pursuant to Art. 83 of the Code of Administrative Procedure, no person may refuse to give evidence as a witness unless that person is the party’s spouse, parent, issue, sibling or blood relative to the first degree, or has a connection with the party by way of adoption, guardianship or receivership (mental incapacity). Also, the privilege against self-incrimination is guaranteed – a witness may refuse to answer a question if such an answer could expose him/her or the persons referred to above to criminal liability, disgrace, direct damage to property or result in a breach of the obligation to maintain professional confidentiality. Before taking evidence the public administration authority is obliged to inform the witness of the right to refuse to give evidence or to answer questions as well as the criminal liability arising from perjury.

Interviewing a party to the proceedings is a separate evidentiary measure; it is always discretionary and may be ordered if other evidentiary measures have been exhausted or due to the lack thereof, and material facts in the case have not been clarified (Art. 86 of the Code of Administrative Procedure). The provisions which are applicable to the hearing of witnesses also apply to the

parties, with the exception of provisions on compulsion. The party to the proceedings may be an individual, a legal person or an organizational entity without legal personality – in the two latter cases the interview is conducted with all or some of the representatives of the collective entity. A party to the proceedings may not be interviewed as a witness.

These general rules may be subject to modification with respect to specific types of proceedings.

In financial cases, the Financial Supervision Authority is authorized, within the framework of preliminary proceedings, to call on a person to make a statement or to provide an explanation. The person in question must be informed of the criminal liability arising from perjury and the privilege against self-incrimination, as described in Art. 83 of the Code of Administrative Procedure, as mentioned above.

Production order

Regarding production orders, the Code of Administrative Procedure provides that ‘anything which is not contrary to law and which is of assistance in clarifying a case is admissible as evidence. Evidence includes: documents, the evidence of witnesses, the opinions of experts and inspections’ (Art. 75). The Code of Administrative Procedure does not provide for any general rules regarding an obligation to produce documents which have a bearing on the parties since it is only a procedural regulation. However, such provisions may be found in separate substantive acts. Especially tax provisions may oblige undertakings to retain certain documents and to produce them on demand. Furthermore, separate rules on the production of documents on demand may be found in relevant legislation regulating UOKiK and KNF powers. Both authorities are entitled to demand any documents in the possession of undertakings and they are obliged to comply with such requests. Undertakings may not question production orders. Neither the Code of Administrative Procedure nor relevant substantive statutes provide for any privilege against self-incrimination which may be invoked against production orders.¹³ A lack of cooperation may result in fines being imposed or on-the-spot inspections being initiated so that documents can be directly obtained by UOKiK or KNF from the undertaking. UOKiK and KNF may only demand to see existing documents and may not require that new documents should be prepared.

In 2013 the Polish competition authority fined three undertakings which did not abide by production orders. Two of them were fined for a delayed response (a 45-day delay resulted in a fine of EUR 4 000,¹⁴ and a 59-day delay resulted in a fine of EUR 8 000¹⁵). The third company was fined EUR 50 000 for a failure to comply with a production order.¹⁶ It is interesting to note that all three fines were imposed due to a lack of cooperation in the same proceedings. Differences in the amount of the fines imposed reflected the level of non-cooperation. From a procedural point of view it is important to note that before imposing these fines UOKiK repeated the production orders. Those fines were relatively low but they have been regarded as some form of precedent for UOKiK (there were no previous similar decisions) and the beginning of a new approach to the fining policy.

13 This privilege is limited to natural persons when they act as parties or witnesses during the provision of oral evidence.

14 Decision of UOKiK of 9 Sept. 2013, No. DKK 117/2013, nyr.

15 Decision of UOKiK of 9 Sept. 2013, No. DKK 116/2013, nyr.

16 Decision of UOKiK of 9 Sept. 2013, No. DKK 115/2013, nyr.

Apart from the case of non-cooperation, sanctions may be imposed for providing false or misleading information in response to a production order. For example, UOKiK has fined two undertakings for providing misleading information.¹⁷ It is striking that both cases did not involve the manipulation of actual data but simply the concealing of some information which was later discovered by the authority. There has been a considerable increase in the amount of fines being imposed in such cases. In 2008 fines amounted to EUR 28 000 and in 2012 this had risen to EUR 175 000. This suggests that UOKiK has been more lenient in initial cases but has become more stringent in subsequent cases.

Similarly UOKiK may demand that any public authority must transfer any information or document which is in its possession if this is necessary in antimonopoly proceedings. However, such a request is not backed up by any sanctions. Therefore, public authorities approached by UOKiK do not always show the same level of cooperation as undertakings.

The Financial Supervision Authority is also authorized to order any person to produce a document or any other information carrier. During our interviews we were informed that KNF has also fined several undertakings for not complying with production orders. Unfortunately, due to the strict policy of KNF none of these decisions is publicly available and we are not able to provide any details thereon.

Some rules may be found in regulations referring to the analyzed authorities.

- Which persons can refuse to cooperate, because of possible interferences with the duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

When analyzing who is obliged to cooperate and testify as a witness three categories of persons may be distinguished: those who are not able to be witnesses, those who can refuse to testify and those who can refuse to answer particular questions during their testimony.

Pursuant to Art. 82 of the Code of Administrative Procedure persons who are unable to identify or communicate their observations – due to their dysfunctionality of any nature – cannot be witnesses under any circumstances.

Second, persons bound by rules of State secrecy or professional privilege, unless they have been exempted under the applicable rules or regulations – for instance, by their superior in the case of professional secrecy or by a central authority in the case of State secrecy, together with members of the clergy who are bound by confessional confidentiality, have the right to refuse to testify about any circumstances covered by their secrecy and confidentiality rules. This provision applies to fraud proceedings and financial proceedings. Similar rules, laid down in the Code of Civil Proceedings,¹⁸ also apply to competition cases. However, those persons may be interviewed as witnesses in other cases or with regard to circumstances which are not covered by State secrecy, professional secrecy or confessional confidentiality.

¹⁷ Decisions of UOKiK of 28 Dec. 2008, No. DKK-101/2008, nyr and of 30 Jan. 2012, No. DKK 6/2012.

¹⁸ Act of 17 Nov. 1964 – Civil Procedural Code, Journal of Laws of 2014, item 101.

Last but not least, any person may refuse to answer certain questions provided that such an answer could expose him/her or his/her spouse and family members to criminal liability, disgrace or direct damage to property.

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

Pursuant to a general rule laid down in Art. 32 of the Code of Administrative Procedure, a party may be represented by a representative, unless the nature of the case requires a personal appearance. This applies to proceedings conducted in PIF cases, the financial market and competition.

Any natural person having legal capacity may act a representative. However, in practice, in all analyzed cases, in particular in competition cases and cases involving to the financial market, parties have access to professional representatives – lawyers. A power of attorney must be given in writing or recorded in the minutes. The lawyer provides the original power of attorney or a certified copy for the file. An advocate, a legal counsellor or a patent agent can certify a copy of the power of attorney granted to him (Art. 33 of the Code of Administrative Procedure).

The lawyer may take part in all stages of the proceedings, including during an interview. He/she may assist the party being interviewed. He/she may also ask questions during the interview, usually after the questions asked by the interviewing official.

- Is an *ex ante* judicial authorisation necessary for the application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure? What happens if this authorization is denied – is there a right to appeal?

No, an interview conducted within the framework of administrative proceedings conducted in any of the analyzed types of cases does not require any judicial authorization. It depends upon the decision of the authority conducting the proceedings in the case at hand.

- Are there other thresholds/procedural safeguards for the application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

Once proceedings have been opened, the decision in this regard depends solely on the authority conducting the proceedings. It is worth noting that the opening of new proceedings is not challengeable even though the parties may find that this is completely unjustified.

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a *de facto* measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

In principle, in administrative proceedings the production of any evidence requires that a production order is issued. However, many authorities fail to issue production orders and rely on a summons.

This practice is not in conformity with the Code of Administrative Procedure. Nevertheless, a summons usually contains all the formal elements of a production order. Therefore, there are no actual significant differences between a production order and a summons from a procedural point of view. Both a summons and a production order contain compulsory measures for their addressees, and sanctions apply in both situations while no remedies are available against a production order or a summons.

A person is summoned to appear for an interview by means of a summons. Pursuant to Art. 54 of the Code of Administrative Procedure, the summons must contain: 1) the name and address of the body issuing the summons, 2) the name of the person being summoned, 3) the name of the case and the reason for which the person has been summoned, 4) details as to whether the summoned person is required to attend personally or by means of a lawyer and whether the explanation or evidence may be given in writing, 5) the deadline by which the requirement must be met, or the date, time and place at which the summoned person or his lawyer is required to appear, 6) the legal consequences of failing to comply with the summons. The summons should bear the signature of an employee of the issuing body, with an indication of the name and job title of the signatory.

In cases requiring urgent action a summons can be issued by telegraph or telephone or using other means of communication, provided that the information referred to above is supplied. A summons issued in such a manner will only have legal effect once there is no doubt that the relevant content has been received by the addressee within the required deadline.

A summons is not an administrative decision *per se* – some authors argue that it is a technical action, but the most common position is that it is a procedural action which is binding for the persons concerned. No appeal against it is possible.

If the summons is not complied with, coercive measures may be applied with regard to the persons concerned. Namely, any person being obliged to appear in person after being lawfully summoned, and who fails to appear as a witness or expert or refuses to give evidence, to provide an opinion, to produce an object for inspection or to assist in any other official act without just cause, can be punished by the body conducting the evidentiary process with a fine of up to 50 PLN,¹⁹ and in the case of a subsequent failure to comply with a summons – a fine of up to 200 PLN.²⁰ An interlocutory objection can be made against a ruling which imposes a fine.

It should be noted that the amount of the fines is very low, even for Poland, so their enforcement function is not very great.

If the person against whom the fine has been imposed makes an application within 7 days of the notification, the authority that imposed the fine may acknowledge that the absence or refusal referred to above was justified and may waive the fine. An interlocutory objection can be made against a refusal to waive the fine.

19 Approximately 10 EUR.

20 Approximately 40 EUR.

In *competition cases*, a party adducing witness evidence is required to indicate precisely the facts to be confirmed by the testimony of individual witnesses and to provide the data allowing a witness to be properly summoned. Also, it is specified that when summoning a witness, the President of the Office must state in the summons the first name, surname and place of residence of the person summoned, the time and place of the examination, the parties to and the subject of the case, and must stipulate the provisions on penal sanctions for false evidence (Art. 52 of the Act on Competition and Consumer Protection).

Also in competition proceedings there are specific provisions on sanctions for non-obedience, namely, the President of the Office may, by way of a decision, impose a maximum fine of PLN 5,000 on a witness for a refusal to give evidence without a valid reason or not appearing, without a valid reason, when summoned by the President of the Office (Art. 108 § 6 of the Act on Competition and Consumer Protection).

In *fraud cases* and in *financial market cases* no special provisions on summonses are provided.

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

It depends on which authority issues a production order and directly conducts the investigatory measure. If the measure is applied by a national authority when supporting an EU institution, it can impose the fine mentioned above on the basis of a production order or summons which it has issued. However, if DG Comp or ESMA sends a formal RFI it has exclusive competence to use coercive measures in the case of non-cooperation. Fines for a failure to comply with production orders are challengeable. In fact, it is the only effective remedy against production orders. The addressee of the production order cannot challenge it directly. The addressee can only challenge a fine that was imposed upon him for a failure to comply with the order.

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

In competition cases the most common practice is that DG Competition conducts its actions autonomously on the territory of Poland, without the assistance of the Polish authorities. DG Comp does not usually inform UOKiK about such actions. Formal notification is required by the OECD recommendation on cooperation between competition authorities.²¹ However, it applies to NCAs from member states of the EU and not to DG Comp. Occasionally UOKiK is asked by Polish undertakings how they should behave in relation to DG Comp RFIs and in that way it assists DG Comp. The Financial Supervision Authority is not even notified of the actions of the Commission's representatives.

21 See OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings of 2014, available at <<https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm>>.

7.3.2 The monitoring of banking accounts (real time)

The monitoring of bank accounts in real time is not provided for in the Polish legal system. Therefore, according to Polish law, the administrative authorities do not have this power.

It should be mentioned here that Polish law provides for an obligation to protect information covered by banking secrecy. However, such information covered by banking secrecy may be made available to the Financial Supervision Authority (KNF) and the President of the UOKiK in relation to administrative proceedings that these authorities are conducting. Those authorities may oblige undertakings or banks to directly supply information which is necessary for the purpose of the investigation.

Provided that data covered by banking secrecy is included in a document which forms a part of the administrative files it may be transferred to EU counterparts under the general rules. The transmitting national authority is obliged to indicate which information is covered by statutory protection and the recipient EU authority is under the same obligation not to disclose this information. According to interviews with UOKiK staff the authority hardly ever asks for bank statements but there are no legal obstacles against transmitting such information to DG Comp.

7.3.3 The right to enter premises, including searches and seizure

The Polish public administration authorities do not usually have the authority to directly search the premises of the parties concerned or to directly seize documents or seal offices. These powers typically belong the police or the public prosecutor who conduct criminal investigations. However, the tax authorities and UOKiK are rare exceptions to this situation. Neither the Ministry of Finance nor KNF has this authority; it is only UOKiK which is competent to search premises and natural persons. KNF may only conduct simple inspections which do not include the competence to directly search premises. Therefore two scenarios must be distinguished. First, a simple inspection may be carried out by UOKiK or KNF. During such an inspection the authority is entitled to enter premises and buildings, to request accessible files, books and all kinds of documents to be made available or to request oral explanations which are relevant for the inspection. Second, an inspection connected with the search of premises or natural persons may be ordered. This is an extraordinary measure and therefore only the Antimonopoly Court may issue an order to conduct a search upon a motion by UOKiK. KNF is not empowered to conduct searches.

– What is the scope (*ratione materiae/personae*) of this power? Particularly:

Competition cases

The right to enter premises is allowed in competition cases, also in the framework of vertical cooperation.

Two types of searches must be distinguished in Polish competition law. Firstly, with regard to vertical cooperation the law provides for a possibility to conduct a search at the request of the European Commission in the cases described in Article 22 of Regulation No. 1/2003/EC and in Article 12 of Regulation No. 139/2004/EC, without instituting separate proceedings (Art. 105i of the Act on Competition and Consumer Protection). There is no need to formally open national

administrative proceedings, as such a search is conducted as part of the proceedings opened by the European Commission. In this scenario it is the Commission which conducts the search and the national competition authority assists the EC in this respect.

In such a case, however, and for formal reasons, the President of the UOKiK may authorize the following persons to participate in an inspection or search:

- (1) an employee from the Office;
- (2) an employee of the European Commission or of a competition authority of a Member State of the European Union;
- (3) persons possessing special knowledge, if such information is necessary to carry out the inspection (for instance, an IT expert).

Where the undertaking or a person authorized to represent the undertaking, or a person in possession of a residential unit, an area within the premises, real property or means of transport, objects to an inspection by the European Commission in the course of proceedings conducted on the basis of the provisions of Regulation No. 1/2003/EC or Regulation No. 139/2004/EC, the persons authorized by the President of the Office to participate in the inspection, employees of the Office and experts have – in the course of the inspection – all the powers of persons conducting the other type of search mentioned below. It should be understood that although the undertaking may object to the inspection, the role of the assisting employees of UOKiK will be to overcome this objection by producing authorization from the Polish court to make the search. It is important to note that the role of the employees of the UOKiK will be simply to allow the European Commission to continue its search and not to replace the EC during the search.,

The second type of search are searches conducted within the framework of national administrative proceedings. In this scenario it is the national competition authority which conducts the search and it will share evidence with the European Commission if required. Such a search may be conducted by the police (Art. 91 of the Act on Competition and Consumer Protection) or by officials from UOKiK (Art. 105n of the Act on Competition and Consumer Protection). The results of such a search may be communicated to the Commission. In this event, The Competition Act enables UOKiK to authorize representatives of the European Commission to take part in such a search. However, employees of the EC serve only as assistants and all documents and other pieces of evidence which are seized during the search constitute part of the files of the national proceedings.

A search of *private premises* may be conducted by the police, but only when this is allowed by the courts at the request of the President of the UOKiK. Such a search may only take place if there are reasonable grounds to presume that any objects, files, records, documents and data carriers within the meaning of the regulations on the computerisation of operations of entities performing public tasks are stored in residential premises or any other premises, real property or means of transport, and such objects may affect the determination of facts which are material to pending proceedings.

An authorized employee of the Office may participate in such a search.

A search of the *premises of an undertaking (a business entity)* may be conducted by the President of the UOKiK, with the consent of the courts, in cases of competition-restricting practices, in the course of preliminary proceedings and antitrust proceedings, in order to find and obtain information from files, records, official letters, any kind of document or information technology data carriers, systems and devices, and other items that might amount to evidence in the case, if there are grounds for assuming that the information or items concerned are located in those places.

Regarding the material scope of a search of the *premises of an undertaking (a business entity)*, pursuant to Art. 105b of the Act on Competition and Consumer Protection, in order to obtain information that may constitute evidence in the case, the party conducting the inspection shall be authorised to:

- (1) enter land and buildings, units within premises, or other areas within premises and means of transport held by the inspected party;
- (2) request access to files, records, all kinds of official letters and documents and copies and extracts thereof, electronic correspondence, information technology data carriers within the meaning of the regulations on the computerisation of operations of entities performing public tasks, other devices containing information technology data, or of information technology systems, including access to information technology systems owned by another party containing data belonging to the inspected party, related to the subject matter of the inspection, to the extent that the inspected party has access thereto;
- (3) make notes concerning the materials and correspondence referred to in subparagraph 2;
- (4) request the inspected party to make copies or printouts of materials, correspondence referred to in subparagraph 2, as well as information collected on the carriers and in devices or systems referred to in subparagraph 2;
- (5) request the persons concerned to provide oral explanations concerning the subject matter of the inspection;
- (6) request the persons concerned to provide access to and hand over other items that may be evidence in the case.

The scope of the jurisdiction of the officials in competition cases is mirrored by the obligations of the persons concerned. Namely, pursuant to Art. 105d of the Act on Competition and Consumer Protection, the inspected party, a person authorised by that party, or a person in possession of a residential unit, an area within premises, real property or means of transport has an obligation to: (1) provide the requested information; (2) provide access to land and buildings, units within premises, or other areas within premises and means of transport; (3) provide access to and hand over materials, or other items that may constitute evidence in the case.

The obligation to cooperate during inspections and searches is safeguarded by a sanction. UOKiK is entitled to impose a fine of up to EUR 50 million on any undertaking which, even unintentionally, does not cooperate during a search or an inspection being carried out within the framework of the investigation. There are two decisions which exemplify the stringent approach of UOKiK towards a lack of cooperation during inspections. In the first case a company was fined for delaying the entry of UOKiK inspectors and a failure to provide access to documentation specified in the search order. Furthermore, the company's personnel only produced selected extracts from the documents instead of all the requested documents. Moreover, the undertaking

did not provide UOKiK inspectors with access to the hard disc which contained copies of e-mail boxes of five of the company's employees. A copy was made by UOKiK inspectors but the company seized it and refused to release it. By the day of issuing the decision, the company continued to refuse access to the said disc. This company was fined a total of 33 million EUR.²² In the second case, an inspection was carried out at another undertaking's premises, but due to the reluctance of the undertaking's personnel the UOKiK inspectors were only able to enter the company's offices after over an hour of waiting by the reception desk and the inspectors had difficulties in contacting the authorized employees of the undertaking. This lack of cooperation resulted in a fine of 30 million EUR being imposed.²³ Both penalties are the highest so far imposed by UOKiK. In a press release, UOKiK stated that it had followed the example of the European Commission in the E.ON Energie case.²⁴

The financial market

In financial cases, the Financial Supervision Authority, when conducting preliminary 'investigative' proceedings, is authorized to enter the premises of a business entity. The right of entry refers to the main headquarters of the undertaking, its branches or representatives, on working days and during working hours, but in urgent cases this may be extended to non-working days and hours.

The Financial Supervision Authority has the right to access any documents, books and information carriers and the business entity is obliged to produce them at the request of KNF officers. They may also request to make photocopies of documents and other information carriers, as well as to request oral or written explanations. These copies may be made by an employee of the business entity or by the KNF officers themselves.

The President or the Vice-President of the KNF may issue an order to seize a document or other information carrier necessary for further proceedings. The person possessing the document or information carrier in question is first called upon to surrender it, and if this is not complied with, then the police may be called in to assist in this matter.

Seized documents or information carriers are to be preserved and cannot be destroyed or distorted. They are to be returned to the person concerned when they are no longer needed in the course of the proceedings.

The order to seize may be subject to an appeal before the Authority acting in its entirety. The appeal has no suspending effect, however.

- Can these measures also be applied vis-à-vis 'persons concerned'/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?

22 Decision of UOKiK of 24 Feb. 2011, No. DKK 1/2011, nyr.

23 Decision of UOKiK of 4 Nov. 2010, No. DOK 9/2010, nyr.

24 Press release dated 9 November 2010. Available at <www.uokik.gov.pl/news.php?news_id=2327>.

As mentioned before, searches are only possible in competition cases. A search may be conducted with regard to any natural person. To the best of our knowledge, UOKiK has never exercised this competence against any natural person.

In principle, the persons concerned are obliged to cooperate with the relevant authorities. However, pursuant to Art. 105d § 2 of the Act on Competition and Consumer Protection, the persons concerned may only refuse to provide information or to cooperate during an inspection when this could lead to their criminal liability or that of their spouses, ascendants, descendants, siblings or relatives in the same line or degree, as well as persons who are adopted, in the care or under the guardianship thereof or life partners. The right to refuse to provide information or to cooperate during an inspection will survive a marriage or a relationship of adoption, care or guardianship.

- Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?

LPP is not officially recognised by Polish administrative law.²⁵ It is only regulated in criminal proceedings. However, in competition cases both UOKiK and the antimonopoly court follow DG Comp's practice. Consequently, only external lawyers may invoke the LPP defence. Therefore, in-house lawyers are not protected by LPP.²⁶

A different approach is taken in financial cases. KNF strictly follows the Code of Administrative Proceedings which is silent on LPP. Therefore KNF does not recognise LPP as a legitimate and justified defence against a production order. We are aware of at least two decisions by KNF where undertakings were fined for refusing to submit documents at the request of KNF by claiming that the documents in question were covered by LPP. As indicated before, due to the lack of transparency on the part of KNF no publicly available data on those decisions are available.

- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?

Lawyers are allowed to be present at any stage of administrative proceedings. They may take part during interrogations. However, they cannot interrupt the authority, party or witness nor interfere with the process of giving evidence. They are entitled to provide legal assistance to the party or witness during an interview. According to our interviewees from UOKiK and KNF the authorities are rather strict when it comes to the presence of lawyers during interrogations. When there is a hearing lawyers representing the parties may question witnesses or other parties.

25 M. Błachucki, 'Procedural safeguards at the evidence stage of administrative proceedings in the light of the legal standards of the European Convention on Human Rights', in C. Nowak (ed.), *Evidence in EU fraud cases* (2013), p. 83.

26 B. Turno, 'Zagadnienie tajemnicy adwokackiej na gruncie prawa konkurencji' (in English: 'The issue of legal professional privilege in competition law'), in C. Banasiński, M. Kępiński, B. Popowska, T. Rabska (eds.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji* (in English: *Current issues in Polish and European competition law*) (2006), p. 172.

The Act on Competition and Consumer Protection provides that with respect to any issues not regulated in the Act, the Act of 6 June 1997 – the Code of Criminal Procedure – applies accordingly to a search of both private and non-private²⁷ premises.

Pursuant to Art. 224 of the Code of Criminal Procedure, during a search, a person whose premises is to be searched has the right to be present in addition to the person designated for that purpose by the person conducting the search. Furthermore, the search may be attended by a person designated by the occupant of the premises being searched – including, so it seems, a lawyer also providing consultation, provided that this will not seriously obstruct the search, or render it impossible. The latter means that the presence of the lawyer may be limited or he/she may even be asked to leave by the officers conducting the action, once they find that his/her presence and/or behaviour during the search is obstructive.

In the event that the search is made in the absence of the owner of the premises, at least one adult member of his/her household or a neighbour must be called upon to attend the search.

- Is an ex ante judicial authorisation necessary for the application of the measures? If so, what test does the national (judicial) authorities apply – content and procedure? What happens if this authorization is denied – is there a right to appeal?

A search of both private and non-private premises in *competition cases* may only be conducted with the consent of the Court of Competition and Consumer Protection (this task is performed by the XVIIIth Division of the District Court in Warsaw). There is no possibility of an appeal against the court's ruling, which must be issued within 48 hours.

The President of the Office may file a request to conduct a search in the course of preliminary proceedings but only if there is reasonable cause to suspect an infringement of the law, in particular where evidence may be lost.

Simple inspections carried out by KNF or UOKiK do not require any judicial proceedings.

- Are there other thresholds/procedural safeguards for the application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?

Generally, the rules on investigatory measures allow for wide administrative discretion and they do not provide for any material thresholds. However, any evidentiary action must be supported by the subject matter of the case. Therefore, any fishing expeditions are not permissible nor are any RFIs which do not relate to the subject matter of the proceedings.

The only exception concerns a search in competition cases. There are special rules regarding the purpose of the search, which must be justified from the point of view of the interest of the proceedings. The authority must apply for court authorization to conduct a search. In a motion to the court UOKiK is obliged to show the probability of alleged anticompetitive practice.

²⁷ However, only to some extent, but with regard to the presence of other persons.

However, the Antimonopoly Court applies a rather liberal interpretation of probability and it is not particularly difficult for the UOKiK to satisfy this standard.

- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of an appeal) or a de facto measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?

A search is conducted on the basis of a formal ruling approved by the courts. The court proscribes the scope of the search (the subject matter and the necessary time) and authorizes particular persons from the authority to conduct the search.

Ordinary inspections are carried out on the basis of a formal ruling. Such a ruling must indicate the subject matter and the time of the inspection.

- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc.]?

In the case of non-cooperation during a search or inspection, the police may enforce the search. In particular, a search of private premises is directly conducted by the police. In the course of a search of non-private premises the party conducting the inspection may be assisted by officers of other state inspection authorities or the police. State inspection authorities or the police perform certain actions on the instructions of the party conducting the inspection (Art. 105b § 3).

- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

In competition cases, in practice, when the proceedings are conducted autonomously by the EU authorities, the Polish UOKiK is not informed of their actions and they can act independently. However, when the UOKiK is assisting the European Commission, the measure must be applied by the President of the UOKiK with the consent of the courts. As has been mentioned above, the President of the Office may authorize employees of the European Commission to participate in an inspection or search.

7.3.4 Access to traffic data and recordings of telecommunications

Generally speaking, under the Telecommunications Act traffic data and recordings of telecommunications are classified and protected under telecommunication secrecy. This protection may be waived upon the order of the public prosecutor in criminal cases. Neither UOKiK nor the Finance Ministry have access thereto.

However, the Financial Supervision Authority does have access thereto, at least to some extent, on the basis of the Act on Capital Market Supervision, referring to the supervision of trading repositories. When conducting controlling activities with regard to supervised entities, KNF may

request, and the entity is obliged to provide, copies of electronic mail and traffic data in the form of registers of telephone calls and registers of data transmissions (Art. 32 para. 5).

Also, in the course of preliminary proceedings instituted by KNF on the basis of the Act on Capital Market Supervision to establish whether there is a need to submit a notification of a suspected crime to the competent authorities, or to open regular administrative proceedings, when necessary, KNF may request the telecommunications service provider to provide information which is protected under telecommunication secrecy regarding traffic data (registers of telephone communications or other information transfers), including data allowing the parties to the communication to be identified, the duration of the communication and other information on the communication, except for the content of the communication itself (Art. 38 para. 5 of the Act on Capital Market Supervision).

These measures may be applied against the persons concerned, which are legal persons. They may not refuse to provide the necessary information. The law does not mention the presence of a lawyer, but it seems that in-house lawyers may be present. No judicial authorization is required, the decision depends solely on the KNF and the measure is applied 'when necessary' in the case at hand. The decision on the application of the measure may not be subject to an appeal. If the controlled entity does not comply or interferes with the controlling activities of KNF, the police may assist KNF.

Consequently, if the traffic data and the recordings of telecommunications are part of the administrative files, KNF may transfer such data to its EU counterparts.

7.3.5 Are there other powers that could be interesting for OLAF?

The powers of KNF, UOKiK or the Ministry of Finance are typical administrative investigatory powers with some minor exceptions. Namely, UOKiK enjoys the power to carry out searches whereas KNF may monitor bank accounts or make use of traffic data.

What may be interesting is that UOKiK has been engaged in preparatory legislative work on an Act concerning operational police methods of evidence gathering. According to press releases the Polish competition authority wants to have similar powers to the law enforcement authorities, typically associated with criminal law, namely wire-tapping and making use of undercover agents. At this moment in time only the police or the secret services have such competences and these powers only apply within the framework of criminal proceedings. These initial press announcements have raised serious concerns with regard to the constitutionality of such powers to be vested on UOKiK. Nonetheless, it should be noted that some jurisdictions (like the USA or Brazil) provide for criminal liability for antitrust violations and antitrust agencies in these countries do enjoy such powers.

7.4 EX POST JUDICIAL PROTECTION BY NATIONAL COURTS

The legal status of KNF, UOKiK and the Ministry of Finance differs. One of the main differences is that the actions of KNF and the Ministry of Finance are supervised by the administrative courts

whereas UOKiK is controlled by the antimonopoly court which is a civil court. Furthermore, appealable actions by KNF and the Ministry of Finance are subject to an internal administrative review. Such internal review is not available for UOKiK. Actions by the antimonopoly authority are directly reviewed by the antimonopoly court.

Note that Polish administrative proceedings do not distinguish between cases ending in sanctions and other outcomes. Therefore, there are no separate rules for administrative cases when fines are levied. The administrative procedure applies equally to all administrative proceedings. Consequently, the same court reviews all decisions taken by the administrative authority irrespective of the character of the particular decision.

- Are investigatory actions subject to judicial review as such, or taken account of in later (sanctioning) decisions? In the latter case, how does this system work when the sanctioning decision is taken at EU level?

Decisions on producing evidence (RFI, initiation of an inspection or a production order) are not challengeable as such. For example, an undertaking may not refuse to respond to an RFI sent by UOKiK or KNF nor may it question the scope of the RFI. However, if an undertaking objects to the RFI, UOKiK or KNF may fine that undertaking. The fine is challengeable before the relevant court. When hearing the case the court indirectly scrutinizes the legality of the RFI. Alternatively, even if the party complies with the RFI, it may still indirectly challenge it when appealing against the final decision concluding the whole proceedings.

However, many actions taken during investigatory proceedings may be directly challenged. Such possibilities exist especially during inspections. Entities subjected to inspections may challenge any misconduct by the authority during the inspection, for example if the inspection exceeds the scope authorized by the court. Furthermore, the seizure of documents during inspections may also be challenged. In competition cases, undertakings may raise LPP defences and request the court to scrutinize documents before allowing the UOKiK to do so.

- To which extent are decisions to use certain powers as such subject to review/appeal (*Verwaltungsakt*, etc.)?

There is a general rule that investigatory measures taken by the authority may only be challenged if such a possibility is clearly foreseen in the relevant statute. If the statute is silent the act may not be challenged.

There are basically two types of remedies available – an administrative appeal and judicial review. An administrative appeal initiates an internal administrative review (concerning KNF and the Finance Ministry). Judicial review may be initiated provided that the administrative review has been exhausted or is not available (UOKiK).

For KNF and the Ministry of Finance an internal administrative review is available. Such review covers formal (legality) and substantive issues. Afterwards the party in question may appeal to

the administrative court. Before the administrative court the party in question may only raise legality issues.

For UOKiK only a judicial review is available for the parties. However, since the antimonopoly court is a civil court the appellant may challenge the decision according to both formal and substantive issues.

As indicated in the previous section, the parties have limited powers to appeal against most of the investigatory measures undertaken by KNF, UOKiK or the Ministry of Finance. For example, decisions relating to inspections and searches or sending RFIs cannot be challenged.

– Do remedies have suspending effect?

Available remedies do not have any suspending effects. Granting a suspension lies within the discretionary powers of the courts. Suspending injunctions may only be granted upon a motion by the appellant. However, an appeal against a final decision of the authority suspends the enforcement of that decision, provided that it was not issued with immediate enforcement.

– Must internal administrative appeals have been exhausted before access to a court is open?

Yes, if an internal administrative appeal is available the party must exercise it before resorting to the courts.

In competition cases, no internal administrative review is available and appeals go directly to the courts.

– Are there time limits applicable?

The party must lodge an appeal in order to initiate an internal administrative review within two weeks from the receipt of the final decision. For judicial review the deadline is one month for the party to lodge the appeal.

The internal administrative review should not take longer than one month. However, this is only an indicative time limit and there are no legal consequences for the authority which does not respect this limit. For the courts, there are no time limits to hear the case.

– What is the scope of internal and judicial review?

An internal administrative review covers all relevant issues that relate to an investigatory measure that has been undertaken. Both formal and substantive claims may be raised. During the internal review proceedings a limited additional evidentiary stage may take place. However, the Code of Administrative Proceedings allows only for the supplementary production of evidence. If the case requires additional and further evidence to be produced the decision should be abrogated and the proceedings should be resumed from the beginning.

The scope of judicial review depends on the type of court reviewing the case. Administrative courts have powers to review the legality of the challenged action. They hear complaints against decisions of the Ministry of Finance and KNF. The civil courts (in antimonopoly cases) have universal jurisdiction and may review both legality and substantive claims against the actions of the authority in question.

- Are specialized remedies available in cases of access to privileged information (professional secrecy or LPP)?

In competition cases a special procedure applies when a party raises an LPP claim during the inspection. It follows the ‘envelope procedure’ developed by DG Comp. Under this procedure, if a party invokes an LPP claim, the relevant documents are placed in an envelope, sealed and transferred to the court for scrutiny. The authority is precluded from inspecting the documents covered by the LPP claims until the court decides on the applicability of the LPP defence in the given case.

As indicated before, LPP is not recognized by KNF in financial sector cases.

7.5 CONCLUSIONS – IDENTIFICATION OF BEST PRACTICES AT THE NATIONAL LEVEL

As indicated above, there are significant differences between the regulation of fraud, competition and financial markets in Polish law. There is neither a coherent vision nor any convergence between the legal provisions regulating all three areas. Each policy area is regulated autonomously.

Competition regulation is probably the best developed in relation to the protection of individual rights. It is clearly the result of a growing awareness that competition sanctions may be dealt with under the ECHR as criminal sanctions and therefore procedural safeguards should adhere to those standards. Moreover, Polish competition rules refer, to a large extent, to the European competition rules. This sometimes leads to controversies. Even though the LPP defence is not regulated in statutory law, it is applied in competition cases.

These differences are to a large extent related to the development of EU law in given policy areas.

Any EU law should provide for a comprehensive regulation of cooperation between OLAF and its national counterparts. National laws may be substantially underdeveloped and this may well hinder effective cooperation.

8. FRANCE

J. Tricot

8.1 INTRODUCTION

Like most investigative services, but probably much more than most investigative services, OLAF faces two main challenges and sources of difficulties. Indeed, as the European Commission and OLAF itself periodically point out, the information flow¹ on the one hand and the (administrative or judicial) outcome of the investigations² on the other hand are conditions which are currently undermining or even prevent the cooperation with (and from) the national authorities responsible for the protection of public financial interests from playing its role. However, such cooperation is essential for the efficiency and effectiveness of the Office's action.

Moreover, the legislative strategy adopted by the EU not only makes the anti-fraud strategy reliant on this cooperation but it also makes it reliant on the legal, institutional and practical national frameworks. This is why the analysis of national systems and their practical implementation is essential to identify the stumbling blocks and thus suggest ways to get out of the rut.

Certainly, such an analysis is not new.³ However, given the evolution of both national and EU law, it is necessary to update it on a regular basis. It is also necessary not to stop there and to consider new approaches. That is the whole point of a comparison of OLAF framework with other bodies of EU law with similar enforcement tasks, such as the European Central Bank, the European Securities and Markets Authority and the European Commission (DG Comp).

Yet, this comparison of their legal and institutional frameworks,⁴ of their investigative powers⁵ and the judicial control applicable to the exercise of such powers⁶ makes it possible to highlight clearly an essential condition for the proper functioning of cooperation. Indeed, any vertical cooperation (*i.e.* any cooperation with a European authority), when it puts into action supervisory and investigative powers directly or indirectly involving the support of the competent national authorities, requires a clear and precise legal framework.

Paradoxically, while OLAF's action is governed by regulations which are directly applicable in domestic law, the main characteristic of the cooperation between French authorities and OLAF

1 'Most of the incoming information sent to OLAF by Member States comes from private sources', OLAF Report 2015. The figures concerning France are in this respect enlightening: 13 reports from private sources and 2 from public sources.

2 See p. 30 of The OLAF Report 2015 ('Judicial monitoring').

3 It has accompanied the various steps of the fight against EC and EU fraud since the first draft treaties envisaged by the Commission in the 1970s. However, the studies are rarely exhaustive or global and appear to be partial, not covering the entire question.

4 See below 8.2.

5 See below 8.3.

6 See below 8.4.

seems to be the uncertainty of the applicable rules, as if the legal framework for such cooperation was lacking. What is lacking in reality and handicaps cooperation are explicit and specific national provisions relating to this cooperation. On this point, the comparison with the other EU authorities is already illuminating because the absence of provisions concerning OLAF contrasts with the presence of provisions concerning the ECB, ESMA and DG COMP. But it also shows that even where provisions exist, the quality, the degree of precision may also vary. In any event, this total or partial absence of an *ad hoc* domestic legal framework has a double – upstream and downstream – effect as it hinders the information flow and weakens the proceedings and there ‘successful’ outcome. This seems to be a central explanation for the fact that cooperation with OLAF appears to work one-way; notably, national authorities provide too little information to OLAF whose existence and action suffer from insufficient recognition in domestic law.

The comparison then makes it possible to show that this first difficulty – central and determining at all stages of cooperation – is duplicated by another. This second difficulty is due to the fragmentation of potential OLAF interlocutors. This ‘atomization’ contributes to complicating and weakening communication channels. It does not encourage both institutionalized and personal relationships and the development of good practices over time.⁷

The protean or multifaceted character of fraud (ranging from mere irregularities to various forms of fraudulent organization of serious offences against probity and public finances) and its transversal scope (both expenditure and revenue being concerned, many authorities of different types and nature are involved in the detection and finding of fraud) explain this fragmentation. Not only does it complicate OLAF’s action but also it clearly distinguishes it from the action of the other European authorities. The scope of competence of the latter covers that of a single national counterpart whose competence is national and exclusive, subject to the competence of the judicial authorities in the event of criminal prosecution.

In order to assess these differences and their impact, it is now necessary to present the legal framework for the action of the various partners of the European authorities (8.2), analyse their respective powers (8.3) and examine the extent of the national judicial control to which they are subject (8.4).

8.2 OVERVIEW OF THE NATIONAL PARTNERS

At first glance, the panorama of the national partners of the various European authorities, OLAF included, shows a perfect symmetry: for every authority of the Union, there is one single national counterpart.

However, a closer examination shows that this symmetry is only apparent. In reality, a comparison of OLAF’s situation with that of the other European authorities reveals a total asymmetry.

The three European authorities with sanctioning powers have a single contact at national level. And this interlocutor is a true counterpart. In each case, it is an independent administrative authority whose own sanctioning powers justify (*de jure*) and strengthen (*de facto*) the (own) investigative powers made available to it.⁸

7 It is well known that the efficiency and effectiveness of all cooperation rests not only on formalized and institutionalized channels that are both solid and fluid, but also more prosaically on personal relationships.

8 M.-A. Frison-Roche, ‘Étude dressant un bilan des AAI’, annexe au Rapport du sénateur P. Gélard, Rapport sur les AAI, jUNE 2006, t. II, p. 93. *Contra* E. Piwnica, ‘La dévolution d’un pouvoir de sanction aux autorités administratives indépendantes’, (2010) *Revue Française de Droit Administratif* p. 915.

As for OLAF, a single interlocutor at national level does exist, whose role and usefulness are beyond doubt. But because it is deprived of operational powers, its action does not appear to be sufficient to cope with the fragmentation of OLAF's potential counterparts (which is accompanied by the fragmentation and variety of legal frameworks and cooperation channels applicable to them). This single interlocutor is not conceived as the counterpart of OLAF (a prospect that is difficult to envisage given the scope of the Office's competences without calling into question the whole architecture of the supervision of public finances in France) but as an interface, a 'facilitator' or a transmission link between the national operational actors and the Office.

Besides, the creation of this national partner for OLAF, although valuable, has not been accompanied by the explicit and specific recognition of the powers and actions of OLAF in domestic legislation. For this reason, such creation did not compensate for the lack of *ad hoc* and visible provisions, providing the national authorities and OLAF with clear and secure (foreseeable) channels for the exchange of information and operational cooperation. However, it might be thought that the wording of the provisions of the EU regulations, on which the Office's powers are based as well as the cooperation with the competent national authorities, calls for it, and in view of the shortcomings of the practice even requires it.

The legal architecture of the partners of the European authorities (8.2.1.) and the legal framework applicable to their action (8.2.2.) reveal how OLAF is in a singular and incomparable situation.

The very complex nature of OLAF's position vis-à-vis the national authorities contrasts with the relative simplicity and clarity that characterize the situation of the three other European authorities studied. This complexity is further compounded by the weakness and/or inadequacy of the coordination between administrative and criminal proceedings (8.2.3.), whereas such coordination is crucial for OLAF investigations and action.

8.2.1 Legal architecture

General remarks

Unlike the other three European authorities, OLAF cannot count on a single actor, acting as its national counterpart, whose action is governed by a unitary legal framework, despite the creation of the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude, DNLF*⁹). The Office faces a variety of authorities that are more or less easily identifiable according to the sector concerned: regarding revenue, the actors (and the applicable legal framework) are easier to identify, while where expenditure are concerned, the situation is less clear.

As for the other three European authorities, they therefore have only one counterpart at national level, namely for DG Comp: the Competition Authority (*Autorité de la concurrence, ADLC*¹⁰), for ESMA: in the area of law on credit rating agencies and trade repositories the Financial Market Authority (*Autorité des marchés financiers, AMF*¹¹), and for ECB: the Prudential Supervision Authority (*Autorité de contrôle prudentiel et de résolution, ACPR*¹²). Moreover, in France, this counterpart is in all three cases an independent administrative authority,¹³ vested with supervisory,

9 <www.economie.gouv.fr/dnlf>.

10 <<http://www.autoritedelaconcurrence.fr/>>.

11 <<http://amf-france.org/>>.

12 <<https://acpr.banque-france.fr/lacpr.html>>.

13 An independent administrative authority (AAI) is an authority acting on behalf of the State autonomously, that is to say without being subordinate to the Government or the Parliament but subject to the control of the judge

investigative, disciplinary and administrative sanctioning powers, designed according to a common model,¹⁴ although some differences regarding the structure, the organisation or the extent of said powers may be noted. This model is characterized by the concentration of powers – controlling, investigative, prosecution and sanctioning powers, but also normative – ‘compensated’ by the separation – sometimes organic (AMF, ACPR), sometimes only functional (ADLC) – of functions (in particular investigative, prosecution and sanctioning functions).

EU Financial interests

For the purposes of Art. 3.4 of Regulation 883/2013, *the French Anti-fraud coordination service* is the DLNF (National Anti-Fraud Unit). Created in 2008, it was designated as the French AFCOS by the Minister for the Economy in May 2013. Its role is not to replace existing actors in charge of the fight against fraud affecting the financial interests of the EU, but to coordinate their actions. It does not have any investigative or operational powers (as it is also the case more generally for national matters). Acting as the national correspondent of OLAF,¹⁵ the missions of the DLNF are to facilitate and promote OLAF’s action: by identifying the appropriate contact or where to find the desired information; and through training seminars, awareness-raising and exchange of good practices initiatives. It fulfils its missions on a subsidiary basis. Its intervention is far from being automatic. The DLNF intervenes in case of difficulties (prolonged silence or inertia of an administration requested by OLAF) or where ‘sensitive’ cases are concerned.

Regarding the operational cooperation with OLAF, it is possible to distinguish 3 types of actors¹⁶ granted with investigative powers.

First, the administrative investigation services. This is where the greatest variety and complexity prevail. It is necessary to distinguish between the control of the revenues, where the essential part is carried out by the Customs Administration.¹⁷ In this case, investigations, although of an administrative nature, are carried out by officers granted by law with judicial police powers¹⁸ in accordance with Articles 15, 3° CPC and 28 CPC.¹⁹ However, they do not act on the basis of the CPC, but on the basis of these special laws, such as for instance the customs code. Expenditure control, on the other hand, is divided between several administrations, each of which intervenes within their area of competence and according their specific status and powers (under the supervision of the French Court of Auditors). However, two entities exercise centralized

and capable of intervening in three distinct areas: the regulation of a specific sector of the economy (which is the case of the counterparts of ECB, ESMA and DGComp), the protection of freedoms, the functioning of relations between the administration and the citizens; cf. among an abundant literature: ‘Les autorités administratives indépendantes’, (2010) *Revue Française de Droit Administratif*, special issue; *Les autorités administratives indépendantes, Rapport public du Conseil d’État* (2001), Études et documents, La Documentation française.

14 Result of numerous and disordered evolutions, this model remains incomplete; cf. ‘Les AAI: une rationalisation impossible’, (2010) *Revue Française de Droit Administratif*, p. 873f; see also the Law No. 2017-55, 20 January 2017, on the general status of independent administrative authorities and independent public authorities.

15 Within the Ministry of Justice, the head of the Bureau du droit pénal économique et financier (DACG) also acts as a contact for OLAF.

16 Subject to what will be said below, they may often intervene cumulatively (either consecutively or simultaneously).

17 S. Détraz, ‘Douanes. – Procédure’, *JurisClasseur Droit pénal des affaires*, Fasc. 20; V. Courcelle-Labrousse, ‘Les enquêtes de la douane’, (2015) *AJ Pénal*, p. 118.

18 As opposed to administrative police powers aimed at protecting – through the use of preventive measures – public order, judicial police powers designate all the acts participating in the detection and finding of offences.

19 The civil servants and agents belonging to the administrations and public utilities to whom special laws grant certain judicial police powers exercise powers under the conditions and within the limits these laws lay down.

coordination and cooperation functions with OLAF:²⁰ the Interministerial Commission for the Coordination of Controls (CICC)²¹ and the Commission for the Accreditation of Accounts of the Paying Agencies of Expenditure financed by the European Agricultural Funds (CCCOP).²² Officers in these administrations may have powers to request documents and to carry out on and off-site inspections, but do not in principle have powers of judicial police.

Second, the judicial investigation services. As stated by the Examining Chamber (*Chambre de l'instruction*) of the Colmar Court of Appeal in the recently decided case concerning the Center for the Development of Enterprise (CDE),²³ 'OLAF is the direct interlocutor of the police and judicial authorities'. Thus, its partners are particularly the judicial police services acting under the authority and direction of the public prosecutor. Although other public prosecutors' offices,²⁴ given the territorial distribution of competences, may exercise concurrent jurisdiction, in many cases competence will rest with the Financial Prosecutor's Office (Parquet National Financier) recently created by Law No. 2013-117 of 6 December 2013.²⁵ The Financial Prosecutor's Office has a national jurisdiction over economic and financial matters in the Paris District Court (TGI). It works in parallel to the Paris office of the district Prosecutor and the other regional Public Prosecutor offices. It has exclusive jurisdiction over stock market offences (and related offences) and a concurrent jurisdiction for a limited list of offences,²⁶ where the case meets the legal criterion of 'great complexity'. It can rely on a special investigative department: the Central Office for the Fight against Corruption and Financial and Tax Offences (OCLCIFI).

Thirdly, 'Hybrid'²⁷ investigative services consisting of judicial investigating officers, that is to say public officers who are not *stricto sensu* part of the judicial police but who are specially authorised to act on the basis of the Criminal procedure code with a limited material competence but a territorial competence of national scope. It is the case of the National Judicial Customs Service (*Service National de la Douane Judiciaire*) which has become since its creation in 1999, one of the main financial investigation service in France (art. 28-1 CPC).²⁸

Yet, according to some professionals interviewed, cooperation with OLAF is surprisingly rare. In comparison, the cooperation between OLAF and the administrative Customs services is much more developed. This can be explained by the relatively recent existence of the National Judicial Customs Service, but also by the number of cases handled by the Customs administrative services and the preference for administrative rather than judicial treatment of fraud cases in general, irrespective of whether they concern national or European financial interests. 'Judicial tax officers' have also been created on the model of the 'judicial customs officers' in 2009 (art. 28-2 CPC).

20 L. Saidj, J.L. Aubert, *Finances publiques* (2015), p. 232 f.

21 <<http://www.economie.gouv.fr/dnlf/cicc>>.

22 <www.economie.gouv.fr/dnlf/cccop>.

23 Cour de cassation, chambre criminelle, 9 December 2015, No. 15-82.300.

24 In practice, OLAF forwards the results of its investigations to the Paris Public Prosecutor, which, if necessary, sends them to the competent public prosecutor (for example, see, among others, the aforementioned case of the CDE: Cour de cassation, chambre criminelle, 9 December 2015, No. 15-82.300).

25 Supplemented by the Decree No. 2014-64, 29 January 2014. See also the circular of 31 January 2014, concerning the Financial Public Prosecutor (<http://www.textes.justice.gouv.fr/art_pix/JUSD1402887C.pdf>).

26 Art. 705 CPC.

27 G. Roussel, 'Police judiciaire', (2014) *Répertoire Dalloz*, no. 294.

28 M. Dobkine, 'La douane judiciaire, premier bilan d'une police thématique', (2002) *Dalloz*, p. 3284.

Competition law

The *Autorité de la concurrence (ADLC)*²⁹ is an independent administrative authority seated in Paris, specialised in supervising anticompetitive practices. The Authority is competent for the application of both national (Book IV of the French Commercial Code) and European legislation (Articles 101 and 102 of the TFEU). It has the power to issue injunctions, impose fines, accept commitments and grant leniency. Its decisions on anticompetitive practices are subject to the control of the Paris Court of Appeal. Its decisions on mergers are subject to the review of the French Administrative Supreme Court (*Conseil d'Etat*). The duties entrusted to the Competition Authority are performed by the Board. The Authority has a large investigation service composed of specialized investigative officers and directed by the *Rapporteur* general. The Authority is the competent national authority for the cooperation with the Commission or national competition authorities of other Member States (L450-1 and L462-9 ComC). It takes part in the activities of the European Competition Network (ECN).

Law on CRA's/TR's

The *Autorité des marchés financiers (AMF)*³⁰ is an independent administrative authority, seated in Paris and granted with administrative enforcement powers. It acts on the basis of the Monetary and Financial Code (and the AMF General Regulation). It is composed of a Board, chaired by the Chairman of the AMF, which adopts regulations, examines individual cases investigated by the AMF, and initiates the sanction procedure. The power to impose sanctions is given to the Enforcement Committee which enjoys full decision-making autonomy. In the performance of its duties, the AMF carries out investigations (*enquêtes*) and inspections (*contrôles*). The purpose of investigations is to identify market offences, whether they are committed by a listed company, an individual or institutional investor, or a market professional.³¹ The purpose of inspections is to ensure that professionals regulated by the AMF and the individuals acting under their authority or in their behalf meet the professional obligations set out in the Monetary and Financial Code, the AMF General Regulation and AMF-approved professional rules.³² The difference between investigations and inspections is not only due to differences in the aims pursued but also to the difference in the powers granted to investigators and inspectors; investigations being more 'coercive' and intrusive than inspections.

Following the adoption of EMIR, the French legislator has adapted the powers of the AMF.³³ According to Art. L544-4 of the Monetary and Financial Code, it 'is the competent authority within the meaning of Regulation (EC) No. 1060/2009 of the European Parliament and the Council, of 16 September 2009, on the credit rating agencies'. In 2010, Art. L621-9 had been

29 P. Arhel, 'Concurrence (Règles de procédure)', (2016) *Répertoire Dalloz Droit commercial*; L. Vogel, J. Vogel, *L'enquête de concurrence* (2016); L. Vogel, *Traité de droit économique, Tome 1 Droit de la concurrence* (2015).

30 A. Couret, H. Le Nabasue, M.L. Coquelet, T. Granier, D. Poracchia, A. Raynouard, A. Reygobellet, D. Robine, *Droit financier* (2012).

31 AMF, *Investigation Guide* (13 November 2014).

32 AMF, *Inspection Guide* (30 September 2014).

33 T. Bonneau, *Régulation bancaire et financière européenne et internationale* (2016); M. Roussille, 'Mutations des pouvoirs de l'AMF à l'occasion de l'entrée en vigueur d'EMIR', (2014) *Revue de droit bancaire et financier*, commentaire 23; D. Bompont, 'Les beaux cadeaux du 10e anniversaire de l'Autorité des marchés financiers', (2013) *Bulletin Joly Bourse*, no. 12, p. 607; M. Galland, 'Évolution des pouvoirs de l'AMF en matière d'enquête et de contrôle', (2013) *Bulletin Joly Bourse*, no. 12, p. 595; A. Millerand, 'La vigilance s'impose face au nouveau renforcement des pouvoirs de l'Autorité des marchés financiers', (2013) *Droit des sociétés*, alerte 67.

modified in order to vest the Authority with the powers to supervise and investigate on credit rating agencies; this provision has been repealed in 2013. Though these specific provisions (on the power of the AMF to carry out investigations on CRA) have been repealed and no specific provisions have been inserted since in the MonFinC in order to specify the conditions of the cooperation with ESMA, the Authority may apply its powers to comply with the requests of the European body on the basis of the general provision of art. L544-4 MonFinC.³⁴

Besides, according to Art. L621-9, it is charged with supervising trade repositories ('3° *dépositaires centraux*').³⁵ The AMF is the French competent authority in the sense of art. 74 of EMIR. Art. L621-18-7 refers explicitly to the European provision and enables the AMF to receive delegation from ESMA regarding supervision of trade repositories.

Similar provisions as those cited below regarding the ACPR has been inserted in order to vest the AMF with a general competence to supervise within its remit compliance with European regulation (Art. L621-9 MonFinC).

Banking law

The *Prudential Supervision Authority (ACPR)* is the national supervision authority for France for the purpose of the single supervisory mechanism (SSM). Seated in Paris, it is an independent administrative authority attached to the *Banque de France* (its chairman is the governor of *Banque de France*). It is charged with preserving the stability of the financial system and protecting the customers, insurance policyholders, members and beneficiaries of the persons that it supervises. It is composed of a supervisory college (chaired by the Governor of the *Banque de France*), a resolution college (tasked with supervising the preparation and implementation of measures to prevent and resolve banking crises) and a sanctions committee (responsible for punishing violations of the laws and regulations applicable to reporting institutions). Its statutory objectives, scope of competence and powers are set out in the Monetary and Financial Code (Art. L 612-1 et seq.). Besides, its supervisory powers, it has the power to impose administrative enforcement measures and disciplinary powers. The Monetary and Financial Code has been adapted in 2013 by the Ordinance No. 2014/1332 in order to facilitate the cooperation with ECB within the framework of the SSM.³⁶ Following the adoption of EMIR, the legislator has adapted the powers of the ACPR. In order to acknowledge the use of regulations instead of directives, it has been vested with a general competence to supervise within its remit compliance with European regulation (Art. L612-1).

For the purpose of the single supervisory mechanism, the ACPR is the national competent authority for France in the sense of regulation No. 1024/2013. In this capacity, the ACPR assists ECB in the performance of its prudential supervisory tasks (see Art. L612-1, IV which refers to Art. 9.1 of Regulation 1024/2013). On request of the ECB, it may use its supervisory and controlling powers (see also, art. L612-38, which refers to art. 18.5 of the same regulation).

34 On the uncertainty however concerning the exact powers available (all, investigative or inspection powers?) in such circumstances, see below.

35 T. Bonneau, 'Les trade repositories', (2013) *Revue de droit bancaire et financier*, no. 5.

36 A. Prum, 'L'union bancaire et les autorités de surveillance nationale', (2014) 4 *Revue de droit bancaire et financier*; J. Lasserre-Capdeville, 'Adaptation du Code monétaire et financier au nouveau mécanisme de surveillance unique par l'ordonnance n° 2014-1332 du 6 novembre 2014', (2015) 1 *Revue de Droit bancaire et financier*, alerte 1; Mathieu Françon, Sylvain Combeaud, Christiane Bruyelle, 'Le mécanisme de surveillance unique. – Missions et prérogatives de la BCE', *JurisClasseur Banque*, Fasc. 45.

8.2.2 Legal framework

The examination of the legal framework applicable to the different partners of the four European bodies provides an opportunity to observe the presence or the absence of a legal basis specifically dedicated on the one hand to the recognition of the action and powers of the European body in question and on the other hand to the organization of the cooperation between the latter and the competent national authorities.

As already mentioned, the ‘legal silence’ that surrounds in French Law OLAF’s action and the cooperation with national authorities is a crucial issue because, as it is confirmed by the professionals met, this presence (or absence) determines the proper conduct and the success of the investigations carried out. More specifically, it is not just the existence of such provisions that matters. What counts is also their degree of precision. Indeed, the aim is to specify in advance the powers available, to avoid mechanisms of ‘self-censorship’ by the national authorities (who may be afraid to jeopardize their own investigations given the limited and uncertain procedural status of OLAF within French criminal proceedings), to remove the opacity and uncertainty that hinder OLAF’s action and finally to secure proceedings. On the latter point, the recent case-law of certain Courts of Appeal but also of the Criminal Chamber of the Court of Cassation on the procedural status of the actions accomplished by OLAF illustrates how detrimental the absence of an *ad hoc* legal framework may be. In the continuation of the above, for all the partners of the EU authorities, there is no explicit or special provision on the thresholds to be applied in proceedings carried out on request of EU authorities. Therefore, national thresholds (where any) apply in these circumstances.

EU Financial interests

In the absence of explicit and specific provisions, cooperation with OLAF relies on general rules. Certainly, the EU dimension of the fight against fraud has been incorporated through an important Circular on the Criminal policy in the field of the protection of the financial interests of the EU in 2002, which maps the French actors of the PIF sector. But it has never been updated despite the considerable changes of both the EU and the French anti-fraud legislative frameworks.

Likewise, article 28-1 CPC, which specifies the remit of judicial powers granted to specially authorised customs officers (‘hybrid’ investigators), explicitly refers to ‘offences relating to the protection of the financial interests of the European Union’. There is no doubt that this provision is important because it reflects the importance accorded to the Union’s financial interests. Above all, it gives the ‘composite’ category of fraud against financial interests legal recognition. However, if it allows the SNDJ jurisdiction based on the CPC to be activated, it does not say anything about the place and role of OLAF vis-à-vis the French authorities within criminal proceedings.

Finally, the European dimension of the fight against fraud is also taken into account by the judges, and especially the criminal judge. In its benevolent case law in favour of the exorbitant powers of customs officials (administrative investigators), the Criminal chamber of the Cour de cassation refers frequently to the objective of constitutional value of fight against fraud. The Court has extended this objective effectively recognised by the Constitutional Council to the fight against the offences affecting the financial interests of the EU.³⁷ However, again, this recognition

37 Cour de cassation, Chambre criminelle, 5 October 2011 (Non lieu au renvoi d’une question prioritaire de constitutionnalité, No. 11-90.089): ‘attendu que la question posée ne revêt pas un caractère sérieux dès lors que

– at the constitutional level³⁸ – fails to avert the weaknesses and obstacles resulting from the absence of special provisions.

Thus, in spite of the above, no national text – statutory or regulatory – organizes cooperation with OLAF. Of course, the duty to report irregularities and fraud is recalled systematically in the memos, but operational cooperation is not precisely organized. However, interviews with professionals from both administrative and judicial services indicate that cases of fraud affecting the EU budget, including cases referred by OLAF, systematically lead to the initiation of an investigation. In the judicial field, such cases are always considered as ‘cases to be investigated’. However, they are not considered – as a matter of principle – as priorities. This approach, however, is not the result of a text but of the practice of public prosecutors’ offices. In the area of administrative investigations, in particular Customs, cases relating to the financial interests of the EU are subject to systematic and priority treatment.

Thus, the practice somehow succeeds in mitigating the lack of text. However, while the issue of protecting the EU’s financial interests appears to be integrated into the functioning of the authorities responsible for the fight against fraud at national level, express provisions would ensure better knowledge by these authorities of OLAF’s action and would constitute a ‘political’ signal essential to the effective mobilization of services in support of this action. Above all, this absence of texts at the national level is detrimental to the exercise of cooperation, its efficiency and effectiveness. As regards the communication of information to OLAF and the ‘judicialization’ of OLAF’s administrative investigations, these two essential conditions for the fight against fraud are hampered by the absence of an indisputable basis on which the French judicial authorities can rely.

The risk of nullity, which might weaken or even bring to naught the investigative work, leads the national judicial authorities bound by the secrecy of the investigation to observe very great caution regarding the official communication during the investigation. Thus, article 11 CCP provides that ‘except where the law provides otherwise and subject to the defendant’s rights, the inquiry and investigation proceedings are secret’. If, however, several statutory provisions derogating – implicitly or explicitly – from Article 11 of the Code of Criminal Procedure, do authorize or require the communication to third parties of all or part of elements of the case file, there is no provision for OLAF. However, such communication is often foreseen in a public interest for the benefit of jurisdictions, administrations (the tax administration³⁹ or Customs,⁴⁰ for instance) or administrative authorities with sanctioning powers (this is the case in particular with the ADLC⁴¹).

Because of the lack of judicial powers entrusted to OLAF, the Office is given the narrow status of ‘qualified persons’ (art. 60 and 77-1 CCP) or experts whose interventions in the course of the proceedings can only be limited.

les textes précités ne méconnaissent à l’évidence aucun des droits ou principes que la Constitution garantit; que les droits de visite et de vérification exercés par les agents des douanes, sous le contrôle d’un juge, répondent, sans disproportion, aux objectifs de valeur constitutionnelle de lutte contre les fraudes transfrontalières et les atteintes aux intérêts financiers de l’Union européenne’. In the same way, Cour de cassation, Chambre criminelle, 21 March 2012, No. 12-90.006 (art. 60 CD); Cour de cassation, Chambre criminelle, 13 June 2012, No. 12-90.026 (art. 67 CD), No. 12-90.025 (art. 60 CD).

38 According to the Cour de cassation.

39 Art. 82 and 101 du Livre des Procédures fiscales.

40 Art. 343bis CustC.

41 Art. L462-3 and L463-5 ComC.

In the absence of *ad hoc* texts, it is necessary to rely on the existing general texts to legitimize OLAF's action within the framework of French criminal proceedings. But this route shows very quickly its limits as illustrated by the recent jurisprudence of the Courts of Appeal and the Criminal Chamber of the Court of Cassation.

It is only in the context of Articles 60 and 77-1 of the CCP that the circulation of information from the file of the proceedings, on the one hand, and OLAF's participation in the investigations, on the other, appear to have a legal basis. Where the requirements laid down in these texts are met, OLAF is therefore granted the status of 'qualified persons' to whom documents may be transmitted and requests for expert opinions (which may take the form of a report) may be addressed. Thus, the Court of Appeal and the Criminal Chamber of the Court of Cassation first refused to annul the report provided by OLAF in a long-running case which has seen several twists and turns.⁴² Although the national investigation had been initiated on the basis of an OLAF investigation carried out previously and in parallel, the court considered it was sufficient to note that 'the (OLAF) experts did not rely on information that was not in the case file'. We can see here, despite the refusal of the judges to admit it, the weakness of the artifice of making OLAF a mere expert.

More broadly, the silence maintained by the French legislature has also important consequences for the case-law of the Court of Cassation concerning the judicial review exercised by French judges on acts and reports adopted by OLAF.⁴³

Competition law

Art. L470-6 ComC offers an explicit and general legal basis for the application by the ADLC of all its investigative powers when applying art. 101 and 102 TFEU in general and in particular, when it acts on request of the Commission.⁴⁴ The same rules apply to proceedings regarding European or domestic cases.⁴⁵ A specific provision is dedicated to the exchange of information on the request of the Commission and within the ECN (and L462-9 ComC).

Law on CRA's/TR's

As noted above, the Monetary and Financial Code has been adapted in 2013 in order to take account of the new powers of ESMA. However, provisions on TR's are more explicit and detailed (Art. L621-18-1; L621-9, par.22 MonFinC) than those related to CR's (L544-4 MonFinC). As regards

42 Chambre criminelle, 16 January 2013 (No. 12-84.221), 10 November 2015 (No. 15-82.497); 9 November 2016 (No. 16-83.602).

43 See below, 8.4.

44 This text was amended by Ordinance No. 2004-1173 of 4 November 2004 in order to enable investigators to use not only the powers recognized by Book IV of the Commercial Code but also those recognized by Regulation 1/2003 / EC; P. Arhel, 'Adaptation du droit national au droit communautaire de la concurrence', (2004) *La Semaine Juridique Editions Entreprise*, No. 51, p. 2010; E. Claudel, 'Ordonnance 2004-1173 du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence', (2005) *Revue Trimestrielle de Droit commercial*, p. 60.

45 In particular, investigations must be conducted in accordance with Arts. L. 450-1 et seq. of the French Commercial Code. If the assistance of the national authorities is in principle only required when the undertaking expresses its opposition, it may also be applied for as a preventive measure, with a view to overcoming any opposition by the undertaking. It is thus not necessary to establish beforehand that the undertaking in question had opposed the verification or to establish a special risk of opposition on the part of that undertaking. In other words, the court is not obliged to find that the undertaking had already opposed the verification or to characterize a particular risk of opposition by the latter.

cooperation with ESMA, the AMF exercises the powers of the competent national authority under EU law.

As a result, general rules on (domestic) investigations should apply. However, certain doubts and questions remains unanswered. Indeed, the general character of the reference to the powers of the AMF⁴⁶ does not make it possible to determine whether and to what extent it is all the powers at its disposal that can be mobilized in the cases here envisaged or whether it is necessary to distinguish between the investigative powers – the most extensive and coercive – and the (more limited) powers available within the framework of inspections.⁴⁷ According to the professionals interviewed, to date (december 2016), ESMA has not delegated to the AMF a supervisory mission concerning a credit rating agency and has not requested the assistance of the AMF to carry out its mission. There are therefore for the moment no precedents in this respect.

Banking law

As noted above, the Monetary and Financial Code has been adapted in 2013 by the Ordinance n° 2014/1332 in order to facilitate the cooperation with ECB within the framework of the SSM and specific provisions on the cooperation with ECB have been introduced (Art. L 612-1 V and Art. L612-38 MonFinC). As regards cooperation with ECB, the ACPR exercises the powers of the competent national authority under EU law. General rules on (domestic) investigations apply.

8.2.3 Interactions between administrative and criminal proceedings

The articulation of administrative investigations and criminal investigations raises two questions: that of the circulation of information and that of the coordination of investigations. On both these grounds, French law provides partial and uncertain answers.

In general, again, the impact on administrative proceedings of the opening of criminal proceedings is generally not or poorly regulated.

As regards the circulation of information and documents of a case file, it is on the whole – subject to the obligation to inform the territorially competent public prosecutor⁴⁸ – for the case-law of the Court of Cassation to set out the applicable framework.⁴⁹

As regards the coordination of procedures, it should be recalled that the French system has long favoured the possibility to duplicate – in parallel or consecutively – criminal and administrative

46 Concerning Art. 621-9 MonFinC: ‘As well as for the ACPR, [Art. 15bis C] insterts a general competence for the AMF to supervise the provisions of the directly applicable European regulations. To this end, it may use its usual powers of inspection, investigation, injunction and sanctions’ (‘de même que pour l’ACPR, [l’art. 15bis C] introduit une compétence générale de l’AMF de supervision des dispositions des règlements européens directement applicables. Elle pourra utiliser, à cette fin, ses pouvoirs habituels en matière de contrôle, d’enquête, d’injonction et de sanction’), R. Yung, *Rapport fait au nom de la Commission des finances sur le projet de loi, adopté par l’Assemblée nationale, de séparation et de régulation des activités bancaires, Sénat*, No. 442, tome I: <<https://www.senat.fr/rap/112-422-1/112-422-11.pdf>>.

47 In the same way, see also M. Roussille, ‘Mutations des pouvoirs de l’AMF à l’occasion de l’entrée en vigueur d’EMIR’, (2014) *Revue de droit bancaire et financier*, commentaire 23.

48 See Art. L612-28 MonFinC for the ACPR; Art. MonFinC for the AMF; Art. L462-6 ComC for the ADLC. More broadly, Art. 40 CPC states that: ‘Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents’.

49 See below 8.4.

investigations and prosecutions and the possibility for administrative and criminal sanctions to be accumulated.

Indeed, constitutional standards have long been limited to requiring compliance with the principle of proportionality, *i.e.* to verify that the overall amount of any penalties imposed may not under any circumstances exceed the maximum incurred for any of the penalties imposed.

It should also be recalled that, in practice, in proportion to the total number of cases dealt with, there is little duplication of proceedings: most of the proceedings are of an administrative nature, so that the main effect (one could say function) of the possibility for proceedings and/or sanctions to be cumulated is to strengthen the powers of the administrative authorities.

But it is also possible to conceive of such accumulation as a duplication (or a transfer) of judicial police powers. In this sense, independent administrative authorities with investigative and sanctioning powers can be considered as ‘sectoral judicial police’.⁵⁰ This is particularly the case when, like the ADLC or the AMF, they can implement their investigative powers not in the service of regulation but in the service of the judicial authority, in other words, not to find administrative breaches but to find criminal offences. But it is also the case of the ACPR whose role of assistance of the judicial authority appears no longer direct but indirect.

However, this model has recently been shaken by the case law of the ECHR⁵¹ and the ECJ.⁵² As a result, we must now take into account a legal landscape deeply renovated. And the renovation does not seem to be completed. Thus the law of the financial markets has been profoundly modified very recently. At the same time, the case-law of the Constitutional Council continues to evolve rapidly in directions, if not contradictory, in any case uncertain.

Competition law

Administrative proceedings against undertakings and legal persons (Art. L420-1 and Art. L420-2 ComC) brought before the ADLC and criminal prosecutions initiated against natural persons (Art. L420-C ComC) before criminal courts were intended by the legislator to be totally independent from each other. The financial penalty imposed by the ADLC does not preclude criminal sanctions from being imposed by criminal courts, in case of a fraudulent personal and decisive participation to a cartel offence, without this resulting in an accumulation of penalties as such. Indeed, the conducts prohibited differ and penalties are imposed on different persons. With respect to anti-competitive practices, most proceedings and penalties are of an administrative nature.

Administrative and criminal enforcement mechanisms are not coordinated. Each authority may initiate proceedings at any time. It will have no impact on other proceedings that may have been already initiated or that may be initiated at a later stage. Public prosecution may be instituted without the intervention of the ADLC; it is particularly the case where a victim files a complaint with a civil party petition. The fact that enforcement proceedings are on going before the ADLC is irrelevant. By virtue of Art. L 462-6, subpar. 2 ComC, the Competition Authority refers the case to the district prosecutor ‘where it considers that the facts require application of’ criminal sanctions. Such referral does not preclude administrative proceedings from continuing before the ADLC. There is not either any coordination between the leniency procedure before the

50 T. Achour, ‘La justification du pouvoir de sanction des AAI de régulation est-elle toujours pertinente ?’, (2013) 3 *Revue Internationale de Droit Pénal*, p. 463.

51 Especially the *Grande Stevens* case (4 March 2014, No. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10).

52 Notably the *Åkerberg Fransson* case, C-617/10, *Åkerberg Fransson*, [2013].

Competition Authority and criminal prosecutions, even though, the ADLC does not refer the case to the district prosecutor where a leniency program has been implemented. In such a case, the public prosecutor's office may consider public prosecutions inappropriate. However, this does not preclude victims from bringing legal action, especially before the investigative judge.

The autonomy of proceedings has one limit, due to the effect of limitation periods: the running of the limitation period is suspended, when the Competition Authority is consulted (Art. L462-3 ComC). If the Competition Authority refers a case to the district prosecutor, such referral suspends the limitation period for public prosecution (Art. L462-6 ComC). In 2001, the Law *NRE* has revised Art. L420-6 ComC in order to take into account the consequences on criminal prosecutions of the length of the proceedings before the administrative Authority. Hereafter, acts interrupting the running of the limitation period for actions before the Competition Authority also interrupt the running of the limitation period for criminal prosecution. Since 2008, the reverse is also true (Art. L462-7, subpar. 2 ComC).

Besides, according to art. L462-9 CC, assistance requested by a foreign authority exercising similar powers that involves investigations or the transmission of information held or gathered by the Competition Authority shall be refused if criminal proceedings have already been instituted in France on the basis of the same facts and against the same persons, or if those persons have already been subject to a final decision for the same facts.

Financial law

As an indirect consequence of the *Grande Stevens* ruling of the ECHR and a direct consequence of the decision of the Constitutional Council of 18 March 2015, commented on below, which repealed the provisions of the Monetary and Financial Code enabling the double prosecution in the field of market abuse, Law No. 2016-819 of 21 June 2016 'reforming the market abuse enforcement system' introduced a new mechanism for the coordination of administrative and criminal prosecutions. The new Article L. 465-3-6 institutes reciprocal obligations for the AMF and the Financial Prosecutor's Office.

According to this text, the Financial prosecutor cannot initiate public prosecution regarding offenses against market transparency when the AMF has notified the statement of objections for the same acts and in respect of the same person pursuant to Article L. 621-15 of the Monetary and Financial Code. Similarly, the AMF may not proceed to the notification of the statement of objections to a person against whom public prosecutions have been set in motion for the same acts by the Financial prosecutor. The law requires each of these authorities to inform the other of its intention to prosecute the facts.

If the notified authority indicates within two months that it intends to prosecute the same acts and against the same person, the first authority shall have a period of 15 days to confirm its intention to prosecute and bring the matter to the Prosecutor General before the Paris Court of Appeal. The prosecutor General has then a period of two months to authorize or not the Financial prosecutor to initiate public prosecution. In the absence of such authorization, the AMF may proceed to the notification of the statement of objection. The decision of the Prosecutor General of the Paris Court of Appeal is final and not subject to appeal.

In the future, this mechanism could constitute a model for coordination between independent administrative authorities and judicial authorities. However, such a coordination is not always necessary. Indeed, the sinusoidal jurisprudence of the Constitutional Council shows that the accumulation of prosecutions and sanctions is far from being always prohibited.

***Ne bis in idem* in the recent case law of the Constitutional Council**

According to the French Council which refuses to recognize any constitutional value to the *ne bis in idem* principle, the principle of the necessity of offences and punishments⁵³ does not prevent the same acts committed by the same person from being subject to different prosecutions for the purposes of administrative or criminal sanctions in accordance with distinct bodies of rules before different courts. If the possibility that two proceedings are initiated may result in cumulative penalties, the proportionality principle implies that the overall amount of any penalties imposed may not under any circumstances exceed the maximum incurred for any of the penalties imposed. However and while maintaining the aforementioned principles, on 18 March 2015,⁵⁴ the French Constitutional Council put an end to the cumulative prosecution before both the French Financial Markets Authority and the Criminal Courts, in insider trading cases. This limited reversal is the direct consequence of the *Grande Stevens v Italy* case rendered by the European Court of Human Rights. It set out four criteria to condemn double jeopardy from a constitutional perspective: the provisions apply to the same facts (because legal definition is essentially the same); they protect the same social interests; the penalties incurred do not differ in nature;⁵⁵ and they are not subject to different proceedings before different courts (meaning before judicial (or ordinary) and administrative courts⁵⁶).

Nevertheless, the situation is far from being settled. Indeed, first, on 14 January 2016, the French Constitutional Council decided that a person could be prosecuted for market abuses both by the administrative and criminal authorities because the nature of the sanctions, applicable at the time, was different.⁵⁷

Second and most importantly, in June 2016,⁵⁸ the case-law of the Council has made an important shift. In order to save the cumulative system applicable to tax fraud, the Council did not use the four criteria set out in 2015, which in themselves prohibit parallel or consecutive proceedings without awaiting a final decision. It discovered new basis to allow for the accumulation of criminal and administrative proceedings with respect to the most serious cases of fraud, namely the ‘complementarity’ of the proceedings deemed necessary to achieve the common purposes

53 Art. 8 of the Declaration of the Rights of Man and Citizen.

54 The English version of the decision is available on the website of the Constitutional council: <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality-qpc-/sample-of-decisions-qpc/2015/decision-no-2014-453-454-qpc-and-2015-462-qpc-of-18-march-2015.143596.html>>.

55 On 14 January 2016, the French Constitutional Council decided that a person could be prosecuted both by the administrative and criminal authorities if the nature of the sanctions was different. It ruled that it was the case of the penalties incurred for insider misconduct and insider offence when the maximum fines that could be imposed by the Enforcement Committee of the AMF were equivalent to criminal fines (i.e. before administrative fines could amount to 10 million euros while the maximum criminal fine was still 1,5 million).

56 This last criterion, after having been subject to harsh criticism, has been abandoned by the Council in its recent case law.

57 It should be noted that these are the same provisions as those that were repealed in 2015, but they were submitted to the Council in an earlier version. The provisions repealed in 2015 provided for an administrative fine of up to 1.5 million euros or ten times the amount of any profit made, which led the council to consider that they presented a nature which was no different from that of criminal sanctions. The provisions examined by the council in 2016 provided for a much lower administrative fine and in fact equal to the criminal fine. Consequently, the Council considered that the criminal and administrative penalties were different, in particular in view of the imprisonment incurred by the natural persons and the dissolution penalty incurred by the legal persons, so that the principle of necessity did not preclude the duplication of prosecutions or the accumulation of penalties (subject to the principle of proportionality).

58 Decisions No. 2016-545 QPC (*Alec W.*) and No. 2016-546 QPC (*Jérôme C.*).

of deterrence and effective enforcement.⁵⁹ The spirit and wording of this decision have met an unexpected echo within the most recent case law of the ECHR. Indeed, it is difficult not to note the similarities between the decisions adopted by the Council in the summer of 2016 and certain paragraphs of the *A and B v. Norway* ruling of the ECHR,⁶⁰ except for perhaps the criterion of the very serious nature of the conduct, which restricts the scope of the case law of the French Constitutional Council.⁶¹

8.3 ANALYSIS OF THE INVESTIGATORY POWERS

The overview of the national partners shows that one of the main difference between OLAF and the other EU authorities lies in the presence or absence of a specific national legal framework that sets out the conditions of the cooperation between the European body and its national partners. This is confirmed by the study of the investigative powers given to the different national counterparts of the EU authorities. Indeed, these powers are generally comparable to those available to OLAF partners; and sometimes, OLAF partners have even greater powers, as for example in the field of revenue fraud.

Moreover, not only are these powers broadly comparable, but they tend to be subject to the same constraints, requirements and standards as a result of a general process of judicialization (*i.e.* gradual dissemination of criminal procedural safeguards) and ‘jurisdictionalization’ (*i.e.* extension of the right to a judge and an effective remedy) of the investigation phase. This process is common to proceedings before the independent administrative authorities and to criminal proceedings, which are characterized in France by a common cultural background of inquisitorial inspiration. However, such a process, although incomplete, remains tightly circumscribed. The investigative phase continues to escape very widely from the adversarial principle. The ‘principle of fairness’, which applies at the outset of the investigation, is supposed to compensate temporarily – until the initiation of prosecutions – this deficit so that the rights of the defence are not irremediably compromised.

59 See para. 20 of the Council decision (No. 2016-545 QPC): the legal provisions examined ‘ensure the protection of the financial interests of the State as well as equality before the tax by pursuing common objectives, both dissuasive and repressive. Recovery of the necessary public contribution and the objective of combating tax evasion justify the initiation of complementary procedures in most serious fraud cases. In addition to the investigations at the end of which the tax administration applies financial fines, criminal prosecution under conditions and according to procedures organized by law can be initiated’.

60 15 November 2016, applications No. 24130/11 and 29758/11: in particular, see para. 121 (‘In the view of the Court, States should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road-traffic regulations or non-payment/evasion of taxes) through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned’) and 130 (‘Art. 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. In particular, for the Court to be satisfied that there is no duplication of trial or punishment (*bis*) as proscribed by Art. 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been ‘sufficiently closely connected in substance and in time’. In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected of the ruling’).

61 For all and among the many comments of the recent constitutional case-law, see J. Chacornac, ‘La diffusion de fausses informations à l’épreuve du principe de nécessité des peines: rétrospective et prospective autour d’une jurisprudence mal née’, (2016) 12 *Bulletin Joly Bourse*, p. 509f.

On the other hand, the comparison reveals common difficulties to the four European bodies. The first is due to the fuzzy and shifting nature of the separation between the exercise of supervisory or monitoring powers (which is pure regulation) and the exercise of investigative powers (which is a matter of regulation but also judicial enforcement).⁶²

This is particularly true of the three independent administrative authorities whose powers are based on the separation of supervisory or inspection powers from investigative powers. While the latter are closer to the powers of the judicial authorities, the former borrow more from the administrative tradition and profile of supervision (permanent or continuous and ‘general’). Thus, within the ADLC, we must distinguish between so-called ‘simple investigations’ (*enquêtes simples*) – supposedly non-coercive – and so-called ‘intensive investigations’ (*enquêtes lourdes*) – on the contrary coercive and therefore subject to stricter rules and a more frequent and/or more closer control by the judge. But to these two types of investigation, we must also add the ‘exploratory surveys’ (*enquêtes exploratoires*). They are symptomatic of the temptation to conceive the different frameworks of investigations as a continuum of powers serving essentially different purposes. These surveys, initiated by the General Rapporteur of the ADLC, prior to the opening of a possible proper investigation, concern politically and economically strategic sectors. If the initial analyzes resulting from this ‘exploratory’ phase justify it, the General Rapporteur can then propose to the Board to examine the practices in question within a formal investigation and thus to use the powers provided for in Articles L. 450-1 to L. 450-8 of the Commercial Code. However, there is considerable legal and procedural uncertainty concerning these large-scale sectoral investigations, in particular as regards the justifications for initiating such an investigation on a given sector and the nature of the investigations carried out by the agents.⁶³ Similar mechanisms exist for these exploratory surveys within the AMF and the ACPR with a view to supplementing or extending the diptychs which distinguish respectively between AMF inspections (*contrôles*) and investigations (*enquêtes*) and ACPR permanent control on documents (*contrôles sur pièces*) and on-site control (*contrôles sur place*).

The second common difficulty relates to the manner and extent to which French law organizes the protection, in the various administrative, judicial and/or ‘para-judicial’ proceedings examined here, against self-incrimination and the protection of legal privilege.

8.3.0 General remarks on the protection against self-incrimination and legal privilege

Prior to the presentation of the main investigative powers available to the partners of the four EU authorities when they are requested for assistance, two general remarks⁶⁴ concerning the right not to incriminate oneself on the one hand and legal privilege on the other.

Protection against self-incrimination

The right not to contribute to one’s own incrimination applies at the investigation stage to the various administrative procedures studied as well as, a fortiori, in the framework of criminal

62 In this sense, see T. Achour, *op. cit.*

63 E. Daoud, S. Albertin, ‘L’*autorité de la concurrence: les pouvoirs d’enquête au crible des droits de la défense*’, (2014) *Revue Lamy Droit des Affaires*, no. 93.

64 In paras. 8.3.1., 8.3.2., 8.3.3., 8.3.4., protection against self-incrimination and legal privilege will be discussed only where specific provisions or case law exist and/or differ from this general presentation.

investigations. However, it is narrowly conceived as illustrated by the jurisprudence of the Constitutional Council.

The latter seems to restrict this right to the prohibition of obtaining forced confessions. At the same time, the notion of confession is itself narrowly understood.⁶⁵

According to the Council, ‘the right conferred on officials to require the communication of information and documents (...) does not seek to obtain the confession of the person under investigation but tends to obtain documents necessary for the conduct of the competition inquiry. It follows that the contested provisions do not infringe the principle [according to which no person is to be compelled to accuse himself’] referred to in paragraph 11’.⁶⁶ In the past, with respect to the powers of Customs officers, the Council had held that the right to obtain disclosure ‘does not confer on those officers a power of enforcement to obtain the production of such documents’.⁶⁷ Similarly, the commentary⁶⁸ to this decision states that ‘the right not to incriminate oneself does not imply the right to obstruct investigative powers by retaining documents which may be used as grounds for its own accusation’. In the same vein, the commentary to Decision 2016-552, on the powers of ADLC agents states that ‘the right to silence recognized by the Constitutional Council can not mean that an individual can legitimately conceal or refuse to produce the documents required by the investigative bodies even if such documents are likely to compromise him. Recognizing such a scope to the right to silence would be tantamount to enshrining a right of the controlled person to obstruct the investigation of offences’.

In line with this case-law, French courts tend to have a narrow interpretation of this constitutional right, limited to the prohibition of unlawfully obtained recognition of ‘guilt’. For this reason, the extended powers to have access to all sorts of documents are barely limited by this right.

This narrow conception of the right not to incriminate oneself is further reinforced in two ways: on the one hand, with regard to the right to information enjoyed by persons under investigation and on the other hand because of the consequences that may result from the refusal to respond to investigators’ requests. As regards information, be it information relating to the benefit of the right itself, information relating to the subject-matter or reasons for the investigation or information relating to the identity of the investigators, it appears unevenly guaranteed. Thus, it is not required for the validity of the procedure that this right be reminded to the persons interviewed by the investigators.⁶⁹ This is particularly the case with the AMF. Furthermore, the right to remain silent does not preclude the possibility for the members of the Authority’s Enforcement Committee to draw from this silence any consequence relevant to their assessment.⁷⁰ As regards the information on the identity of the investigators, it may be delayed until notification to the person under investigation of the finding of the offence or infringement to be established (Art. L 450-3-2, I ComC). Furthermore, for ADLC and AMF agents, the Commercial Code (Art. L 450-3-0, II) and

65 G. Decocq, ‘Constitutionnalité du droit d’obtenir communication des documents professionnels de l’entreprise lors d’une enquête’, (2016) *Contrats Concurrence Consommation*, Comm. 221.

66 Conseil constitutionnel, 8 July 2016, No. 2016-552 QPC, para. 12.

67 Conseil constitutionnel, 27 January 2012, 2011-214 QPC, para. 6.

68 The exact status of such commentaries are however uncertain: they are official but do not amount to an authentic interpretation (*stricto sensu*) of the decision.

69 See for instance, AMF Enforcement Committee, 5 June 2013: ‘There is no requirement to warn the person who is requested to produce document that he/she is free not to do’.

70 C. Le Corre, ‘Les droits de la défense mis à l’épreuve par l’évolution des pouvoirs d’enquête de l’AMF’, (2014) *Revue Lamy de Droit des Affaires*, No. 93.

the Monetary and Financial Code (Art. L612-24 (ACPR) and L 621-10-1 (AMF)) provide for the possibility for investigators to use an assumed identity in certain investigations.⁷¹

However, to preserve the right not to incriminate oneself, courts require clear and precise information on the object of the measure and/or the investigation be given to the person concerned in order to allow said person to be capable of assessing the significance and implications of his/her statements. Yet, the obligation to indicate the subject of the investigation is most often fully satisfied only in the context of investigations requiring the authorization and supervision of the judge. Within the framework of ‘non-coercive’ investigations, such an obligation (which falls within the general requirement of loyalty applicable to the investigation phase) appears to be considerably more fragile.⁷² As for the consequences resulting from the refusal to respond to the investigators’ requests, they sometimes seem to contradict the affirmation of the right not to incriminate oneself.

Thus, obstructing or hindering the proper performance of an investigation (by refusing to submit the documents requested, providing inaccurate information or preventing investigators from exercising their investigative powers) is systematically subject to criminal penalties⁷³ and may also be subject to administrative penalties.⁷⁴

Although according to the professionals interviewed, which is confirmed by the small number of decisions published, prosecutions for obstruction are relatively rare, the mere threat of prosecution exercises a power of indirect ‘constraint’, subject to criticism.⁷⁵ This is why a think tank proposed modifying the wording of the offense of obstruction concerning the AMF with a view to clarifying that only positive acts aimed at undermining the proper conduct of investigations and not mere exercise of the right not to incriminate oneself are punishable.⁷⁶ But this proposal did not succeed.

Legal privilege

Within the framework of the investigating powers of the national counterparts of the EU authorities, professional secrecy is always subject to limitations: information, documents, etc. may not be withheld on the grounds of professional secrecy.⁷⁷

However, an exception is generally made for ‘officers of the law’, especially lawyers in order to guarantee the confidentiality of communication (with a defence/external lawyer)⁷⁸ and the rights of the defence. However, the possibility of ‘global seizures’ (*saisies globales*) – that is,

71 For the control of the sale of goods and the provision of Internet service for ADLC agents; in the framework of investigations into the compliance of financial services offered exclusively on the Internet by professionals subject to the AMF’s control as far as this authority is concerned.

72 Concerning competition investigations see: P. Arhel, ‘Concurrence (Règles de procédure)’, *Répertoire de Droit commercial*, no. 47-52 ; See also more broadly below.

73 Art. L642-2 MonFinC (for the AMF); L571-4 MonFinC (for the ACPR); L. 450-8 ComC (for the ADLC); concerning customs officers, there are several offences (misdemeanours: Art. 416 and 416bis CustC and petty offences: Art. 413 bis and 413 ter CsutC).

74 See notably Art. L621-12-II f MonFinC with respect to the AMF.

75 See also in the same way: M. Galland, ‘Évolution des pouvoirs de l’AMF en matière d’enquête et de contrôle’, (20130 *Bulletin Joly Bourse*, p. 595.

76 Le Club des Juristes, *Des principes communs pour les autorités administratives dotées d’attributions répressives*, May 2012, p. 51.

77 Art. L621-9-3 MonFinC (for the AMF); Art. L450-7 ComC (for the ADLC); Art. L64A CustC (for Customs officers); see also Art. L612-1 MonFinC (for the ACPR).

78 Art. L621-9-3 MonFinC (for the AMF); Implicitly Art. L450-4 ComC (for the ADLC); Art. 64§2 CustC (for customs officers).

the seizure of a whole e-mail account – has for a long time broken the principle of confidentiality of lawyer-client communications.

Although the case law has evolved, particularly with regard to investigations carried out by ADLC and AMF investigators, the protection of secrecy remains imperfect (see below).

8.3.1 The interviewing of persons and production orders

Interviewing of persons

As regards the power to interview persons, it is possible to distinguish between the power to summon and hear a person on the one hand and the power to receive information and justifications within the framework of the power to access business premises on the other hand (on-site interviews). This section deals only with the power to summon and hear persons. Access to business premises will be dealt with below (8.3.3.).

Such power is granted to all the counterparts of the EU authorities, either explicitly or implicitly. It is explicitly granted to investigators and inspectors of the AMF,⁷⁹ the Secretary General of the ACPR or his/her representatives.⁸⁰

It results implicitly from Art. 334-1 and Art. 336 CustC, as regards customs officers; and from Art. L450-1 Com.C, as regards investigators of the ADLC.

This power is generally considered as a non-coercive and mere administrative power: it does not require prior factual indications of an offence nor judicial authorisation. It may be used against any person, suspected or not. Provisions of the MonFinC only specify that, as far as AMF investigators and inspectors are concerned, they may summon and take statements from ‘any individual capable of providing information’ (art. L621-10); and, as far as the ACPR is concerned, that it may summon and hear any entity subject to its supervision or which it needs to hear in order to perform its supervisory duties.

To exercise this power, no formal decision is required.⁸¹ There are no specific provisions regarding self-incrimination or legal privilege. The right to have access to a lawyer is not explicitly regulated except for the AMF (Art. L621-11 MonFinC); in this framework, the person interviewed must be informed of his/her right to be assisted by a lawyer.

However, with respect to the interviewing of a person suspected of having committed a customs offence (‘plausible reasons to suspect’), Art 67D CustC requires customs officials, where they decide not to hold a person under customs custody (the ‘equivalent’ of a garde-à-vue decided by police officers), to notify that person of the rights set out in art. 61-1 of the criminal procedure code (information on charges, possibility to end the interview at any time, right to be assisted by a lawyer if the offence is a felony or a misdemeanour).

Productions orders

All counterparts of the EU authorities have the power to request and obtain records or documents (*droit de communication*).⁸²

79 Art. L621-10, para. 2 MonFinC.

80 Art. L612-24, para. 6 MonFinC.

81 Subject to the personalised inspection order given to AMF inspectors (see Art. R621-34 MonFinC and Art. 143-3 of the AMF General regulation) or letter of assignment given to the ACPR inspectors.

82 L621-10 MonFinC (AMF); L612-24 MonFinC (ACPR); Art. L450-3 ComC (ADLC); Art. 64A and 65 CustC (Customs officers).

This power may be exercised in writing or within the framework of the power to access premises (below 8.3.3.). It concerns all type of professional/business information, documents and supporting evidence,⁸³ regardless of their storage medium, which makes it possible to control unofficial documents or mixed documents such as internal memos, meeting reports, business agendas, even if they contain personal annotations, contracts, etc.⁸⁴ The request for communication must be formulated in a precise manner and must relate to documents which the investigators are aware of or are able to identify. In practice, the line is blurred and companies must be particularly vigilant since agents can also take any documents which have been given to them freely and without any constraint.⁸⁵

The measure applies to any person⁸⁶ as far as customs officials are concerned, and to any legal person (as well as the natural persons acting on their behalf) of interest, as far as AMF or ADLC agents are concerned, or susceptible to be subject to the supervision of the administrative authority, concerning ACPR agents.⁸⁷

Investigators and inspectors may exercise their right to request information from any person likely to provide information or documents connected with the inspection/investigation. Where appropriate, they may ask to be provided with a copy of the requested document.

As far as customs officials are concerned, it also applies to public administrations,⁸⁸ which are required to comply with the request to produce information and documents in their possession. It is considered as a none-coercive measure.⁸⁹ Records and documents are submitted on a voluntary basis even though refusal to hand them over is a criminal offence. The measure does not require a judicial authorisation or a formal decision, nor special grounds.

As stated above (8.3.0.), the Constitutional Council recognized the conformity with the Constitution of these provisions. In particular, it reaffirmed its position in a recent decision⁹⁰ on the powers conferred on ADLC officers under L 450-3 paragraph 4 ComC: 'If the contested provisions require that the authorized agents be given the documents requested by them, they do not confer on them a power of enforcement to obtain the communication of such documents, nor a general power of hearing or a search power'. As a result, only documents voluntarily disclosed can be seized. The fact that the refusal to hand over information or documents requested may give rise to an injunction under compulsory penalty imposed by the Competition Authority, an administrative fine imposed by that authority or a penal sanction does not confer a different scope

83 Art. 65 CustC: 'papers and documents of any kind concerning operations of interest to their service' (such documents are those which must be legally retained for 3 years since the expedition or reception of the products); Art. L450-3 ComC: 'all professional documents of whatever nature' (ADLC); Art. L621-10 MonFinC: 'for the purposes of the investigation, any document' (AMF); Art. L612-24, para 2 MonFinC: 'any information or documents (...) required to perform its duties' (ACPR).

84 E. Daoud, S. Albertin, 'L'autorité de la concurrence : les pouvoirs d'enquête au crible des droits de la défense', (2014) *Revue Lamy Droit des Affaires*, no. 93.

85 E. Daoud, S. Albertin, 'L'autorité de la concurrence : les pouvoirs d'enquête au crible des droits de la défense', (2014) *Revue Lamy Droit des Affaires*, no. 93.

86 Art. 65 CustC: 'any natural person or legal person directly or indirectly involved in regular or irregular operations falling within the competence of the customs authority'.

87 The measure applies also to parent companies and third parties to which the legal person under supervision has outsourced part of its activities (Art. L612-24 MonFinC).

88 Art. 64A CustC.

89 Constitutional Council, 19 January 1988, No. 87-240 DC (concerning the powers of the predecessor of the AMF).

90 Decision No. 2016-552 QPC, 8 July 2016.

to the powers vested in the authorized agents'. In this decision, labelled 'sophist' and 'artificial',⁹¹ the Council also states that 'the right conferred on officials authorized to require the production of information and documents (...) does not in itself disregard the rights of the defence'. In addition, it states that 'requests for the production of information and documents formulated (...) are not in themselves capable of adversely affecting the person subject to it'. It then considers that the right to an effective remedy before a tribunal is safeguarded to the extent that: 'If proceedings are brought against an undertaking following an administrative inquiry for anticompetitive practice or if a penalty payment or penalty is imposed on an undertaking, the legality of the requests for information may be challenged by way of a plea'. Furthermore, in the event of the illegality of those measures, even in the absence of a decision having an adverse effect, the damage may be remedied by means of an action for damages. It follows that the contested provisions do not affect the right of the persons concerned to have the competent courts review the investigative measures'.

8.3.2 The monitoring of banking accounts (real time)

Banking secrecy may not be opposed to national counterparts of EU authorities when they exercise their powers to access business premises, obtain information and, where applicable, search and seized documents.

However, the power to monitor banking accounts is only granted to tax and customs authorities.⁹² Tax officers (art. L96 of the tax procedure book) and customs officers (Art. 65, 1^o j, and 455 CustC) may obtain from banking institutions information on bank accounts and banking transactions. It seems that such information may be given in real time.

Though it is not an explicit power, according to case law,⁹³ those provisions grant customs officers with the same powers as tax officers. They do not require any judicial authorisation.

The judges verify however that the information requested concern transactions and operations within the remit of this administration.

Besides, police officers exercising their general power to order production of documents and information (within the framework of a flagrant or preliminary investigation) as well as judicial customs officers may also monitor bank accounts.

The public prosecutor's office must be informed of the measure. In practice, on the basis of the CPC (Art. 60-1, 77-1-1 or 99-3 CPC), the officer will have to issue regularly, in order to update the bank transactions, a production order either to the bank or to the Economic Interest Group 'credit card'.

91 G. Decocq, 'Constitutionnalité du droit d'obtenir communication des documents professionnels de l'entreprise lors d'une enquête', (2016) *Contrats Concurrence Consommation*, Comm. 221.

92 They also have access to the FICOBA (National central database on bank accounts).

93 Pannier, 'Le droit de communication de l'administration des douanes', (1989) *Revue de droit bancaire et Bourse*, p. 101.

8.3.3 The right to enter premises, including searches and seizure

Access to business premises

All the counterparts of the EU authorities have the power to access business premises.⁹⁴ This power entails the possibility to enter the premises, gather explanations on the spot from any person (interview). As a non-coercive measure, it does not require judicial authorisation or a formal decision (subject to the inspection mission order), nor specific grounds.

The scope of the measure is not always explicitly regulated. With respect to the powers of the Administrative authorities (ADLC, AMF, ACPR), it should be limited to the premises of the legal persons falling within the remit of the Authority. However, ADLC investigators (Art. 450-3 ComC) – like customs officers (art. 63ter CustC) – may also access means of transport for professional use.

In the absence of an explicit provision, administrative agents are authorized to access the premises during the opening hours of the company but also outside these times when the occupier accepts it. For ADLC agents, the measure may be exercised between 8am and 8pm,⁹⁵ in presence of the occupier of the premises or its representative; if the occupier/representative is absent, he/she is notified of the measure immediately after the performance of the measure. The duration is not strictly regulated and, for example, in the field of ADLC investigations, a duration of three days, given the number of documents communicated was deemed acceptable.⁹⁶ Any person whose interview may help the inspection or investigation, including representatives and employees of the inspected/investigated person and any third parties, may be interviewed at any stage of the inspection/investigation where required.

As regard inspection carried out by ACPR, the legal person concerned receives prior notification of the measure.

The threshold required are low: there is no need for factual indication of an offence, but merely the possible presence of information or documents useful for the investigation/inspection.

This measure, which requires consent, does not (in principle, see below the extended powers of customs officials) authorise inspectors and investigators to search (*fouille*) the premises or seized documents. The gathering of information and documents cannot be forced.⁹⁷ This is why access to business premises does not require judicial authorisation (see however the necessity for customs officials to inform the competent public prosecutor), nor a formal and or reasoned decision.

Assistance of lawyer is possible, but this right is rarely explicitly regulated: as regards access to premises by customs officers, ACPR and ADLC investigators, no special provision on legal assistance is foreseen;⁹⁸ by contrast, the right to be assisted by a lawyer (and informed of said right) is set out in Art. L621-11 MonFinC. In any case, the exercise of such right does not have the effect of postponing the performance of the measure.

94 Art. L450-3 ComC (ADLC); L621-10 MonFinC (AMF); L612-24 MonFinC (ACPR); Art. 63D CustC (Customs officers).

95 Art. 63ter CustC; Art. 450-3 ComC.

96 E. Daoud, S. Albertin, 'L'autorité de la concurrence: les pouvoirs d'enquête au crible des droits de la défense', (2014) *Revue Lamy Droit des Affaires*, no. 93.

97 Constitutional Council, 19 January 1988, No. 87-240 DC (concerning the powers of the predecessor of the AMF).

98 However a request in this sense may be made. In practice, the presence of the lawyer is generally allowed by ADLC agents provided that this does not hinder the proper conduct of the investigation.

In comparison, Customs officers are vested with extended powers: they may access all public premises at any moment and without requiring consent. They may control persons, goods and means of transports. With respect to business premises, they may access them, after prior information of the competent public prosecutor who may oppose to the performance of the measure (Art. 63ter CustC), between 8am and 8pm. Goods or samples may be retained.

Where they exercise their power to obtain communication of documents, pursuant to art. 65 CUsC, they may seize any documents (books, invoices, copies of letter, cheque books, bank accounts, etc.) likely to facilitate the performance of their mission.

Search and seizure

Except for the ACPR (see below), all EU counterparts have the power to ‘search’ professional and private premises and seize documents.⁹⁹

To exercise this power, common requirements must be met. The overall philosophy lies in the fact that, in order to counterbalance the increased powers given to the investigative officers in the framework of search and seizures, enhanced judicial scrutiny is organized upstream and downstream of the implementation of the measure.

Indeed, a prior judicial authorisation in the form of a reasoned ordinance handed down by the liberty and custody judge is first required. An appeal may be lodged against this decision (by the public prosecutor’s office or the person against whom the search was ordered) before the first presiding judge of the court of appeal. The appeal is non suspensive and may be subject to an appeal on a point of law before the *Cour de cassation*. The documents seized are kept until the decision becomes final.

The judge verifies that the application for authorisation is well founded.¹⁰⁰ The applicant must provide all the elements of information, which would justify an inspection.¹⁰¹ The authorization procedure may be carried out without prior notification of the undertakings concerned, in particular in order to retain the ‘surprise effect’, as in the case of the ADLC investigations.

Searches and seizures take place under the authority and supervision of the authorising judge who may visit the premises during the inspection or decide to suspend or terminate it. He/she appoints police officers required to be present to provide assistance (by performing any requisition necessary), inform the judge on the progress of the inspection and make sure that professional secrecy and defence rights (in accordance with art. 56 of the criminal procedure

⁹⁹ Art. 64 CustC; Art. L450-4 ComC; Art. L621-12 MonFinC.

¹⁰⁰ However, in practice, the requesting administration may prepare a draft authorization order, which the JLD endorses as a whole. A major dispute over ADLC’s investigations has developed on the issue of these pre-drafted orders, which raise doubts as to the JLD’s impartiality with respect to the administration, as well as on the effectiveness of the control of the grounds for the measure. However, the Court de Cassation continues to validate this practice. The Court considers that ‘the reasons and the operative part of the order made (...) are deemed to be established by the judge who made it and signed it; that such a presumption does not infringe either the principle of the separation of powers or that of the independence of the judiciary or those enshrined in the ECHR’, *Chambre commerciale*, 16 May 1995, No. 92-20.748; *Chambre Criminelle*, 27 February 2013, No. 11-88.471, *Bulletin des arrêts de Chambre Criminelle*, n° 51).

¹⁰¹ For instance, the application must be supported by all the elements justifying the measure, characterizing the existence of presumptions of anti-competitive practices and allowing the judge to base his decision. It can thus rely on a report established in the framework of a ‘simple investigation’, on the implementation of a leniency program or on an anonymous declaration when it is presented by means of a signed document drafted by officers of the authority and corroborated by other information (*Chambre criminelle*, 19 October 2011, No. 10-85.269).

code) are guaranteed. Where the inspection takes place in the office of a lawyer, the specific procedural safeguards set out in art. 56-1 of the criminal procedure code apply.

The degree of suspicion required refers to mere suspicions (i.e. information and documents of interest are likely to be found).

The power entails hearings, gathering of relevant information¹⁰² or explanations, taking of inventories, placing of seals,¹⁰³ search and seizure. It concerns both professional and private premises as well as vehicles belonging to the occupant and located within the premises of the enterprise, as far as ADLC and customs officers are concerned. Investigators may seize documents and any information regardless on the medium relating to the prohibited conduct referred to in the judicial authorization. The calendars in the premises visited may also be seized,¹⁰⁴ as well as documents that are only ‘in part useful’ to the establishment of the conduct, the documents thus forming ‘an indivisible and unique whole’. In any event, investigators are in principle obliged to initiate prior to seizure any measures necessary to ensure the observance of professional secrecy and the rights of the defence. Indeed, communications protected on this basis are in principle unseizable. They must be returned or destroyed if they have been seized by virtue of an overall measure covering other documents falling within the scope of the investigation. E-mails accounts can therefore be seized, even in their entirety. Thus, for a period of time, the undifferentiated seizure of all these elements has been allowed as long as the mailbox contained documents useful for the finding of the conduct. Thus, this practice (global seizure, then restitution on a case-by-case basis of those that could not be legally seized) had become almost systematic. This situation has been the subject of an abundant litigation which has led the Court of Cassation to review this system. Five decisions of 24 April 2013¹⁰⁵ have led to a change in case law: “The power conferred on agents of the Autorité de la concurrence (...) to seize documents and information is limited by the principle of defence rights, which requires confidentiality of correspondence between a lawyer and his client’. It follows that it is for the First President of the Court of Appeal to find that the seized documents are subject to the protection of professional secrecy between a lawyer and his client and to annul the seizure of such correspondence. The Court stated in this connection that the violation of professional secrecy occurs as soon as the document is seized by the investigators. But it left open the question of the perimeter of nullification. A decision of 27 November 2013 clarified that, since computer files may contain elements relevant to the investigation, the presence among them of unseizable documents cannot have the effect of

102 The investigating authority is therefore entitled to require passwords to access protected computer data. All passwords are affected: those that allow access to a session, those that allow access to data stored online in a cloud service, and those that protect specific files within sessions (C-H., Boeringer, ‘État des lieux des visites inopinées, perquisitions et gardes à vue dans l’entreprise: l’enjeu de la saisie des données’, *Revue des juristes de Sc. Po.*, 2015, 107).

103 In the context of competitive investigations, investigators may decide to affix seals to certain premises, documents and information media of the company before examining them. In practice, French competition agents affix seals to the parts of the company most directly targeted and break them as they progress. This affixing of seals is limited to the duration of the measure. It is necessary for the company to ensure their protection and avoid any breaking of seals. Substantial fines may be imposed in this case (Art. 434-22 Penal Code).

104 For example, the Competition Authority rejected arguments based on the allegedly ‘mixed’ and unprofessional nature of a seized agenda (17 January 2001 for example). Investigators, on the other hand, are not authorized to check the identity of a person or search his handbag unless they have been specifically authorized by the judge (Chambre commerciale, 19 December 1995, No. 94-10.581).

105 Chambre criminelle, No. 12-80.331; No. 12-80.332; No. 12-80.335; No. 12-80.336 and No. 12-80.346.

invalidating the seizure of all other documents'.¹⁰⁶ In addition, it was held that the cancellation of documents covered by professional secrecy was not incurred in case where 'the seized files were identified and then inventoried and where the plaintiffs, who had received a copy and had thus been enabled to know the contents, made no observations at the time when the measures were carried out and did not raise any evidence before the first President that certain of the documents could not, given their subject-matter, be seized'.¹⁰⁷

As regards the investigations of the *Autorité des marchés financiers* (AMF), it was held that the seizure may relate to documents prior to the facts under investigation, provided that these documents are relevant to the facts and may concur in the manifestation of truth.¹⁰⁸ As regards the question of documents covered by professional secrecy, the Commercial Chamber of the Court de Cassation has validated the seizure by investigators of correspondence covered by professional secrecy insofar as the elements voluntarily produced have not been used against him, and where there is no indication that the investigators knew the existence of such messages in the messaging service prior to the production thereof.¹⁰⁹

Given the national scope of competence of the ADLC and the AMF, an inspection may be carried out in several places, on the basis of a unique order, simultaneously.

Like searches in the framework of criminal proceedings, the measure may not commence before 6am or after 9pm; they may last several days. The performance of the inspection and/or seizure may be subject to an (non suspensive) appeal before the first presiding judge of the court of appeal (which, in turn, may be subject to an appeal on points of law before the *Cour de cassation*)

The order is served to the occupier or its representative. It specifies the possibility to be assisted by a lawyer. In the absence of the occupier, the order is served after the performance of the inspection and the police officer enlists the services of two witnesses who are not under his authority or that of the investigating administrative authority.

As far as ACPR is concerned, like permanent controls on documents, on-the-spot inspections are organized by the Secretary-General. It issues a letter of assignment specifying the purpose of the inspection and appointing the agents in charge (Art. L. 612-23 and R. 612-22 MonFinC). The mission statement must be brought to the knowledge of the controlled establishment, if it so requests. The Secretary-General thus decides to carry out missions of general scope concerning all the activities of a supervised institution, or thematic missions, targeted at certain activities or lines of business.¹¹⁰ These missions may take place after prior notification but also unexpectedly. In the framework of these missions, large powers are conferred on investigators. In addition to the power to request information and documents, investigators may also access the computer tools and data of the person checked (Art. R. 612-26 MonFinC).

Finally, the Secretary-General may, as in the case of permanent controls on documents, have recourse to external services. In practice, supervisors can stay for up to one year in the premises

106 Chambre criminelle, 27 November 2013, No. 12-85.830.

107 Chambre criminelle, 14 November 2013, No. 12-87.346.

108 Commission des sanctions AMF, 5 June 2013, Société ADT, Lado, Y and Z and de MM. P. Engler, A. Duménil, A and B.

109 Chambre commerciale, 29 January 2013.

110 *Charte de conduite d'une mission de contrôle sur place* (ACPR).

of the audited entity in order to verify, obtain a copy and hear the persons whose hearing is useful for the proper execution of the control.

As in the case of permanent controls, the Secretary-General is never required to communicate the list of documents produced and received. Article L. 612-26 of the Monetary and Financial Code provides that ‘in the event of on-the-spot checks, a report shall be drawn up. A draft report shall be brought to the attention of the supervisor’s management, who may submit their observations, as set out in the final report’.

8.3.4 Access to traffic data and recordings of telecommunications

The power to access traffic data is only granted to Customs officers (Art. 65 CustC) and AMF investigators (Art. L621-10 MonFinC).

The legislator failed to extend such power in favour of the competition authority (ADLC) in 2014. The Constitutional council decided in its decision 2015-715DC that the possibility for ADLC investigators to require telecommunications operators traffic data was unconstitutional because the safeguards foreseen were incapable of protecting sufficiently the right to privacy. It considered that the fact that this power was granted to specially authorised officials, bound by professional secrecy wasn’t enough even though the measure was not of a coercive nature. The fact that telecommunication operators could refuse to hand over the requested data does not represent an appropriate and proportionate safeguard in order to protect the right to privacy especially, given the absence of judicial authorisation.

Such decision is interesting because it conflicts with a former decision of the Council concerning the equivalent power conferred on AMF agents. It could then challenge in the future the possibility for AMF investigators to require access to traffic data...

None of the administrative authorities has the power to record telecommunication or have telecommunication recorded. Such power is exclusively given to judicial police officers, under the prior authorisation of the investigating judge and its supervision of the performance of the measure. However, judicial customs officers may exercise such powers where the scope of their investigations meet the requirements for the applicability of special proceedings on organised crime set out in the criminal procedure code (Art. 28-1 CPC).

8.4 EX POST JUDICIAL PROTECTION BY NATIONAL COURTS

As a result of the process of jurisdictionalization of the procedure applicable before independent administrative authorities, the refusal to recognize the jurisdictional nature of these authorities and the transfer of coercive powers to them have led to require that investigative powers be subject to the control of a judge, usually judicial, sometimes administrative. But this control is limited when the powers given to the AAI are considered as not being enforced or coerced.

By contrast, the national judicial control over the legality of OLAF’s participation in national investigations has been considerably increased¹¹¹ to such an extent that it may upset the balance on which cooperation is based.

111 B. Aubert, ‘L’expérience de l’OLAF. Le contrôle opéré par la Cour de cassation’, in G. Giudicellei-Delage, S. Manacorda, J. Tricot (eds.), *Le contrôle judiciaire du parquet européen. Nécessité, Modèles, Enjeux*, (2015), p. 185f.

Interviewing of persons, access to premises (without search or seizure),¹¹² monitoring of bank accounts and access to traffic data are not subject to a specific judicial review. In practice, operators are deprived of the means to challenge the regularity of control missions and must wait until the sanctioning body is seized or an appeal can be filed against the decision of the latter (it is therefore the situation of operators subject to the investigations of the ACPR).

On the contrary, searches and seizures are subject, as such, to an appeal before the first presiding judge whose decision may be appealed on points of law before the Cour de cassation (see above references to the customs, commercial and monetary and financial codes).

However, appeals have no suspensive effect. In this regard, concerning investigations conducted by the ADLC, the Criminal Division of the Court of Cassation held that: ‘the contested provisions of Article L. 450-4 of the Commercial Code ensure effective control by the judge of the necessity of each search and give the judge the power to effectively monitor its course, to resolve any incidents that may occur, including those related to seizure by the administration of documents of a personal or confidential nature or covered by professional secrecy and, if necessary, terminate the inspection at any time’.¹¹³

Where seizures may affect lawyer-client privilege, it is possible to ask that they be placed under seals. The documents that affect such privilege are returned and excluded from the procedure. But, according to case law, the exclusion is limited to such documents and does not affect the regularity of the rest of searches and seizures.¹¹⁴

As far as OLAF is concerned, from the procedural status given to the European Office within criminal proceedings (see above 8.2.2), it also follows that the investigative measures and in particular the reports produced by OLAF are not ‘procedural acts’,¹¹⁵ nor, when requested by the French authorities, ‘a delegation of investigative powers of judicial police officers’.¹¹⁶ But they are not either ‘mere unverified allegations’.¹¹⁷

The cooperation provided by OLAF consists of technical examination measures, expert appraisals, which are governed by the Union texts on which OLAF’s powers are based.¹¹⁸

All this seems to suggest that the control of OLAF’s action is beyond the control of national courts, at least a review based on domestic law.

Yet, neither does the jurisdiction of the Court of Justice under Article 267 TFEU to give a preliminary ruling on the validity of acts of the institutions, bodies, offices or agencies of the Union or the primacy and direct effect of EU Regulations providing for OLAF’s investigative powers did not prevent the French Court of Cassation from recognizing the faculty (and even the

112 As indicated above, the Constitutional council has considered that the absence of a specific judicial review was not contrary to the constitution (8 July 2016, 2016-552 QPC). The decision has been criticized because the available remedies assume either that the undertaking has committed a fault (it is the case of appeals against periodic penalty payments or against penalties in the event of a refusal to produce documents) or do not permit the removal of unlawfully obtained documents (it is the case of compensation claim).

113 Chambre criminelle, 27 June 2012, No. 12-90.028

114 See above 8.3.3.

115 Paris Court of Appeal, 6 May 2015, No. 13/22647. Reason why they are not subject to the requirement of translation into French (in this case, the OLAF report which, among other elements, served as a legal basis for the Customs application for authorization of searches, was drafted in English and had not been translated); see also Paris Court of Appeal, February 10, 2016, No. 14/04827.

116 Cour de cassation, chambre criminelle, 16 January 2013, No. 12-84.221.

117 Cour de cassation, chambre criminelle, 12 November 2015, No.

118 Chambre criminelle, 16 January 2013, No. 12-84.221; B. Aubert, *op. cit.*, p. 191f.

duty) of French courts to review OLAF's action once the results of that action is included in the case file and, therefore, form part of the national criminal procedure.

Indeed, by two decisions in 2015¹¹⁹ and 2016,¹²⁰ the Criminal Division of the Court of Cassation ruled that French criminal courts are competent to 'review the legality of the investigative acts carried out by OLAF' in order to 'guarantee effective judicial protection'. It follows that the courts may, if necessary, annul these acts, in so far as they are included in the case file and of which they become an element, therefore, subject to the rules of the CPC. In other words, it is the exhibition, the production of these documents which can be annulled and not the original documents which by their very nature cannot be invalidated by French courts.¹²¹ However, this verification by the judge of the absence of a violation of fundamental rights by OLAF in the course of its investigations, is also complemented by the verification that acts and reports adopted by OLAF 'do not find their necessary basis in definitively cancelled acts'. The aim is to prevent the 'revival' of cancelled documents through the use of OLAF reports within the framework of national proceedings. More generally, these decisions are part of a broader movement to broaden the scope of cancellable acts and measures, in line with the case law of the ECHR¹²² and the ECJ.¹²³ Verification of the validity of acts and measures is no longer limited to those carried out in the context of the procedure subject to a request for nullification. It may be exercised on evidence from another procedure, be it criminal,¹²⁴ administrative¹²⁵ or foreign.¹²⁶

If the refusal of the Court of Cassation to refer a question to the Court of Justice for a preliminary ruling may be regretted, this body of case-law illustrates the consequences of the silence kept by the national legislature on the cooperation between OLAF and French authorities.¹²⁷

8.5 CONCLUSIONS – IDENTIFICATION OF BEST PRACTICES AT THE NATIONAL LEVEL

Finally, one of the main interest of the comparison of the investigative powers of the four EU entities is to emphasize how the clear, explicit and precise identification of the competent bodies and the applicable legal frameworks is as, if not more, decisive as the content of the powers and the actual organization of the procedure.

This results from the fact that the powers are on the whole comparable and finally subject to procedural conditions which tend to come closer.

This general weakness affects cooperation in practice: due to a lack of a legal framework for securing the flow of information, actors may be reluctant to foster cooperation with OLAF for fear of weakening / jeopardizing investigations.

119 No. 15-82.300.

120 No. 16-83.602.

121 E. Pichon, *Dalloz*, 2016, p. 151f.

122 Notably, *Matheron v. France*, Decision of 29 March 2005, No. 57752.; F. Massias, *Revue de science criminelle et de droit pénal comparé* (2006), p. 662.

123 C-419/14, *WebMindLicenses*, [2015]; V. Corvolo, 'L'échange d'informations entre autorités administratives et judiciaires', (2016) 3 *Eucriim*.

124 Cour de cassation, Chambre criminelle, 8 June 2006, No. 06-81.796; 16 February 2011, No. 10-82.865.

125 Cour de cassation, Chambre criminelle, 16 May 2012, No.11-83.602; see also the similar position of the Administrative Supreme Court: Conseil d'Etat, 23 November 2016, No. 387485; *Droit fiscal*, 2017, 553.

126 Cour de cassation, Chambre criminelle, 4 November 1997, No. 97-83.463; 13 September 2011, No. 11-82.284; 31 May 2012, No. 10-87.641.

127 A decision of the Bordeaux Court of Appeal, which was unpublished and for that reason was not consulted (17 December 2015), seemed to have created, more broadly, confusion and doubt as to the conditions of OLAF's cooperation in France where criminal investigations are concerned.

This finding is in line with another, concerning the request for increased judicialization of administrative investigations. Here, ‘judicialization’ does not refer to the gradual dissemination of criminal procedural safeguards within administrative proceedings. It refers to the referral, the transfer of the case by the Administration to the judicial authority. According to some actors, the added value of achieving such an objective (increasing the number of cases concerned) deserves to be demonstrated and compared with the effectiveness of administrative action for recovery and more broadly the protection of public funds.

List of abbreviations

ACPR	Autorité de Contrôle Prudentiel et de Résolution / Prudential and Resolution Supervisory Authority
ADLC	Autorité De La Concurrence Competition Authority
AMF	Autorité des Marchés Financiers Financial Market Authority
DNLF	Délégation Nationale de Lutte contre la Fraude National Anti-Fraud Unit
ComC	Commercial Code
CustC	Customs Code
MonFinC	Monetary and Financial Code

9. TRANSVERSAL REPORT ON JUDICIAL PROTECTION

K. Ligeti & G. Robinson

9.1 INTRODUCTION

9.1.1 The concept of judicial review and the definition of ‘full jurisdiction’ according to the ECtHR

Judicial review is the means by which courts exercise their supervisory control over the administrative measures or penalties applied by a State enforcement agency.¹ The right to effective judicial protection, now enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (‘CFREU’, ‘the Charter’), is an essential component of the rule of law within any legal system. Within the EU legal system, Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to a fair and public hearing and an effective remedy within a reasonable time by an independent and impartial tribunal previously established by law.

The Union legal order, marked by the shared administration of EU institutions and national authorities, requires the principle of effective judicial protection to be realised at both national and Union level.² Article 19(1) TEU thus provides that Member States shall ensure that remedies sufficient to ensure effective legal protection in the fields covered by Union law are available. At Union level, the TFEU provides several routes for the review of the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, of the European Parliament and of the European Council, and of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The most important of these routes are actions for annulment launched against such acts³ and references for a preliminary ruling⁴ concerning the interpretation and validity of such acts under EU law.

The completeness of judicial review takes on great importance in the context of investigations carried out either in part or entirely by EU institutions or agencies and which may lead to the imposition of administrative and/or criminal penalties by that same institution or agency. In EU competition law, for instance, absent an adequate review mechanism the Commission would in

1 R. Wilson QC, ‘Judicial review. An introduction to the Key Principles’ in P. von Berg (ed.), *Criminal Judicial Review: A Practitioner’s Guide to Judicial Review in the Criminal Justice System and Related Areas* (2014), at 6f.

2 See P. Craig, *EU Administrative Law* (2012), Chs. 22 and 23.

3 Art. 263(1) TFEU.

4 Art. 267(1)(b) TFEU.

practice act as a *de facto* ‘tribunal’ without meeting the basic criteria of judicial independence.⁵ There is thus a long-standing debate on whether the General Court exercises ‘full jurisdiction’ as defined by the Strasbourg jurisprudence – a debate which has recently been revived by the elevation of the CFREU to Treaty status, the process of EU accession to the ECHR, and the intensification of the Commission’s fining policy over the course of the past decade.⁶ Meanwhile, the newer ‘mixed administration’ scenarios presented by the ECB and ESMA (wherein coercive measures and administrative sanctions may be actioned either autonomously or in cooperation with national authorities) and the ‘mixed inspections’ carried out by national authorities along with OLAF each entail an interplay between (at least) two legal systems which is liable to create uncertainty as to both the formal and substantive aspects of judicial review: respectively, which acts may be subject to judicial review before which court(s), and what the content of such a review ought to be.⁷ This confusion risks substantially weakening the judicial review of investigative acts to the direct (and often irreparable) detriment of the fundamental rights of those under scrutiny.⁸

The ECtHR jurisprudence is clear that ‘where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)’.⁹ The defining characteristics of full jurisdiction include ‘the power to quash in all respects, on questions of fact and law, the decision of the body below’.¹⁰ Notwithstanding this, the jurisprudence is clear that the requirement of full jurisdiction may be flexibly applied depending on the nature of the case, in particular in ‘specialised areas of law’ such as antitrust enforcement. In these areas, the ECtHR does not demand a *de novo* or *ex proprio* review of the facts, especially in cases where the facts have previously been established in a quasi-judicial procedure governed by many Art. 6(1) safeguards. This was confirmed most recently in *Menarini*, where the ECtHR deemed that the Italian administrative courts had in fact been able to apply a thorough proportionality check in reviewing the correct exercise of discretion by the independent administrative authority.¹¹

5 A. Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (2013), at §3.4[A].

6 W.P.J. Wils, ‘The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker’, (2014) 37 *World Competition*, no. 1, pp. 7-8.

7 S. Allegrezza and O. Voordeckers, ‘Investigative and Sanctioning Powers of the ECB in the Framework of the Single Supervisory Mechanism’, (2015), *eu crim*, no. 4, p. 158.

8 See for example in relation to OLAF, J. Wakefield, ‘Good Governance and the European Anti-Fraud Office’, (2006) 12 *European Public Law* no. 4:549; X. Groussot and Z. Popov, ‘What’s Wrong with OLAF? Accountability, Due Process and Criminal Justice in European Anti-Fraud Policy’, (2010) 47 *Common Market Law Review* no. 3, p. 607.

9 *Tsfayo v. UK*, Decision of 14 November 2006, [2006] ECHR, para. 42 citing *Albert and Le Compte v. Belgium*, Decision of 24 October 1983, [1983] ECHR, para. 29.

10 *A. Menarini Diagnostics S.R.L. v. Italy*, Decision of 27 September 2011, [2011] ECHR, para. 59; *Schmautzer v. Austria*, Decision of 23 October 1995, [1995] ECHR, para. 36.

11 In *Menarini*, *ibid.*, the Court recognised that the administrative review performed by the Italian *Consiglio di Stato* satisfied the full jurisdiction requirement since it went beyond a mere ‘external’ control of the motivation of the decision of the national competition authority (see paras. 63-66).

9.1.2 Scope of the report

This report deals with *ex post* judicial review in relation to the investigative acts of DG Competition, the ECB, ESMA and OLAF. This implies a two-fold limitation of the scope: on the one hand, aspects of *ex ante* authorisation are excluded from the report, and on the other hand only *investigative acts* carried out and/or *sanctions* imposed by the four authorities are addressed. Judicial review in relation to supervisory tasks or measures of the ECB and ESMA are thus not dealt with. For the sake of completeness, the report also addresses *ex post* non-judicial (or *quasi-judicial*) review in all four cases, touching on the relationship between those internal review mechanisms and *ex post* judicial review by the EU courts.

9.2 APPLICABLE HUMAN RIGHTS FRAMEWORK AND COURT ORGANISATION

9.2.1 Applicable human rights framework

Investigations and sanctions carried out or issued by all four authorities have the potential to interfere with and/or violate the fundamental rights of those subject to investigation or sanction enshrined in the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). Since the Lisbon Treaty reforms, the Charter is legally binding.¹² Although EU accession to the ECHR, as required by Article 6(2) TEU, is still pending, the content of ECHR rights may be read across to Charter rights – but the latter may provide more protection than the former.¹³ Furthermore, it is now well-established in CJEU jurisprudence that the protection of fundamental rights, 'including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights' is a principle forming 'part of the very foundations of the Community legal order'.¹⁴

The key fundamental rights in the context of this report are the right to an effective remedy¹⁵ and to a fair trial,¹⁶ the right to respect for private and family life, home and communications,¹⁷ and the rights of the defence,¹⁸ including the right to be heard, the right to access the case file, the right to information and interpretation, legal professional privilege, the right not to incriminate oneself, the right to access a lawyer, and the right to examine and present witnesses.¹⁹ The EU legislator

12 Art. 6(1), TEU.

13 Art. 52, CFREU.

14 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International* [2008] ECR I-06351, para. 304.

15 Inherently bound up with the principle of effective judicial protection, a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR: see Case 222/84 *Johnston* [1986] ECR 1651, paras. 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, para. 14; Case C-424/99 *Commission v Austria* [2001] ECR I9285, para. 45; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I6677, para. 39; Case C467/01 *Eribrand* [2003] ECR I6471, para. 61; and Case C-432/05 *Unibet* [2007] ECR I-2271, para. 37; Case C-279/09 DEB [2010] ECR I-13849; para. 29.

16 Entailing 'a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented': Art. 47, CFREU; Arts. 6 and 13, ECHR.

17 Art. 7, CFREU; Art. 8 ECHR.

18 Art. 48(2), CFREU.

19 In accordance with Art. 52 (3) CFREU, art. 48 CFREU has the same meaning and scope as the rights guaranteed in Arts. 6(2) and (3), ECHR; see *Explanations relating to the Charter of Fundamental Rights*, OJ C303/17, 14.12.2007, p. 30.

responded swiftly to the elevation of the Charter to Treaty status with the Lisbon reforms: in 2009, the EU Council adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.²⁰ To date, the Roadmap has inspired the promulgation of three directives: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, and Directive 2013/48/EU on the right to access a lawyer.

Specifically relevant to this report, the fundamental rights of investigated persons or entities are further protected by Article 41 of the Charter, which sets out the right to good administration entailing the right to have one's affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Article 41(2) also partially codifies the proclaimed protection of defence rights in the Union actor context by enshrining the right to be heard, to have access to one's file, and the obligation on the administration to give reasons for its decisions.

9.2.2 Court organisation

At EU level, Article 263 TFEU provides that the CJEU shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank (other than recommendations and opinions), of acts of the European Parliament and of the European Council, and of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. Any natural or legal person may institute proceedings against such an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.²¹

A review may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.²² Plaintiffs have two months from publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, to institute proceedings.²³ Significantly for the remit of this report, Article 263(5) provides that acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

Article 267 TFEU sets out the jurisdiction of the CJEU to give preliminary rulings, at the request of a court or tribunal of a Member State, concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where any such question is raised in a case pending before a national court or tribunal against

20 Council Resolution of 30 November 2009, Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 4.12.2009 C295/1.

21 Art. 263(4), TFEU.

22 Art. 263(2), TFEU.

23 Art. 263(6), TFEU.

whose decisions there is no judicial remedy under national law, that court or tribunal must make a request to the CJEU for a preliminary ruling.²⁴

Finally, Article 340 TFEU provides that in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by its institutions or by its servants in the performance of their duties. Actions for damages in relation to investigative acts and/or sanctions carried out or imposed by the four authorities are therefore also addressed in the following.

9.2.3 Effective judicial protection: Overarching issues

The relationship between *ex ante* and *ex post* review is the first issue common to all four sub-chapters. For instance, in relation to inspection of private premises the lack of a prior judicial authorisation is not incompatible as such with Art. 8 ECHR: it can be counterbalanced by the availability of an *ex post* judicial review. In order to so, however, there must be effective access to the remedy, a review of both the legality of the measure and the factual circumstances justifying its adoption, and appropriate redress in case of unlawfulness of the inspection performed must be available.²⁵ This latter qualification is a persistent source of concern in the context of investigative acts carried out by the four authorities: to what extent can a remedy consisting of purely financial compensation be either ‘effective’ or ‘appropriate’ where (in the case of OLAF) the material or information gleaned from the contravening inspection is forwarded to national authorities regardless?²⁶ In what follows, reference will be made where instructive to *ex ante* judicial authorisation, which is addressed in detail in the *EU Report* by Dr. Scholten and Dr. Simonato.

A second common feature is the at times foggy relationship between *ex post* non-judicial review and judicial review by the EU courts. Depending on the authority, the form of *ex post* non-judicial review possible ranges from the (voluntary) public issuing of non-binding opinions or recommendations by internal yet independent departments (e.g. the OLAF Supervisory Committee) to a formalised, quasi-judicial process seized by aggrieved parties as a mandatory first step on the path to eventual review by the CJEU (e.g. ESMA decisions challenged before the Board of Appeal of the European Supervisory Authorities). Several aspects of such review mechanisms remain unclear or as yet undecided due to their ambit and/or novelty; the most significant to this report are the overall stringency of the controls operated, the proportion of potential objections which is filtered through to court level (or filtered out beforehand), and the exact procedural safeguards used in practice in order to ensure Charter standards are upheld.

Finally, since justice delayed is justice denied, the issue of timeliness is another key concern for effective judicial protection in the ensuing analysis. The Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated is entitled to ‘a fair and public hearing

24 Art. 267(3), TFEU.

25 *Smirnov v. Russia*, Decision of 7 June 2007, [2007] ECHR, para. 45; *Heino v. Finland*, Decision of 15 February 2011, [2011] ECHR, para. 45; *Harju v. Finland*, Decision of 15 February 2011, [2011] ECHR, para. 44; *Delta Pekárny v. Czech Republic*, Decision of 2 October 2014, [2015] ECHR, paras. 82, 87, 92.

26 Potentially causing extensive reputational and professional damage; in the OLAF context, see Case T-308/03, *Camós Grau v. Commission*, [2006] ECLI:EU:T:2006:110.

within a reasonable time'.²⁷ As noted above, Article 263(6) TFEU establishes a two-month rule for challenging acts of bodies, offices or agencies of the Union. Once that period has elapsed, their legality is unchallengeable – only the manner in which investigative acts are carried out may be challenged.²⁸ Although proceedings must therefore be lodged fairly swiftly, unless and until the impugned act is declared invalid, it remains enforceable unless the Court declares otherwise²⁹ – in other words, the decision stands until it is quashed (and will most often be acted upon long before). The applicant's interest in a timely resolution of the main proceedings is thus clear – and all the greater given the immense difficulty of proving to the requisite level the risk of irreparable damage in order to qualify for interim relief (discussed *infra*).³⁰

9.3 JUDICIAL REMEDIES AT THE EU LEVEL

This section discusses judicial remedies at EU level in relation to the investigative acts of DG Competition, the ECB, ESMA and OLAF. It addresses direct review by the EU courts (actions for annulment; actions for damages), *ex post* (internal) non-judicial or *quasi-judicial* review and – in the case of OLAF – indirect review by the EU courts (references for a preliminary ruling).

9.3.1 DG Competition

Article 263 TFEU gives the EU courts exclusive jurisdiction to review the legality and necessity of Commission decisions in the competition enforcement field. This means that the EU courts may annul such decisions on points of fact and law in the first instance (before the General Court) and on points of law in the final instance (before the Court of Justice), but in neither instance may they carry out a complete *de novo* review of the facts and evidence or substitute an *ex proprio* decision at EU level for that of the relevant national jurisdiction. It is for the General Court to evaluate the evidence presented to it; the Court of Justice can check for possible 'manifest errors'.

Article 261 TFEU also hands the EU courts broader jurisdiction with regard to the penalties provided for in regulations. The General Court and the Court of Justice may therefore quash a fine, reduce or increase it taking into account all factual evidence presented.

9.3.1.1 Direct review: Actions for annulment

a. Requests for information

Article 18(3) of Regulation 1/2003³¹ enables the Commission to require by decision undertakings and associations of undertakings to supply information. Fines and periodic penalty payments

27 Art. 47, CFREU.

28 'Such a rule is based in particular on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called into question indefinitely': Joined Cases T-305/94 et al., *Limburgse Vinyl Maatschappij and Others v. Commission* (the 'PVC cases'), [2002] ECR I-08375, ECLI:EU:T:1999:80, paras. 408-414.

29 Art. 278, TFEU; Joined Cases 46/87 and 227/88, *Hoechst AG v. Commission*, [1989] ECR 02859, ECLI:EU:C:1989:337, para. 64.

30 K. Lenaerts et al., *EU Procedural Law* (2014), p. 277.

31 Council Regulation (EC) No. 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 L1/1, 4.1.2003 ('Regulation 1/2003').

are applicable in case of non-compliance.³² The Commission must state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. Addressees of such a decision are entitled to have it reviewed before the EU courts. However, if the action for annulment has not been launched autonomously within the two-month time limit, the review of the legality of the request for information is, according to the jurisprudence of the General Court, foreclosed in the action for annulment brought against the final decision finding an infringement.³³

In the recent CJEU judgment in *HeidelbergCement*,³⁴ the applicant challenged the legality of a Commission decision issued under Article 18 of Regulation 1/2003 requesting that the applicant and its EU subsidiaries answer a questionnaire comprising 94 pages and 11 sets of questions. The Commission had earlier inspected the premises of the applicant and of other companies active in the cement industry, before sending the applicant a draft questionnaire which it had completed and returned to the Commission.

Following the General Court's dismissal of the applicant's action for annulment of the latest decision to request information, HeidelbergCement lodged an appeal before the Court of Justice relying on seven grounds attacking various aspects of the Commission decision, all related to its alleged imprecision: the purpose of the request for information; the reasons stated for the choice of the investigating measure and for the time-limit imposed for responding; the 'necessity' of the information requested; the format of the information requested; the proportionality of the time-limits imposed; the vagueness of the questions; and that the General Court had interpreted excessively restrictively the appellant's right to avoid self-incrimination.

Of the seven grounds of appeal, five were upheld by Advocate General Wahl in his Opinion;³⁵ those focusing on the choice of the investigating measure and time-limits were dismissed. In its judgment, the Court of Justice concluded that the General Court had erred in law in finding that the decision at issue contained an adequate statement of reasons; there was no need to examine the appellant's other pleas.³⁶ In so doing, the Court of Justice referred by analogy to its own jurisprudence on inspection decisions in order to emphasise the importance of the 'fundamental requirement' to state *specific* reasons not only in order to demonstrate that a request for information is justified but also in order to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence.³⁷

32 Arts. 23 and 24 respectively, Regulation 1/2003.

33 See the 'PVC cases', supra note 28, paras. 441 and 442. The same applies for inspection decisions: see Lenaerts et al, *EU Procedural Law*, supra note 30, pp. 275, 277. It is however important to distinguish between the lawfulness of the decision itself and the lawfulness of the manner in which the inspection is carried out; in the latter case, the PVC foreclosure does not apply (see paras. 413 and 414 of the PVC judgment). See C. Kerse and N. Khan, *EU Antitrust Procedure* (2012), pp. 175-176.

34 Case C-247/14 P, *HeidelbergCement AG v. European Commission*, [2016], ECLI:EU:C:2016:149.

35 Case C-247/14 P, *HeidelbergCement AG v. European Commission*, Opinion of Advocate General Wahl, 15th October 2015, ECLI:EU:C:2015:694

36 Case C-247/14 P, *HeidelbergCement AG v. European Commission*, [2016], ECLI:EU:C:2016:149, paras. 26, 39-41.

37 At para. 19; Case C-179/12 P, *Dow Chemical Ibérica and Others v. Commission*, 97/87 to 99/87, [1989] ECR 03165, ECLI:EU:C:1989:380, para. 26; Case C94/00, *Roquette Frères*, [2002] ECR I-09011, ECLI:EU:C:2002:603, para. 47; Case C37/13 P, *Nexans and Nexans France v. Commission*, [2014], ECLI:EU:C:2014:2030, para. 34; and Case C583/13 P, *Deutsche Bahn and Others v. Commission*, [2015], ECLI:EU:C:2015:404, para. 56.

The Court of Justice thereby rejected the Commission's contentions which insisted on the one hand that it generally lacks information at such a preliminary investigation stage and should not therefore be held to describe in detail the nature, geographical scope and duration of, or type of products specifically concerned by the alleged infringement,³⁸ and on the other that its decision *did* contain sufficient details of the nature of the alleged infringement.³⁹ Its judgment was unequivocal: the statement of reasons was 'excessively succinct, vague and generic – and in some respects ambiguous', especially given that the decision at issue was taken more than two years after the initial inspections of the cement companies.⁴⁰ As such, the Court of Justice's stance in *HeidelbergCement* represents a forceful prohibition of Commission 'fishing expeditions'⁴¹ in questionnaire form.⁴²

b. Inspections

Article 20 of Regulation 1/2003 sets out the Commission's powers to carry out inspections of the premises of undertakings and associations of undertakings, whilst Article 21 sets out slightly different⁴³ powers in relation to inspections of any other premises where a reasonable suspicion of a serious violation of the competition rules exists. One key distinction is that inspections of the premises of undertakings and associations of undertakings do not require prior judicial authorisation unless national rules provide otherwise.⁴⁴ This underlines the pressing need for effective judicial review at EU level of the Commission's decisions to inspect and the manner in which its inspections are carried out.

Most significantly, the Commission is obliged to specify the subject matter and purpose of its inspections.⁴⁵ This is considered a fundamental requirement in order both to show that the investigation to be carried out at the premises of the undertakings concerned is justified, enabling those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence guaranteed primarily by Article 47 of the Charter.⁴⁶ In particular, the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law⁴⁷ which now finds expression at Treaty level via Article 7 of the Charter. In ensuring that a Commission decision to inspect is in no way arbitrary, the EU courts do not demand that the Commission communicate to the recipient of such a decision all of the information at its disposal concerning the presumed infringements or make a precise legal analysis of those infringements, but it must nonetheless clearly indicate the presumed facts which it intends to investigate.⁴⁸

38 Case C-247/14 P, *HeidelbergCement AG v. European Commission*, [2016], ECLI:EU:C:2016:149, para. 13.

39 *Ibid.*, para. 14.

40 *Ibid.*, para. 39.

41 See discussion of *Deutsche Bahn*, *infra*.

42 See also the judgment of the General Court in Joined Cases T-458/09 and T-171/10, *Slovak Telekom a.s. v. European Commission*, [2012], ECLI:EU:T:2012:145 and the case law referred to.

43 For inspections of 'any other premises' *ex ante* judicial authorisation is required, whereas for Art. 20 inspections this matter is left to national law. For more detail, see the *EU Report* by Scholten and Simonato.

44 Article 20(7), Regulation 1/2003.

45 Arts. 20(3)-(4), Regulation 1/2003.

46 *Dow Chemical Ibéria*, *supra* note 37, para. 26; cited in *Nexans*, *supra* note 37, para. 39.

47 *Roquette Frères*, *supra* note 37, para. 27.

48 *Dow Chemical Ibéria*, *supra* note 37, para. 45.

For example, in *Nexans*, the applicants challenged the Commission inspection decision on two grounds. On the one hand, the product scope ('the supply of electric cables and material associated with such supply...') was challenged as overly broad and vague, making it impossible for the applicants to exercise their right of defence or to distinguish the documents which the Commission was able to consult and copy from other documents in the possession of the applicant which could be withheld. On the other, it was relatedly contended that it was only in the *high voltage underwater* cable sector that the Commission had detailed information leading it to suspect an infringement of competition rules. A technical analysis thus led the General Court to allow the action for annulment in so far as it concerned electric cables *other* than high voltage underwater and underground cables and the material associated with those cables. More recently, in its judgment in *Deutsche Bahn*⁴⁹, the Court of Justice also recalled that the specification of the subject-matter and scope in the inspection decision and the prohibition on the use of information obtained during investigations for purposes other than those indicated in the inspection decision 'is aimed at preserving, in addition to business secrecy [...], [an] undertaking's rights of defence' and that 'those rights would be seriously endangered if the Commission were able to rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof'. In other words, 'fishing expeditions' are not permitted.

Finally, it ought to be noted that in addition to applying for annulment of the Commission's inspection decision, the applicants in *Nexans* specifically challenged two acts adopted by the inspectors during the inspection: the decision to make copy-images of a number of computer files and of the hard drive of an employee's computer for the purposes of examining them later in the Commission's offices, and the decision to interview that employee on-the-spot. In this regard, the General Court recalled that the review of the lawfulness of acts performed during an inspection falls within the scope of an action for the annulment of the final decision of the Commission and cannot be the object of an action for annulment of the inspection decision itself.⁵⁰

c. Review of fines

'Unlimited jurisdiction' in relation to fines signifies that the EU courts may quash, reduce or raise a fine on the basis of all factual evidence presented before them.⁵¹ The 'unlimited' nature of the jurisdiction does not, however, entail a review of the Court's own motion; it is for the applicant to adduce evidence in support of his pleas.⁵² It may be contrasted, however, with the EU courts' jurisdiction in relation to decisions taken by the Commission in the enforcement of EU competition law, which in principle amounts to a comprehensive legality test, albeit one which is 'limited' in two senses. First, the EU courts are not entitled to carry out a complete *de novo* review of the facts and evidence or substitute an *ex proprio* decision at EU level for that of the relevant national jurisdiction. Should an action for annulment be successful, therefore, the contested act is merely voided. Second, the EU judges' review is 'limited' in order to accommodate the Commission's margin of discretion to assess the complex economic and technical issues bound up with antitrust

49 See note 37, *supra*, paras. 57 and 58. This line of case law dates back to the case C-85/87, *Dow Benelux NV v. European Commission*, [1989] ECR 03137, ECLI: EU:C:1989:379; see para. 17.

50 *Nexans*, *supra* note 37, para. 132; see, in this regard the 'PVC cases', *supra* note 28, paras. 413 and 414.

51 Pursuant to Art. 261 TFEU.

52 J. C. Laguna da Paz, 'Understanding the limits of judicial review in European competition law', (2014) 2 *Journal of Antitrust Enforcement* no.1, pp. 210-211.

matters.⁵³ This has been often criticised for potentially failing to meet the ECtHR standard of ‘full jurisdictional control’ as evoked in *Menarini*. However, in *Tetra Laval*⁵⁴ and the more recent cases *KME*⁵⁵ and *Chalkor*⁵⁶ the Court insisted that the fact that the Commission has a margin of discretion ‘does not mean that the [EU Courts] must decline to review the Commission’s interpretation of economic or technical data’.⁵⁷

9.3.1.2 Direct review: Actions for damages

Should an act carried out by the Commission cause the targeted entity to suffer harm such as to cause the European Union to incur liability an action may be brought against the Commission for non-contractual liability.⁵⁸ A remedy of this kind is not part of the system of the legality of acts of the EU which have legal effects binding on, and are capable of affecting the interests of, the applicant, but it is available where a party has suffered harm on account of unlawful conduct on the part of an institution.⁵⁹

Settled CJEU jurisprudence presents a high hurdle to any such action against a DG Competition investigative act: the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and a direct causal link between such a breach and the allegedly sustained damage must be established.⁶⁰

9.3.1.3 Direct review: Interim relief in actions for annulment and actions for damages

Article 278 TFEU provides that ‘actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended’. According to Articles 160 para. 3 of the ECJ Rules of Procedure and 104 para. 2 of the GC Rules of Procedure an application for interim relief must establish a *prima facie* case and must be urgent. In addition, the case law

53 Complex technical appraisals are in principle subject to limited review; the ECJ has stated in several cases that the Commission ‘has a certain discretion, especially with respect to assessments of an economic nature, and that consequently, review by the Community Courts of the exercise of that discretion [...] must take account of the margin of discretion implicit in the provision of an economic nature’ (Case C-12/03, *Tetra Laval*, [2005] ECR I-00987, ECLI:EU:C:2005:87, para. 38); the case law of the General Court has been more explicit: see Case T-201/04, *Microsoft Corp. v. Commission*, [2007] ECR II-03601, ECLI:EU:T:2007:289, para. 87: ‘The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Case T-65/96 *Kish Glass v Commission*, [2000] ECR II-1885, para. 64, upheld on appeal by order of the Court of Justice in Case C-241/00 P *Kish Glass v Commission*, [2001] ECR I-7759; see also, to that effect, with respect to Article 81 EC, Case 42/84 *Remia and Others v Commission*, [1985] ECR 2545, para. 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission*, [1987] ECR 4487, para. 62)’.

54 *Supra* note 53, para. 39.

55 Case C-272/09, *KME and Others v. Commission*, [2011] ECR I-13125, ECLI:EU:C:2011:816.

56 Case C-386/10 P, *Chalkor v. Commission*, [2011] ECR I-13085, ECLI:EU:C:2011:815.

57 *KME*, *supra* note 55, para. 121; *Chalkor*, *ibid.*, para. 54.

58 Under arts. 268 and 340, TFEU.

59 See judgment of the General Court in Case T-135/09, *Nexans and Nexans v. Commission*, [2012], ECLI:EU:T:2012:596, para. 133; Case C131/03 P *Reynolds Tobacco and Others v Commission*, [2006] ECR I7795, paras. 82 and 83.

60 Case C-352/98 P, *Bergaderm and Goupil v. Commission*, [2000] I-05291, para. 42.

developed a third substantive condition of admissibility, namely, that the applicant's interest in the interim measure must outweigh the other interests at stake in the main proceedings.⁶¹

With regard to competition proceedings and the urgency requirement it is important to highlight that purely financial losses are not regarded as an 'irreparable form of harm', unless their magnitude would be such as to imperil the applicant's existence before the final judgment in the main action.⁶² In competition proceedings, interim relief has been granted against decisions ordering undertakings to alter their conduct (cease and desist orders; *United Brands*,⁶³ *Magill*,⁶⁴ *Net Book Agreements*⁶⁵), while a much stricter approach has been adopted in regard to the suspension of investigative measures and decisions ordering the payment of fines.⁶⁶

9.3.1.4 Ex post non-judicial (or quasi-judicial) review

Internal (non-judicial) review of the respect for certain procedural safeguards during the Commission's investigations is exercised by the hearing officer.⁶⁷ In particular, the hearing officer is competent to solve disputes relating to respect of the legal professional privilege and the privilege against self-incrimination in the context of requests for information and inspections and to certain disclosure and information issues. The hearing officers are not part of DG Competition, but are directly attached to the office of the Commissioner, to whom they must report on the lawfulness of the conduct of the procedure before a final decision on an infringement is taken.

9.3.2 ECB

The SSM Regulation⁶⁸ grants the ECB the following investigatory powers: to require supervised entities to provide information (Article 10), to carry out 'general investigations' (Article 11) and to conduct on-site inspections (Article 12). Cooperation between the ECB and national competent authorities ('NCAs') as regards these powers is fleshed out in Part XI of the SSM Framework Regulation;⁶⁹ notably, Article 144 provides for the establishment and composition by the ECB of separate on-site inspection teams, with the head of the team designated from among ECB and NCA staff members.

61 See *Lenaerts et al*, *EU Procedural Law*, supra note 30, at 591.

62 In this regard, see the orders of the President in Case T-181, *Neue Erba Lautex v. Commission*, [2002] ECR II-05081, ECLI:EU:T:2002:294, para. 84 and Case T-53/01, *Poste Italiane v. European Commission*, [2001] ECR II-01479, ECLI:EU:T:2001:143, para. 120.

63 Case C-27/76, *United Brands v. Commission*, [1987] ECR 00207, ECLI:EU:C:1976:51.

64 Joined Cases C-76/89, 77/89 and 91/89, *Radio Telefis Eireann v. European Commission*, [1989] ECR 01141, ECLI:EU:C:1989:192.

65 Case C-56/89, *Publishers Association v. Commission*, [1989] ECR 01693, ECLI:EU:C:1989:238.

66 See *Kerse and Khan*, *EU Antitrust Procedure*, supra note 33, pp. 8-179 *et seq.*

67 For the mandate of the hearing officer, see the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, 2011/695/EU, OJ L 275, 20.10.2011, pp. 29-37.

68 Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29.10.2014 (hereinafter 'SSM Regulation').

69 Regulation of the European Central Bank of 16 April 2014, (ECB/2014/17), OJ L 141/1, 14.5.2014 (hereinafter 'SSM Framework Regulation').

The mixed composition of on-site inspection teams reflects the mixed administration inherent to the day-to-day monitoring of significant financial institutions by Joint Supervisory Teams (JSTs), composed of ECB and NCA staff members, with the possibility to include National Central Bank staff members,⁷⁰ headed by an ECB staff member (the ‘JST coordinator’) and one or more NCA sub-coordinators.⁷¹ As for judicial review, although there is no requirement to do so, the ECB always indicates the right to challenge a decision in its interaction with the monitored entities.⁷²

9.3.2.1 Direct review: Actions for annulment

a. Requests for information

Unlike Regulation No.1/2003 in the competition law field, the SSM Regulation makes no distinction between simple requests for information (no obligation to reply; no penalty attached to non-compliance) and requests for information taken by decision (obligation to reply; penalty attached to non-compliance), merely providing that recipients shall provide all necessary information.⁷³ Cross-reading from competition law jurisprudence allows us to posit that the reviewability of an ECB request for information will hinge on its obligatory nature: in particular, where such a request is taken by decision and the threat of a fine in case of non-compliance exists, this changes the recipient’s legal position, and the request is open to review by the EU courts.⁷⁴

The SSM Framework Regulation does not include any obligations on the ECB to formulate its requests for information in a precise way, along the lines of the CJEU jurisprudence in competition law. The information position of the ECB is very strong due to the information supplied by the supervisors in the course of regular supervision. Consequently, external requests (for information not already available through supervision) are used rarely, where there exist indications that SSM rules have been breached, potentially leading to sanctions.⁷⁵ Moreover, as it is very difficult to secure a formal decision (under the SSM, a hearing is required), if a request is issued it usually takes the form of a ‘soft letter’ or ‘operational request’. Although the privilege against self-incrimination applies both to decisions and ‘soft letters’, the latter cannot lead to a fine. In practice, the same criteria apply as for a formal decision insofar as the recipient must be informed of the purpose of the request, the suspected breach, and so on.

The ECB, differently to the comparable situation with OLAF, may require NCAs ‘to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed’.⁷⁶ It remains an open question whether or not an instruction from the ECB to a national authority may change the legal position of the person involved, although this would appear unlikely.⁷⁷

70 Art. 5, SSM Framework Regulation.

71 See art. 3 *et seq.*, SSM Framework Regulation.

72 Source: informal discussions with ECB representative, November 2016.

73 Art. 10(2), SSM Regulation.

74 L. Wissink et al., ‘Shifts in Competence between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection’, (2014) 10 *Utrecht Law Review* no.5, p. 105.

75 Source: informal discussions with ECB representative, November 2016.

76 Art. 18(5), SSM Regulation.

77 See discussion at 9.3.2.1 sub c *infra*.

Although NCAs may in theory challenge such a request, the fact that one representative of each NCA is on the ECB's internal Supervisory Board⁷⁸ would seem to limit this possibility in practice.

b. General investigations and on-site inspections

Under Article 11 of the SSM Regulation, the ECB may by decision⁷⁹ require the submission of documents, examine books and records and take copies or extracts, obtain written or oral explanations from the targeted legal or natural persons, and interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation. Article 12 sets out the framework for inspections at the business premises and land of the relevant persons carried out by (potentially mixed) on-site inspection teams, also on the basis of an ECB decision.

Where any person obstructs the conduct of general investigations, the local NCA shall afford the necessary assistance in accordance with national law⁸⁰ and that person will be considered in breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, potentially leading to sanctions.⁸¹ These consequences are liable to change the legal position of the addressee, suggesting that review of 'general investigations' by the EU courts is possible.⁸² Any such review will take into account the legal basis for the decision and its purpose, as set out in the ECB decision.⁸³ Analogous provisions apply to on-site inspections: obstruction is considered a breach of an ECB decision liable to trigger penalties,⁸⁴ whilst the ECB decision must at a minimum specify the subject matter and the purpose of the on-site inspection.⁸⁵

Targeted persons shall be informed of an impending on-site inspection at least five working days before it begins, except where the proper conduct and efficiency of the inspection require that the inspection take place unannounced.⁸⁶ The lawfulness of an ECB decision ordering an on-site inspection may only be challenged before the CJEU through an action for annulment *ex* Article 263 TFEU.⁸⁷ Meanwhile, the SSM Regulation leaves judicial authorisation prior to the carrying out of on-site inspections, clearly of heightened importance in such cases, to national law.⁸⁸ As pointed out by Wissink et al, across the national systems different fields feature different rules on judicial authorisation: it may be optional but not required (and e.g. in competition law in the Netherlands, in practice rarely applied for) or simply unavailable (e.g. in the Netherlands, in the area of banking supervision).⁸⁹ Where there is no *ex ante* check and sanctions are imposed by

78 Art. 26(1), SSM Regulation.

79 Art. 11(2), SSM Regulation.

80 *Ibid.* It is unclear how the obstruction of a general investigation may be resolved where no judicial authorisation is forthcoming at the national level.

81 This is to be communicated in the terms of the decision request to its addressee. See Art. 142(c), SSM Framework Regulation.

82 Wissink et al., *supra* note 74, p. 105.

83 Art. 142(a), SSM Framework Regulation.

84 Art. 143(2)(b), SSM Framework Regulation.

85 Art. 143(2)(a), SSM Framework Regulation.

86 Art. 12(1), SSM Regulation in conjunction with art. 145, SSM Framework Regulation.

87 Art. 13(2) of the SSM Regulation, similar to Art.20 (8) and Art. 21 (3) of Regulation 1/2003, provides that the review of the lawfulness of the inspection decision can be performed only by the Court of Justice (reaffirming the *Roquette Frères* and *Foto Frost* rules).

88 Art. 13(1), SSM Regulation.

89 Wissink et al., *supra* note 74, p. 110.

the ECB or the national authority of another Member State based partly on information obtained during that (unlicensed) inspection, the same authors submit that it is highly unlikely that either the EU or national court will seriously assess the effectiveness of the inspection. In this way, the rule of non-inquiry and the principle of mutual trust are respected, but a gap in substantive legal protection is opened.⁹⁰

c. Review of fines

Under the SSM Regulation, measures and penalties are in general imposed by the ECB and are thus open to review before the EU courts. The CJEU has unlimited jurisdiction based on Article 261 TFEU and Article 5 of Regulation 2532/98 to review administrative penalties imposed pursuant to Article 18 of the SSM Regulation. Other administrative measures adopted pursuant to Article 16 of the SSM Regulation are subject to annulment actions before the CJEU according to Article 263 TFEU. The case law on the review of ‘complex economic and technical assessments’ may also be relevant in the context of the review of ECB decisions (with the same ‘caveats’ laid down by the most recent case law of the CJEU in *KME* and *Chalkor*).

In addition, Article 18(5) of the SSM Regulation also provides that the ECB may require NCAs to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in cases not covered by Article 18(1). The latter article covers breaches of requirements under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law; in such cases, the ECB may levy fines.

Article 18(5) provides that ECB requests for NCAs to open proceedings with a view to applying appropriate penalties shall be applicable in particular ‘to pecuniary penalties to be imposed on credit institutions, financial holding companies or mixed financial holding companies for breaches of national law transposing relevant Directives, and to any administrative penalties or measures to be imposed on members of the management board of a credit institution, financial holding company or mixed financial holding company or any other individuals who under national law are responsible for a breach by a credit institution, financial holding company or mixed financial holding company’.

Since such requests from the ECB aim only at the opening of proceedings by national authorities, following the *Tillack* precedent set in the context of the judicial review of OLAF final reports,⁹¹ ECB requests will thus not be open to review before national courts,⁹² even if the ECB is empowered to *require* national authorities to open proceedings – there is, after all, no obligation to levy a fine.

9.3.2.2 Direct review: Actions for damages

The SSM Regulation does not expressly provide for non-contractual liability, but in its preamble the Regulation recalls that in accordance with Article 340 TFEU the ECB should make good any

⁹⁰ *Ibid.*, at 110-111.

⁹¹ See discussion *infra*.

⁹² See Wissink et al., *supra* note 74, p. 103.

damage caused by it or by its servants in the performance of their duties.⁹³ The three-step test in CJEU jurisprudence presents a high hurdle to any such action against an ECB act: the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and a direct causal link between such a breach and the allegedly sustained damage must be established. In particular, the second criterion may be difficult to establish given the discretionary nature of the decision-making powers handed to the ECB.⁹⁴ Moreover, the ECB's reliance on national authorities in the day-to-day assessment of a credit institution's situation and on-site verifications may create difficulties in attributing responsibility for a specific act or decision to the ECB or to the national level.⁹⁵

9.3.2.3 Direct review: Interim relief in actions for annulment and actions for damages

In respect of ECB supervisory decisions, Article 34 of the SSM Framework Regulation provides that the ECB may suspend the decision on request of the addressee. This is, however, without prejudice to actions for interim relief under Article 278 TFEU.

9.3.2.4 Ex post non-judicial (or quasi-judicial) review

Decisions of the ECB adopted under Regulation 1024/2013 finding an infringement and applying sanctions⁹⁶ may be reviewed by the Administrative Board of Review of the ECB.⁹⁷ The scope of review of the Administrative Board pertains to the 'procedural and substantive conformity' of the decision with the SSMR. The Administrative Board cannot directly annul or declare void the decision: it can only express an opinion and remit the case to the Supervisory Board. The opinion of the Administrative Board has to be taken into account when adopting a new decision.

The request for review before the Administrative Board of Review of the ECB, in any case, is without prejudice to the right to launch an annulment action before the CJEU in accordance with Article 263 TFEU.⁹⁸ Each formal decision can be challenged before the Board of Review, whereas 'soft letters' may not. It ought to be underlined that no cases have so far arisen, and such discussions remain theoretical.⁹⁹

93 This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation; see Preamble 61, SSM Regulation.

94 T.M.C. Arons, 'Judicial Protection of Supervised Credit Institutions in the European Banking Union', in D. Busch and G. Ferrarini (eds.), *European Banking Union* (2015), p. 471.

95 Ibid.

96 Pursuant to art. 4b 5), Regulation No. 2532/98, as amended by Regulation No. 2015/159.

97 Art. 24, SSM Regulation.

98 See art. 24(11), SSM Regulation.

99 Source: informal discussions with ECB representative, November 2016.

9.3.3 ESMA

When the ESMA¹⁰⁰ supervisory teams find indications of possible infringements listed in Annex to EMIR¹⁰¹ and the CRA Regulation¹⁰² with regard respectively to trade repositories and credit rating agencies, the Executive Director is informed and may appoint an independent investigation officer from within ESMA to follow up on the matter. Such indications will mostly arise from prior investigative acts, but may also emerge from a supervised entity's response(s) to requests for information sent out in the context of regular supervisory contact. The entity under investigation is informed of the appointment of an independent investigation officer, and in practice the latter in turn then informs the entity of the purpose of the investigation and of the indication(s) that there may have been a breach.

This is the formal opening of an investigation. The investigation officer shall take into account any comments submitted by the persons subject to the investigations, and has powers to request information¹⁰³ and to conduct investigations¹⁰⁴ and on-site inspections.¹⁰⁵ The officer's independence implies that s/he must seek out both incriminating and exculpatory evidence. The officer's complete file is submitted to the Board of Supervisors which, should it find an infringement, decides on measures and sanctions.

The joint Board of Appeal¹⁰⁶ provides a first opportunity to challenge the finding of an infringement, before potential subsequent review by the EU courts via actions for annulment under Article 263 TFEU or actions for failure to act under Article 265 TFEU.¹⁰⁷ The EU courts alone are entitled to review the legality or 'lawfulness' of the relevant ESMA act.¹⁰⁸ The relevant provisions of EMIR and the CRA Regulation confirm that *ex ante* judicial authorisation at the national level, where required,¹⁰⁹ shall entail verification of the authenticity of the ESMA decision, but also a proportionality test: the national judicial authority is to check that the coercive measures envisaged

100 Established by Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision No. 2009/77/EC, OJ L 331/84, 15.12.2010 (hereinafter 'ESMA Regulation').

101 Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, 27.2.2012 (hereinafter 'EMIR').

102 Regulation (EU) No. 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit ratings agencies, OJ L 145/30, 31.5.2011 (hereinafter 'CRA Regulation').

103 Art. 61 EMIR, art. 23b CRA Regulation.

104 Art. 62 EMIR, art. 23c CRA Regulation.

105 Art. 63 EMIR, art. 23d CRA Regulation.

106 Arts. 58-60, ESMA Regulation. The competent body of ESMA shall be bound by the decision of the Board of Appeal and adopt an amended decision regarding the case concerned; see Art. 60(5).

107 Art. 61, ESMA Regulation.

108 Arts. 61(3)(g), 62(6), and 63(9) EMIR and arts. 23b(3)(g), 23c(6) and 23d(8), CRA Regulation.

109 Neither EMIR nor the CRA Regulation mention *ex ante* judicial authorisation in the context of (the non-coercive) requests for information – whether simple requests or requests made by decision. In contrast, in relation to on-site inspections (art. 63(8) EMIR, art. 23d(8) CRA Reg.) and, in the context of general investigations, a request for records of telephone or data traffic (art. 62(5) EMIR, art. 23c(5) CRA Reg.), where prior judicial authorisation is required by national law such authorisation shall be applied for. *Ex ante* authorisation of all other general investigative acts (listed in article 62 EMIR and article 23c CRA Reg.) is thus left to the national level.

are neither arbitrary nor excessive in relation to the subject matter of the investigation.¹¹⁰ The national judicial authority may ask ESMA for detailed explanations as to *inter alia* the grounds for suspicion, the seriousness of suspected infringements and the nature of the involvement of the person targeted by the coercive investigative measures, but cannot demand access to ESMA's file.¹¹¹ As such, national-level *ex ante* judicial control of ESMA investigative acts represents a 'meantime accountability check'¹¹² before possible internal and external appeals to the Board of Appeal and CJEU respectively.

9.3.3.1 Direct review: Actions for annulment

a. Requests for information

As with DG Competition,¹¹³ ESMA may issue simple requests¹¹⁴ for information or requests pursuant to a decision.¹¹⁵ In the former case, since no obligation to provide the requested information exists, it may be assumed that a simple request for information does not alter its recipient's legal position, and thus cannot be challenged under Article 263 TFEU, notwithstanding the fact that where a 'voluntary' reply is incorrect or misleading¹¹⁶ a fine is foreseen.¹¹⁷ In practice, in such cases there has been no formal decision to request information – and thus no threat as yet of fines in case of non-cooperation.

On the other hand, as requests for information which emanate from an ESMA decision carry the threat of monetary penalties in case of non-compliance,¹¹⁸ that decision may ultimately be subject to an action for annulment before the CJEU¹¹⁹ should the matter not be resolved at the Board of Appeal stage. When requiring information by decision, ESMA must state the legal basis and purpose of the request, specify what information is required, set a time-limit and so on.¹²⁰ As such, the framework for ESMA's request powers closely resembles that of DG Competition and the above-cited case law may prove instructive in evaluating the legality of their application. That being said, it would seem unlikely that much jurisprudence will be generated in the near future; notably, as of November 2016 ESMA had not yet issued a request for information based on a decision in the enforcement context (as opposed to the supervision side of ESMA's remit), indicating a cooperative relationship between the Authority and supervised entities.¹²¹

110 Arts. 62(6) and 63(9), EMIR and arts. 23c(6) and 23d(9), CRA Regulation.

111 Ibid.

112 M. van Rijsbergen and M. Scholten, 'ESMA inspecting: the implications for judicial enforcement under shared enforcement', (2016) 7 *European Journal of Risk Regulation*, no.3, p. 576.

113 During the CRA Regulation legislative process under the Belgian EU Presidency, a number of powers available to ESMA were, in fact, copy-pasted from Regulation 1/2003 (source: meeting with ESMA, November 2016).

114 Art. 61(1), EMIR and art. 23b(1), CRA Regulation.

115 Art. 61(3), EMIR and art. 23b(3), CRA Regulation.

116 Art. 61(2)(e), EMIR and art. 23b(2)(e), CRA Regulation.

117 Art. 65 and Point IV(a), Annex I to EMIR, and art. 36a and Point II(7), Annex III to the CRA Regulation.

118 Where information provided is incomplete (art. 23b(e), EMIR and art. 61(3)(e), CRA Reg.) or where answers are incorrect or misleading (art. 23b(f), EMIR and art. 61(3)(f), CRA Reg.).

119 Art. 61(5), EMIR and art. 23b(3)(g).

120 Art. 59(3)(a)-(d), EMIR and art. 23b(3)(a)-(d), CRA Regulation.

121 Source: meeting with ESMA, November 2016.

b. General investigations and inspections

ESMA is empowered to examine records, data and procedures, take or obtain copies of such material, summon relevant representatives or staff for oral or written explanations, interview any other natural or legal person who consent to being interviewed, and request records of telephone and data traffic.¹²² These ‘general investigation’ measures may be taken upon production of a written authorisation specifying the subject matter and purpose of the investigation along with the periodic penalty payments attached to non-compliance;¹²³ where measures are taken on the basis of a decision, this may be reviewed by the Court of Justice.¹²⁴

Very similar conditions (written authorisation; specification of purpose and penalties in case of non-compliance) apply to on-site inspections – which may be carried out without prior announcement, where the proper conduct and efficiency of the inspection so require – in order to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.¹²⁵ An ESMA decision to carry out an on-site inspection shall be subject to review only by the CJEU.¹²⁶

Van Rijsbergen and Scholten reported in February 2016 that ESMA had completed two enforcement investigations, neither of which featured on-site inspections.¹²⁷ By November 2016, there had still not been an on-site inspection (ESMA investigations are almost entirely paper-based) but the number of completed investigations had risen to four. This may appear *prima facie* to be a small return, but it must be kept in mind that ESMA only supervises a total of 40 entities – 10% of which have thus been investigated.

c. Review of fines

The CJEU has unlimited jurisdiction based on Article 261 TFEU and the ESMA legal framework¹²⁸ to review administrative penalties imposed pursuant to Article 18 of the SSM Regulation. The case law on the review of ‘complex economic and technical assessments’ in competition law may also be relevant in the context of the review of ESMA decisions (with the same ‘caveats’ laid down by the most recent case law of the CJEU in *KME* and *Chalkor*).

9.3.3.2 Direct review: Actions for damages

Article 69 of the ESMA Regulation provides that ESMA shall make good any damage caused by it or by its staff in the performance of their duties, and confirms that the CJEU has jurisdiction in any dispute over the remedying of such damage.

9.3.3.3 Direct review: Interim relief in actions for annulment and actions for damages

Article 278 TFEU provides that actions brought before the CJEU shall not have suspensory effect. The Court may, however, if it considers that circumstances so require,¹²⁹ order that application

¹²² Art. 62(1), EMIR and art. 23c(1), CRA Regulation.

¹²³ Art. 62(2) and art. 23(2), CRA Regulation.

¹²⁴ Art. 62(3), EMIR and art. 23c(6), CRA Regulation.

¹²⁵ Art. 63(1)-(2), EMIR and art. 23d(1)-(2), CRA Regulation.

¹²⁶ Art. 63(9), EMIR and art. 23d(9), CRA Regulation.

¹²⁷ See Van Rijsbergen and Scholten, *supra* note 112.

¹²⁸ Art. 69, EMIR and art. 36e, CRA Regulation.

¹²⁹ See discussion of interim relief in relation to OLAF *infra* at 9.3.4.7.

of the contested act be suspended as well as prescribe any necessary interim measures.¹³⁰ Since, as noted in several other parts of this report, suspensory effect is difficult to obtain, one possible solution might be to suspend not the levying of a sanction against an entity supervised by ESMA, but of its publication, preserving to a considerable extent the reputation of the entity involved until all appeal routes have been exhausted. This is, however, precluded by the current legal framework which provides that ESMA shall publicly disclose any such decision to levy a sanction on its website within 10 working days of adopting it.¹³¹

At the temporally-prior non-judicial stage, the ESMA Regulation also establishes that an appeal to the joint Board of Appeal shall not have suspensive effect; the Board may however decide to suspend the application of the contested decision (see *infra* at 9.3.3.4).¹³²

9.3.3.4 Ex post non-judicial (or quasi-judicial) review

Members of the joint Board of Appeal (see 9.3.3 above) shall be independent in making their decisions; they shall not perform any other duties in relation to ESMA.¹³³ Proceedings before the Board of Appeal are organised in a quasi-judicial manner: a Notice of Appeal is first filed by the appellant, before the respondent files its Response,¹³⁴ and parties are invited to file observations and are entitled to make oral representations.¹³⁵ If the review is of a decision (to sanction or to carry out investigative acts), the Board of Appeal may establish a standard of review that is different to that of the General Court. The Board of Appeal is not bound by the case law of the CJEU, and can examine the facts.

At the time of writing, there have been no decisions of the Board of Appeal in relation to ESMA investigative acts or sanctions – those that have been handed down in relation to ESMA have concerned other matters: for example, the challenging of a decision to refuse to register a credit rating agency.¹³⁶ This is unsurprising given (as noted at 9.3.3.1 sub a) that no investigative measures in the enforcement context have yet been carried out on the basis of an ESMA decision – only through simple requests for information.¹³⁷

From a procedural rights perspective, the issue of access to a lawyer is of lesser importance than in the OLAF or DG Competition contexts since the Board of Appeal procedure is largely paper-based, and indeed turn-based. One possible future issue, however, concerns the right to interpretation: whilst a large share of ESMA's interaction is currently with supervised entities

130 Art. 279, TFEU.

131 Art. 73(3), EMIR and art. 24(5), CRA Regulation.

132 Art. 60(3), ESMA Regulation; see further article 10, *Rules of Procedure*, Board of Appeal of the European Supervisory Authorities, BOA 2012 002.

133 Art. 59(1), ESMA Regulation.

134 See Articles 5 and 6, *Rules of Procedure*, *supra*.

135 Art. 60(4), ESMA Regulation.

136 Decision of the Board of Appeal of the European Supervisory Authorities, *Global Private Rating Company 'Standard Rating' Ltd vs. ESMA*, 10 January 2014. Looking beyond ESMA, a decision of the Board of Appeal in relation to a decision of the European Banking Authority was annulled by the General Court in Case T-660/14, *SV Capital OÜ v. EBA*, [2015], ECLI:EU:T:2015:608, but this case hinged on grounds of lack of competence, rather than any procedural irregularity at the Board of Appeal stage.

137 Supervisory measures, on the other hand, have been taken on the basis of a decision. However, none has yet to found an appeal to the Board of Appeal (source: discussion with ESMA representatives, March 2017).

based in London or entirely comfortable using English, translation and interpretation will need to be ensured should the number of supervised entities based further afield continue to grow.

Finally, depending on how its future body of decisions takes shape, the timeliness of the Board of Appeal procedure – as a necessary first step to judicial review by the CJEU – may arguably raise concerns in relation to effective judicial protection. Although the appeals so far made to the Board have not been overly complicated, when an enforcement appeal does eventually arise, the time limits set out in the Rules of Procedure may be greatly tested due in part to the fact that members of the Board of Appeal are spread across multiple Member States, making swift correspondence more difficult. Moreover, Article 20(1) of the Rules of Procedure allows the President of the Board of Appeal to deem that the appeal is lodged – thereby triggering the two-month period in which it must decide an appeal¹³⁸ – begins when s/he considers that evidence is complete. As such, should the exchange of evidence, making of oral representations and so on drag on for months, the effectiveness of (quasi-)judicial protection may be jeopardised. In such circumstances, recourse to suspensive effect¹³⁹ might provide welcome succour, although it remains to be seen whether the Board of Appeal would apply the (exacting) established CJEU criteria.

9.3.4 OLAF

Since OLAF has no legal personality of its own, actions for annulment¹⁴⁰ and actions for damages¹⁴¹ brought before the EU courts against the legality of its investigative acts are lodged against the Commission.¹⁴² In relation to both types of action the EU courts may, upon request of the applicant, grant interim relief provisionally suspending the effects of the contested act(s).¹⁴³ Furthermore, an indirect¹⁴⁴ review of such acts is available before the EU courts where an act or decision taken by an authority other than OLAF is based – entirely or partly – on an OLAF investigative act.

9.3.4.1 Direct review: Actions for annulment

a. Transfer of final OLAF report to national authorities

Since the creation of OLAF, the EU Courts have systematically construed the wording in Article 263 TFEU to the effect that any natural or legal person may ‘institute proceedings against an act addressed to that person or which is of direct and individual concern to them’ in order to reject as inadmissible actions for annulment in relation to the Office’s investigative procedures which are deemed not to bring about a distinct change in the applicant’s legal position.¹⁴⁵ The reasoning at

138 Under Art. 60(2), ESMA Regulation.

139 Under Art. 60(3), ESMA Regulation and Article 10, Board of Appeal Rules of Procedure, *supra*.

140 On the basis of Article 263(4) TFEU and, for EU staff, Article 270 TFEU in combination with Article 91 of the Staff Regulations.

141 Articles 268 and 340 TFEU.

142 See J.F.H. Inghelram, ‘Judicial review of investigative acts of the European anti-fraud Office (OLAF): A search for balance’, (2012) 49 *Common Market Law Review*, no. 2, pp. 603-605.

143 Articles 278 and 279, TFEU.

144 J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF): An Analysis with a Look Forward to a European Public Prosecutor’s Office* (2011), pp. 203, 225 *et seq.*

145 *Ibid.*, p. 204.

the core of this consistent¹⁴⁶ interpretation is that the forwarding of OLAF's findings, in the shape of a final report, to national competent authorities does not lead automatically to the opening of judicial or disciplinary proceedings: the recipient competent authorities remain entirely free to decide whether or not to act upon the report – and thus whether or not to alter the legal position of the person(s) concerned by OLAF's investigations.¹⁴⁷ As such, investigations carried out by OLAF represent a preliminary stage of proceedings which may or may not lead to a decision establishing the liability of the person concerned.¹⁴⁸

In *Tillack*, the CJEU thus held that the possible initiation of legal proceedings subsequent to the forwarding of information by OLAF, and the possible legal acts capable of affecting the legal position of the applicant, belonged to the sole and entire responsibility of the national authorities.¹⁴⁹ The action for annulment in *Tillack* against OLAF's forwarding of information on internal investigations to the Belgian prosecuting authorities was thereby deemed inadmissible. According to the reasoning in *Tillack*, should the adverse conclusion be drawn to the effect that national competent authorities are *not* free to assess the content and significance of the information they receive from OLAF – in other words, should national authorities be considered bound to initiate proceedings in relation to the person(s) concerned – this would 'alter the division of tasks and responsibilities as prescribed' in the (then-applicable) OLAF Regulation.¹⁵⁰

b. OLAF investigative acts

Nor have actions for annulment against investigative acts carried out by OLAF prior to the delivery of any final report met with success before the EU courts. Settled case law provides that acts or decisions adopted in the course of preparatory proceedings would be open to review only if they 'were themselves the culmination of a special procedure distinct'¹⁵¹ from the final decision on liability – in the OLAF context, that taken at national level. This reasoning has been applied in rejecting as inadmissible actions for annulment brought against an OLAF decision to open an investigation,¹⁵² acts performed by OLAF in the course of an investigation,¹⁵³ the drawing up by the Office of a final report,¹⁵⁴ decisions by OLAF to close an investigation¹⁵⁵ and not to annul investigative acts allegedly compromised by a conflict of interest,¹⁵⁶ OLAF's refusal to inform an investigated person of certain acts taken against that person in order to allow for a defence

146 Only one action for annulment against an OLAF investigative act has been considered admissible by the EU courts, in Case T-48/05, *Franchet and Byk v. Commission*, [2008] ECR II-01585, ECLI:EU:T:2008:257.

147 Case T-29/03, *Comunidad Autónoma de Andalucía v. Commission*, [2004] ECR II-02923, ECLI:EU:T:2004:235, para. 37; *Camós Grau*, supra note 26, para. 51; Case T-193/04, *Tillack v. Commission*, [2006] ECR II-03995, ECLI:EU:T:2006:292, paras. 69 and 70.

148 See Case 60/81, *IBM v Commission*, [1981] ECR 02639, para. 10 (emphasis added). '...[I]n principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a *provisional measure intended to pave the way for the final decision.*'

149 See *Tillack*, supra note 147, para. 70.

150 *Ibid.*, para. 72.

151 *IBM*, supra note 148, para. 11.

152 Case C-471/02 P(R), *Gómez-Reino v. Commission*, [2003] ECR I-03207, ECLI:EU:C:2003:210.

153 *Ibid.*

154 *Comunidad Autónoma de Andalucía*, supra note 147.

155 Case C-127/13 P, *Strack v. Commission*, [2014], ECLI:EU:C:2014:2250.

156 *Camós Grau*, supra note 26.

in the context of the investigation,¹⁵⁷ and OLAF's forwarding of a report concluding an internal investigation to an EU institution.¹⁵⁸

Crucial to this line of reasoning are the direct consequences – at the supranational level – of an economic actor's refusal to cooperate with OLAF. Where an undertaking subject to investigation refuses to cooperate by, for example, denying the Office access to its premises, OLAF's only option is to request the aid of the national competent authorities to perform the operation.¹⁵⁹ Although those authorities are in principle bound by the duty of loyal cooperation,¹⁶⁰ this in no way diminishes their freedom to adopt the action they deem to be appropriate in accordance with national law: they may very well decline to offer assistance. Here, a useful comparison¹⁶¹ can be drawn between OLAF and the enforcement of EU competition law where the Commission may, unlike OLAF, order undertakings to submit to inspections¹⁶² bolstered by the threat of fines in case of non-compliance.¹⁶³ As such, an order to submit to inspection clearly affects the legal position of the relevant undertakings or associations of undertakings – and is hence open to review by the EU courts.¹⁶⁴

A 'tentative exception'¹⁶⁵ to the EU courts' refusal to admit actions for annulment against OLAF investigative acts appeared in *Violetti*¹⁶⁶ where the Civil Service Tribunal found, pursuant an OLAF investigation into high rates of invalidity pensions granted to personnel at the Commission's site in Ispra (Italy), in favour of the plaintiffs who argued *inter alia* that they had had no opportunity to be heard before the transmission of the Office's final report on the matter to the Italian judicial authorities. Having first accepted, in contrast to the ECJ judgment in *Tillack*, that the decision to forward the information contained in that report met the criterion of an 'act adversely affecting'¹⁶⁷ the officials,¹⁶⁸ the Tribunal went on to insist that the fundamental principle of the rights of the defence (in this case, the right to be heard) could not be effectively protected 'in sufficient time' were it not to carry out a review of legality in relation to that decision, since the national court would retain before it information received from OLAF which it should be barred from acting upon.¹⁶⁹

The decision in *Violetti* was later reversed¹⁷⁰ by the General Court in a return to the established case law, albeit in a decision which insisted that it is not impossible for an action for annulment

157 *Gómez-Reino*, supra note 152.

158 *Ibid.*

159 See V. Covolo, *L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraude* (Nomos), p. 567 *et seq.*

160 Art. 4(3) TEU.

161 See Inghelram, supra note 144, pp. 208-210.

162 Art. 20(4), Regulation No. 1/2003.

163 *Ibid.*, art. 23(1)(c).

164 *Ibid.*, art. 20(4).

165 Inghelram, supra note 144, p. 206.

166 Joined Cases F-5/05 and F-7/05, *Violetti and Others vs. Commission*, [2009] ECR FP-I-A-1-00083 and FP-II-A-1-00473, ECLI:EU:F:2009:39, esp. paras. 56-58.

167 Art. 90a Staff Regulations.

168 *Violetti* (CST), supra note 166, para. 77. The Tribunal also stressed at para. 75 that such a decision 'is liable to have significant consequences for the career of the persons concerned'.

169 *Ibid.*, para. 78.

170 Case T-261/09 P, *Commission v Violetti and Others*, ECLI:EU:T:2010:215.

to succeed against OLAF investigative acts, depending on the specific (and likely exceptional) context.¹⁷¹ The General Court added, as had the Court of Justice in *Tillack*,¹⁷² that effective judicial protection is secured by other EU-level remedies: actions for damages and preliminary ruling procedures.¹⁷³

Finally, since the legality of an OLAF investigative act may in turn affect the legality of another decision taken by an EU institution partly or entirely on the basis of that act, there have also been attempts to seek the review of the prior OLAF act indirectly via a review of the later decision. In *CPEM*¹⁷⁴ the applicant challenged a Commission decision to cancel European Social Fund (ESF) assistance which was partially based on an OLAF report. The applicant argued, unsuccessfully, that the preceding OLAF investigation had violated his defence rights. All analogous instances of this version of indirect judicial review by the EU courts of OLAF investigative acts have also been dismissed.¹⁷⁵

9.3.4.2 Direct review: Actions for damages

Articles 268 and 340(2) TFEU provide that where non-contractual liability is proven, the EU is to make good any damage caused by its institutions or servants in performance of their duties. Three conditions must be met for reparation to be awarded: the rule of law infringed must be intended to confer rights on persons; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation and the damage sustained by the injured parties.¹⁷⁶

To date, damages have been awarded in only a handful of cases – all concerning internal investigations.¹⁷⁷ In all cases of an alleged violation of individual rights in external investigations, on the other hand, application of the *Tillack* rationale distancing action taken in respect of information forwarded by OLAF from the Office's preceding contested act(s) has precluded fulfilment of the 'direct causal link' condition.

From a defence rights perspective, the progress represented by successful actions for damages¹⁷⁸ is tapered by the fact that damages awarded have no effect on the validity of the legal effect giving rise to reparation. So it was in *Camós Grau*, where a final report deemed 'one-sided and biased'¹⁷⁹ by the General Court was nonetheless forwarded to prosecuting authorities. This is

171 Ibid., para. 71: '[I]l convient de rappeler que le fait qu'un acte intervienne au cours d'une procédure complexe n'implique pas nécessairement qu'il sera dépourvu d'effets juridiques [...] et que la conclusion selon laquelle une décision de transmission d'informations ne constitue pas un acte faisant grief ne préjuge pas de la position du juge à l'égard de la qualification d'autres actes de l'OLAF.'

172 Ibid., para. 80.

173 Ibid., paras. 65 *et seq.*

174 Case T-444/07, *Centre de promotion de l'emploi par la micro-entreprise (CPEM) v. Commission*, [2009] ECR II-02121, ECLI:EU:T:2009:227.

175 Case T-259/05, *Spain v Commission*, [2009] ECR II-00095, ECLI:EU:2009:232; Case C-432/04, *Commission v. Cresson*, [2006] ECR I-06387, ECLI:EU:C:2006:455.

176 Case C-352/98 P, *Bergaderm and Goupil v. Commission*, [2000] ECR I-05291, ECLI:EU:C:2000:361, para. 42.

177 *Camós Grau*, supra note 26; *Franchet and Byk*, supra note 146; Case C-220/13 P, *Nikolaou v. Court of Auditors*, [2014], ECLI:EU:C:2014:2057.

178 For a violation of the obligation of impartiality (*Camós Grau*), unauthorised leaks of confidential information (*Nikolaou; Franchet and Byk*) and for infringement of the right to be heard (also *Franchet and Byk*).

179 Para. 129.

further compounded by the fact that actions for damages, similarly to actions for annulment, take a considerable length of time before judgment is passed.¹⁸⁰

9.3.4.3 Direct review: Interim relief in actions for annulment and actions for damages

Although actions brought before them have no suspensory effect, where the EU courts consider that the circumstances so require – in essence, in order to avoid the situation in which the time needed to establish the existence of a right does not have the effect of depriving that right of substance by eliminating any possibility of exercising it¹⁸¹ – they may order that application of the contested act(s) be suspended.¹⁸² Interim relief is necessarily provisional in nature, and is an ancillary mechanism in the sense that an application for interim relief is admissible only if the applicant is challenging the measure *per se* in the relevant proceedings. As such, where the primary claim is thrown out, any application for interim relief falls with it.

This package effect poses particular difficulty in actions for annulment, whose admissibility is construed narrowly by the EU courts. Where the admissibility threshold *is* met in such an action, Inghelram sees no obstacles to the granting of interim relief suspending OLAF operations pending the outcome of the court proceedings provided that the order is justified *prima facie* in law and fact, that there is an urgent need for interim relief in order to avoid serious and irreparable damage to the applicants' interests, and that those interests outweigh others at stake in the proceedings.¹⁸³ The same author sees the immediacy of interim relief as a potentially very effective form of legal protection for suspects in OLAF investigations.¹⁸⁴ The jurisprudence remains unclear on whether interim relief is a realistic proposition in the context of actions for damages targeting OLAF investigative acts.¹⁸⁵

9.3.4.4 Indirect review: Preliminary rulings

Where a national measure amenable to judicial review is taken on the basis of OLAF findings delivered to national authorities or information or evidence brought to light following a request for assistance emitted by OLAF to national authorities, individuals subject to such a measure may request that the CJEU rule on the validity of the relevant OLAF act under EU law.¹⁸⁶ In this regard it is irrelevant that an OLAF investigative act is not legally binding: primary EU law confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the EU institutions without exception.¹⁸⁷

180 Inghelram, *supra* note 144, p. 220.

181 *Ibid.*, p. 220.

182 Art. 278 TFEU.

183 Inghelram, *supra* note 144, p. 221.

184 *Ibid.*, p. 225.

185 See the President of the ECJ in Case C-51/90, *Comos-Tank and Others*, [1990] ECR I-02167, ECLI:EU:C:1990:228, para. 33: '[I]t can also be left open whether an application for the suspension of the operation of a measure is admissible where it is made by a party which has brought an action solely for compensation for the damage which it claims to be suffering as a result of the application of the measure in question [...]' See also Case T-203/95, *Connolly v. Commission*, [1995] ECR II-02919, paras. 23-25, and Inghelram, *supra* note 144, p. 222 *et seq.*

186 Art. 267 TFEU.

187 Case C-322/88, *Grimaldi*, [1989] ECR 04407, para. 8.

To date, two requests¹⁸⁸ for a preliminary ruling on the validity of OLAF investigative acts have been made, with one producing answers to the questions asked by the national court. In *Afasia Knits Deutschland*, the Court of Justice found that an on-the-spot check carried out by OLAF in Jamaica was consistent with the international agreement on Office investigations in third countries, underlining that the local authorities took part in the inspections and endorsed the results of the investigation.¹⁸⁹

The continued paucity of requests for a preliminary ruling on the validity of OLAF investigative acts may be explained by two facets of Article 263 TFEU: such a ruling must be deemed essential by the national jurisdiction in order to reach judgment, and is mandatory only in cases pending before a court or tribunal against whose decisions there is no judicial remedy under national law.¹⁹⁰ In practice, in the vast majority of cases national law enforcement authorities' assistance provided to OLAF may not be demonstrably (exclusively) based on the information provided to them by OLAF: separate, further investigation will often take place on the national level before a prosecution is brought on the strength of all available evidence. In this scenario, the applicant challenging a national measure – in his eyes, based on OLAF's activity – will have difficulty establishing that the validity of that national measure depends on the validity of a prior OLAF investigative act, and hence in turn that a request for a preliminary ruling on the OLAF act is required in order to resolve the national proceedings.¹⁹¹

9.3.4.5 Ex post non-judicial (or quasi-judicial) review

The Supervisory Committee ('SC') monitors OLAF's implementation of its investigative function, in particular the application of procedural guarantees and the duration of investigations, in order to reinforce its independence.¹⁹² The SC addresses opinions and recommendations to the Director-General (and may submit reports to the European Parliament, the Council, the Commission and the Court of Auditors), but must not interfere with the conduct of investigations in progress.¹⁹³ In practice, the division is not always clear between systemic supervision and review of individual cases, where the SC has levelled severe criticism at OLAF and its Director-General.¹⁹⁴ However, the SC was not designed as a complaints body and its opinions and recommendations are not legally binding on OLAF.

On 11th June 2014, the Commission adopted a proposal¹⁹⁵ for a regulation amending the OLAF Regulation in order to provide for the establishment of a new 'Controller of procedural guarantees'. The fate of the proposal remains unclear at the time of writing; there has been no follow-up in

188 Case C-409/10, *Afasia Knits Deutschland*, [2011] ECR I-13331, ECLI:EU:C:2011:843 and Case C-348/11, *Thomson Sales Europe*, [2012], ECLI:EU:C:2012:169.

189 *Ibid.*, para. 34.

190 Respectively Art. 267(3) and (4) TFEU.

191 Covolo, *supra* note 159, at 18.

192 Art. 15(1), Regulation No. 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999, OJ L 248/1, 18.9.2013 (hereinafter 'OLAF Regulation').

193 *Ibid.*

194 Citing SC Opinion 2/2012 on the Dalli case, see M. Luchtman and M. Wasmeier, 'The political and judicial accountability of OLAF' (2017), p. 7.

195 COM (2014) 340 final.

the EU Council. The tasks of the Controller were proposed to consist of both an *ex post* review of OLAF investigative acts in relation to any person concerned by such acts¹⁹⁶ and an *ex ante* authorisation mechanism in relation to certain investigative measures taken against members of EU institutions.¹⁹⁷ The Controller would exercise his functions ‘in complete independence and shall neither seek nor take instructions from anyone in the performance of [his] duties’.¹⁹⁸

Set against this independence, the Controller’s *ex post* review would be non-binding; where the Director-General decides not to follow a recommendation, he is bound only to provide reasons for doing so to the Controller and (where this would not affect an ongoing investigation) the complainant.¹⁹⁹ Said reasons shall also be stated by the Director-General in a motivated note attached to the final investigation report.²⁰⁰ The envisaged *ex post* complaints mechanism is limited to a review by the Controller of the respect by the Office of the procedural guarantees set out in Article 9 of the OLAF Regulation.²⁰¹ Subject to short time-limits, the Controller shall examine the complaint in an adversarial procedure in the course of which he may ask witnesses to provide written or oral explanations.²⁰²

In contrast, the envisaged *ex ante* authorisation of the Controller is required by the Director-General before the Office exercises its power to inspect the professional office of a member of an EU institution at the premises of an EU institution during an internal investigation or to take copies of documents or of any data support located in that office.²⁰³ Within 48 hours of receiving a request for authorisation, the Controller is to carry out an objective assessment of the legality of the investigative measures at hand, and examine whether the same objective could be achieved with less intrusive investigative measures.²⁰⁴

9.4 COMPARATIVE CONCLUSIONS

The principal differences between the routes to EU-level judicial review of investigative acts and/or sanctions carried out or imposed by the four analysed authorities are set out in the comparative tables below.

Not all points of comparison can be represented in such a form due to the manifold differences between the authorities, with the ECB and ESMA more supervision-oriented entities than DG Competition, whilst OLAF lacks – for now – the capacity to oblige national authorities to open investigations. The absence of this power has, indeed, been the single biggest cause of the extreme paucity of successful challenges to OLAF investigative acts before the EU courts. Should it be envisaged to increase the autonomous powers of OLAF in future (e.g. should OLAF be able to address binding requests for information to national authorities) a commensurate level of

196 Ibid., art. 9a.

197 Ibid., art. 9b.

198 Ibid., art. 9c(2).

199 Ibid., art. 9a(7).

200 Ibid.

201 Ibid., art. 9a(1).

202 Ibid., art. 9a(2)-(6).

203 Ibid., art. 9b(1).

204 Ibid., art. 9b(2).

review before the EU courts will be an essential corollary in order to ensure the effective judicial protection of implicated persons.

Finally, due to the dearth of information provided on this aspect by the national reports, the complex relationship between judicial control at the national level and the EU level has not received here the attention that it merits.²⁰⁵ With the benefit of more years of practice and more developed jurisprudence, this interplay ought to provide fertile ground for comprehensive comparative analysis in future.

Direct Review – requests for information

DG Competition	ECB	ESMA	OLAF transfer of final report to NAs
Commission must state: Legal basis Purpose of request Specify information required	Obligations on ECB as to precision of request unclear. But, requests used rarely due to strong information position of ECB.	(As DG Comp.) ESMA must state: Legal basis Purpose of request Specify information required	Action for annulment of decision to transfer to national authorities is inadmissible (<i>Tillack</i>)
Fishing expeditions are prohibited	Review only if Request is taken in form of decision Non-compliance leads to fine (?)	Review only if Request taken in form of decision that sanctions non-compliance No resolution at Board of Appeal stage	

Direct Review – inspections

DG Competition	ECB	ESMA	OLAF
Commission must clearly indicate presumed facts it intends to investigate	ECB decision must indicate legal basis and purpose of inspection	ESMA must have written authorisation, state purpose and penalties for non-compliance	Action for annulment is inadmissible (<i>Tillack</i>)
Need to safeguard rights of defence!	Need to safeguard rights of defence?		
No separate action against individual investigative measures!	No separate action against individual investigative measures?		
		(No <i>enforcement</i> inspections yet cf. many supervisory inspections)	

²⁰⁵ The report for the Netherlands does address this issue, at 4.4.2., citing the observations of Wissink et al., supra note 74, in relation to mixed administration mentioned in 3.2.1.b of this report.

Direct Review – review of fines

DG Competition	ECB	ESMA	OLAF
EU courts may quash, reduce or raise a fine on basis of all factual evidence presented before them	Penalties imposed by ECB are open to review by EU courts	Penalties imposed by ESMA are open to review by EU courts	No power to impose fines
But, EU courts are not entitled to carry out a complete <i>de novo</i> review of facts and evidence	But, EU courts may not review an ECB request to NCA to open proceedings (<i>Tillack?</i>)		
	Relevance of ‘complex economic and technical assessments’ (as in competition law case law)?	Relevance of ‘complex economic and technical assessments’ (as in competition law case law)?	

Direct Review – actions for damages

DG Competition	ECB	ESMA	OLAF
The rule of law infringed must be intended to confer rights on individuals	Test as in left column.	Test as in left column	Test as in left column
the breach must be sufficiently serious	May be difficult to assign responsibility for specific investigative act to either ECB or NCA		Handful of successful actions, but only internal investigations.
and a direct causal link between such a breach and the allegedly sustained damage must be established (<i>Bergaderm and Goupil</i>)			Length of process at EU level undermines reparation; file used regardless by NAs.

10. COMPARISON OF THE LEGAL FRAMEWORKS

*M. Luchtman & J. Vervaele*¹

10.1 INTRODUCTION

The foregoing chapters have introduced the general EU framework, the implementation of obligations of EU law into the national enforcement regimes of the Member States and a transversal report on judicial protection at the EU level. This chapter aims to combine the main findings of those chapters. In the following sections we will make a comparative analysis of how the respective investigative powers are given shape within the frameworks of the four authorities and how they are integrated into the legal regimes of the six national legal orders of this study (section 10.5: production orders and interviews; section 10.6: on-site inspections; section 10.7: access to telecommunications data; section 10.8: online monitoring of bank accounts).

For such an analysis, it is helpful to introduce an analytical grid for how the EU frameworks interact with their national counterparts. The models that are introduced in section 10.2 help us to identify at which instances national laws (and national authorities) become relevant in the investigations of the EU authorities and, therefore, what to look for in national law. They provide us with answers as to who is the lead authority, what is the precise role of the national partners (in terms of their capacity to operate autonomously or under the instructions of EU authorities), and to which legal order (EU or national) the investigative acts are ultimately to be attributed. Depending on the model chosen, there are considerable consequences for the issues that are at the core of this project, i.e.:

- the scope and content, as well as the enforceability of the investigative acts,
- the scope and content of the procedural safeguards, and
- the available remedies.

As will also become clear below, however, the relationships between the tasks and competences of the EU authorities, the models and the applicable legal rules are not always as clear-cut as one would expect, particularly not within the OLAF setting. This is why section 10.3 will consequently deal with another issue that needs to be taken into account in the comparative analysis. That issue pertains to how the applicable legal regime (national and/or EU) can be determined (particularly with respect to fundamental rights standards). This is also of great influence for our comparative analysis. After that, we will offer a comparative analysis of the organizational set-up of the partners of the four EU authorities at the national level (section 10.4).

¹ The authors thank Ms. Danielle Arnold for her very valuable assistance during the writing of chapter 10.

Finally, it is already worth mentioning that the models do not only offer an empirical-analytical framework for the state of play and for identifying and explaining inconsistencies in the respective frameworks, but that they also offer a more normative perspective. What are the consequences and factors to be taken into account when choosing between them, in light of the applicable law, *et cetera*? That issue will be taken up after our comparative analysis, in chapter 11.

10.2 MODELS OF INTERACTION BETWEEN THE EU AND NATIONAL LEVEL

The legal frameworks of all the authorities have (at the least) two features in common. First of all, the legal regimes of ECB, ESMA, DG Comp and OLAF allow these authorities to operate on the joint territories of the participating states for the realization of common European goals (e.g. banking supervision or the fight against EU fraud). This allows them to gather information without recourse to the time-consuming procedures for mutual legal or administrative assistance. It also means that not only do national authorities exercise enforcement jurisdiction on the territories of their nation state, but EU authorities which – under different cooperation models with their national partners – are also entrusted with specific European tasks and which may have to live up to different rules than their national partners. By definition, this situation will give rise to complicated situations, particularly where these regimes are different, yet applicable simultaneously. Indeed, EU powers may be exercised in parallel with those of the national partners (OLAF, DG Comp; ECB (LSEs)), but we also see in some policy areas that the EU authority is exclusively competent (ESMA; ECB (SEs)).² Even in the latter case, national authorities have a certain role to fulfil.

Secondly, the legal designs of the four authorities are in constant interaction with the national legal orders involved. This interaction can refer to the national statutory framework (legislation), but also to the operational cooperation (enforcement) with national partners and to the arrangements for offering legal protection (adjudication). The links with the national legal orders help to deal with language problems and becoming acquainted with local customs, but also take away certain capacity problems at the EU level.³ 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. The use of physical force is always reserved for the national authorities. EU law, consequently, recognizes the need for nation states to retain oversight over the actions of EU authorities on their territories. This is why they are for instance allowed to be present (upon their request) during on-site visits.

All four frameworks therefore seek a balance between, on the one hand, a common level playing field for the EU authorities, yet, on the other, a strong interaction with and also integration in national law. It goes without saying that these two interests are sometimes difficult – if not

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

3 Cf. P. Schammo, 'EU day-to-day supervision or intervention based supervision: Which way forward for the European system of financial supervision', (2012) 32 *Oxford Journal of Legal Studies*, no. 4, pp. 782-783; Recital 15 CRAR (ESMA). ESMA will typically delegate tasks where they require specialist knowledge and experience with respect to local conditions, where these are available at the competent authority. This may include tasks such as carrying out specific investigatory tasks and on-site inspections.

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).

impossible – to combine. Our study reveals that the different types of legal frameworks deal with this core dilemma in different ways. In light of our common goal of seeking ways to improve the legal framework of OLAF for gathering evidence, three factors are key for determining the relevant models for interaction and for the imputation of investigative acts to the legal orders of the EU or the national authorities:

1. The issue of which authority is the acting authority, i.e. the authority that performs the investigative acts. Is this the EU authority itself or its national partner?
2. The issue of whether the national partner becomes (functionally)⁵ a part of the EU organization or whether assistance is provided to the EU authority by the national partner as a representative/part of its national administration (on behalf of the EU authority or in its own name).
3. The issue of who instructs the national partners: are instructions provided by the EU authority or through the national lines/chains of command?

On the basis of the aforementioned three factors, we can discern the following types of interaction between the EU and national authorities:

- **Autonomous investigative acts (*Vor-Ort-Kontrolle*):**⁶ EU authorities perform investigative acts themselves. This means that the laws to be applied are mostly EU regulations and that the remedies are, in principle, to be found at the EU level. Although national authorities are usually allowed to be present, their assistance is not related to the performance of their own tasks. It is seen as mutual (administrative) assistance *Amtshilfe*,⁷ and mostly comprises the use of coercive power in case of non-cooperation or assistance of a practical nature. Physical force remains, after all, a power which is only available to the national authorities. Beyond that, however, MS have no say over the actions performed on their territories.

We can find examples of such acts in all legal frameworks, for instance in Regulation 2185/96 for OLAF (on-the-spot checks), Arts. 20 and 21 Regulation 1/2003 (DG Comp), and on-site inspections within the framework of ECB and ESMA. Here, we can already notice major differences between the OLAF framework and those of the others. Whereas OLAF does have the power to perform on-the-spot checks, it is highly dependent in law and practice on its national partners. The applicable regulations do not provide for autonomous powers or means to deal with a lack of cooperation by economic actors. This is different for DG Comp, ESMA and ECB.

- **Mixed investigations (inspections):** In this model, national and EU authorities work together in the performance of their respective tasks. The authorities of this research use the information for purposes of direct enforcement, i.e. for investigations into alleged infringements of the law by economic actors and individuals.⁸ Without a clear legislative basis providing otherwise, the cooperating authorities will have to act within the limits of their own statutes. Provisions for

5 Not necessarily in terms of HR statutes (i.e. the legal position of staff members and civil servants).

6 See *in extenso* also A. Althaus, *Amtshilfe und Vor-Ort-Kontrolle* (2001); A. David, *Inspektionen im Europäischen Verwaltungsrecht* (2003).

7 F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (2005), p. 154.

8 The model has existed for a longer time for indirect enforcement, i.e. the monitoring by EU institutions as to how national authorities implement, monitor and enforce obligations stemming from EU law.

mixed investigations usually determine who has the lead and which law applies. Mostly, it is provided that investigative acts are performed on the basis of [harmonized] national law, under the lead of the national authorities. But the information obtained is consequently, in principle, available to EU authorities.

Mixed investigations are particularly important for OLAF.⁹ In this setting, OLAF can join national partners in their investigations, under the latter's lead.¹⁰ But, as the Office is also performing its own tasks, it would be odd to accept that its own regulations, particularly Reg. 83/2013, no longer apply in this setting. We therefore have a cumulative regime of applicable laws.¹¹ Most potential conflicts are then mitigated by the fact that OLAF regulations refer back to national law. Simultaneously, OLAF's legal regime becomes fragmented, which is particularly problematic in transnational cases.

In the absence of specific rules on cooperation with OLAF in many countries, mixed investigations can offer OLAF a useful instrument. By opening investigations at the national level, national authorities assume their role in fighting EU fraud and can cooperate with OLAF on that basis (rather than providing assistance). However, it is obvious that OLAF is thus dependent on the will of its national partners; it cannot instruct national authorities to do this. Moreover, national laws may impose hurdles to protect the national investigations. This, in fact, happens quite often.

- **Mandated investigations, or even *Organleihe*:** In this constellation, too, EU authorities direct the investigation, but national authorities also have a clear role (which exceeds the mere opening of doors). Both models (mandates and *Organleihe*) have in common that the investigative acts of the national partners are ascribed to the EU authorities; national authorities perform tasks on behalf of the EU authorities (not in their own name).¹² The law to be applied is usually (directly applicable) EU law. Where EU authorities give such instructions and retain the power of oversight and to act themselves, we speak of mandated delegations.¹³ The (gradual) difference between a mandate and *Organleihe* is that, in the latter case, the (national) authority also becomes a part of the EU structure in legal terms; participating states lose control over their authorities, which act as the extended arm of the EU authority. They operate within the framework of EU laws.¹⁴

9 Cf. Art. 18 (4) Regulation No. 515/97 (customs).

10 Cf. Arts. 9 and 18 Regulation No. 515/97. See also Art. 6(4) of the retracted Regulation No. 595/91, stipulating: 'Where Commission officials participate in an inquiry, that inquiry shall at all times be conducted by the officials of the Member State; Commission officials may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials. Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in any event in searches of premises or the formal questioning of persons under national criminal law. They shall, however, have access to the information thus obtained.'

11 Cf. Art. 3(3) Regulation No. 883/2013, stipulating that during on-the-spot checks and inspections, the staff of the Office will act in compliance with national law and with the procedural guarantees provided in this Regulation.

12 See Wettner, *supra* note 7, p. 147.

13 See Wettner, *supra* note 7, pp. 148-149.

14 See Wettner, *supra* note 7, pp. 152-153; A.A.H. van Hoek & M.J.J.P. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights', (2005) *Utrecht Law Review*, p. 28.

We submit that the two models can be found in the ESMA (delegation) and ECB frameworks (JSTs, possibly also OSITs). Art. 23 (6) CRAR deals with delegation. It holds that ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in the Regulation. National partners then have the same powers as ESMA. This article is to be read in conjunction with Art. 30 CRAR. The question is to which extent Art. 23d (6) truly concerns a delegation, i.e. a transfer, of powers. The legal construction of the provision rather resembles a mandated power. The construction, after all, does not affect the responsibility of ESMA and does not limit ESMA's ability to conduct and oversee the delegated activity (Art. 30 (4) CRAR).

Organleihe appears to be the most accurate form to qualify the cooperation between ECB and NCAs for significant entities in the framework of Joint Supervisory Teams (responsible for the monitoring of significant entities), as defined in the SMM Framework Regulation. This conclusion is warranted in light of the central goals of the SSM system which transfers supervisory competences with respect to significant entities completely from the national to the EU level. Yet, at the same time, these teams are composed of ECB and national officials (from different states). The organizational intensity of this structure, however, greatly exceeds those of occasional mutual assistance.¹⁵ Moreover, within the JST setting, NCA members follow the instructions of the ECB (JST coordinator) and the overall composition of the team is in the hands of the ECB.¹⁶ They apply EU law. The decision to appoint staff members from NCAs to JSTs is taken by the ECB Supervisory Board. All of this is why we submit that the legal construct resembles a situation where representatives of national authorities – for the purposes of SSM (significant entities) – become a part of the ECB framework. A similar reasoning also applies to the on-site inspection teams in the SSM Framework.¹⁷

- **Mutual assistance (*Amtshilfe*), including instructions:** This is the oldest and most well-known form of interaction. Mutual (administrative) assistance means that, upon the request of the EU authorities, national authorities perform specific acts of investigation in their own name, but for the fulfilment of the tasks of the EU authorities (not their own tasks, therefore). In principle, they apply national laws (which may have been harmonized). *Amtshilfe* as such creates no changes in the legislative framework of the requested party (in terms of its powers

15 Incidentally, ECB regulations do provide for such acts of assistance in cases of opposition. L. Wissink et al., (2014), 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', (2014) 10 *Utrecht Law Review*, no. 5, pp. 106-107 seem to be of the opinion that the organizational set-up of JSTs is one of NCAs assisting the ECB (*Amtshilfe*).

16 Cf. Arts 4-6 SSM Framework Regulation. See also the 2016 Special report No. 29 of the European Court of Auditors, 'Special Report Single Supervisory Mechanism - Good start but further improvements needed', p. 64: 'Given their structure, the efficient functioning of the JSTs is subject to a number of challenges, particularly with regard to the allocation of tasks and communication flows within the team, for which the Coordinator is responsible. Formally, all staff comprising a JST (from both the ECB and the NCAs) report to the Coordinator (while keeping the NCAs informed). However, *the NCA members of a JST are subject to a dual functional reporting line: for JST work, which easily accounts for most of their professional duties, they report to the Coordinator, while for any other work they report to their NCA line managers.* Moreover, on all matters of hierarchy and human resources, they report only to the NCA management [emphasis added].'

17 Art. 144 SSM Framework Regulation states that 'the ECB shall be in charge of the establishment and the composition of on-site inspection teams with the involvement of NCAs, in accordance with Art. 12 of the SSM Regulation.' The ECB shall also designate the head of the on-site inspection team from among ECB and NCA staff members.

and rights). Hierarchically, the assisting national authorities do not take instructions from their EU partners, but via their national chains of command.

Examples of *Amtshilfe* are found in the legal frameworks of ESMA and ECB, where they mostly refer to providing assistance to the relevant authorities in cases of opposition. A similar provision is found in Art. 4 of Reg. 2185/96. Within the setting of competition law, DG Comp has the power to ‘ask’ national partners to collect evidence on its behalf, applying their own law (Art. 22 (2) Reg. 1/2003). The latter power is somewhat different from the other types of mutual assistance within the framework of EU authorities as the national competition authority then performs acts of investigation individually, but on behalf of DG Comp and applying EU law.¹⁸ This provision appears to be rarely used.

A distinct category of mutual assistance is the *instructions*, available in the SSM framework.¹⁹ Instructions allow the ECB to oblige the national partner/NCA to use powers that are not available to the ECB itself. The applicable legal regime is therefore the regime of the agent, not the principal EU authority. Likewise, the consequences of the acts are, in principle, not imputed to the EU authority.²⁰

Figure 1 – Different models for interaction between EU authorities and national partners; the role of national partners

	Autonomous	Mixed	<i>Organleihe</i>	Mandate	Assistance
Acting authority is ...	EU authority	both	national	National	national
Act is part of ...	EU organization	both	EU	National	national
Instructions via ...	EU hierarchy	both	EU	EU	national

The models illustrate the different modalities of how national authorities can assist their EU partners and how their actions are imputed to the respective national or EU legal orders. As a rule of thumb this will have consequences, particularly for the legal remedies available.²¹ Actions imputed to the national authorities will as a rule end up before national courts, whereas actions by EU authorities that bring about a distinct change in the legal position come before the EU courts.²²

18 This is why one may doubt whether this is really mutual assistance or rather a different type of assistance. Most academic writings qualify it as mutual administrative assistance; see Wettner, *supra* note 7; M. Böse, ‘The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases’ in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), vol. 1.

19 Arguably, instructions may also be regarded as a separate category, particularly where they are so specific that national partners are left without discretion. In that situation, national lines of hierarchy are less relevant. The difference between instructions and mandated investigations is that, under the latter regime, one cannot transfer more powers than one has oneself. In that respect, instructions come closer to mutual administrative assistance. In fact, some mutual assistance regimes are so specific in their terms and conditions that the differences between the two forms are sometimes very small. That is why we have placed the two forms in a single category.

20 Cf. Wissink et al., *supra* note 15. This may be different where discretion for national authorities is absent; cf. A. Witte, ‘The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?’, (2014) *Maastricht Journal*, pp. 89-119.

21 Questions of political accountability are another relevant issue.

22 There are some tricky areas, particularly when national authorities are left with no discretion by the EU authorities, but their actions do affect the position of individuals and undertakings; cf. A. Witte, *supra* note 20,

The models also show various degrees of intensity with respect to integrating the EU frameworks into the legal orders of the states concerned (from autonomous to assistance on the basis of national law). With respect to the dilemma introduced above (between the need for EU-wide powers and integration into national law), two assumptions seem to be logical.

It makes sense, first of all, to expect that there is a relationship between the model chosen and the applicable law. The more an EU authority is required to act autonomously, the more it needs a uniform set of rules that defines the powers and the corresponding safeguards. Yet such an autonomous model also has disadvantages. The more it acts autonomously, the more there is a risk of conflicts (on the territory of a single Member State) between the rules of that EU authority and the national law.

The second assumption, therefore, is that there appears to be a connection between the law enforcement *tasks* (monitoring, investigating, sanctioning of alleged offences) of the relevant authority and the models. Particularly where tasks are exclusively attributed to the EU level, the autonomous models (including the *Organleihe* and mandated investigations) are appropriate and legitimate. The risk of diverging national and EU legal regimes (problematic both in terms of effective law enforcement and legal protection) is then not a particularly relevant concern; after all, there can be no forum shopping or problems of a similar nature.

However, the reverse is not necessarily true: shared tasks in the area of law enforcement between the EU and national levels do not exclude autonomous inspections as a tool. But then, as will be explained below, differences in the applicable laws may become a problem and need an answer. Therefore, the foregoing is not to suggest that only autonomous models of interaction require EU-wide standards. Rather, the point is that the different models may require support through different legal instruments in order to function properly. The need to create a level playing field is for instance also very relevant for types of interaction in the sphere of mutual legal assistance. But then, the legal basis can also be a harmonizing instrument instead of a directly applicable regulation. Indeed, particularly where tasks at the EU level are shared with those of national partners (PIF, but also competition law), it makes sense to decrease the differences between the applicable EU and national laws through harmonization (top-down), or via a voluntary adjustment to the EU system at the national level (bottom-up). The latter has occurred in the area of competition law, but not in the PIF area. Many Member States do not appear to feel inclined to adjust their systems to accommodate OLAF investigations, as will become apparent below.

It is in light of the foregoing that we can already signal a peculiarity of the OLAF legal framework. Although one would have expected that the more ‘autonomous’ an authority is required to operate, the more it can avail itself of autonomous, enforceable powers of investigation and – consequently – safeguards and remedies that are defined at EU level, this is not the case for OLAF. In contrast to ECB, ESMA and DG Comp, OLAF does not have autonomous powers of enforcement. Consequently, legal protection in OLAF investigations also becomes scattered. Moreover, we must note that OLAF – while formally charged with investigative duties in the area of PIF and serious misconduct by EU officials – is not given the powers to effectively fulfil this task. To that extent, its mandate is larger than the powers to execute that mandate.

pp. 97-103; Schammo, *supra* note 3, pp. 785-786. This particularly holds true for mandated investigations and instructions.

10.3 THE APPLICABLE LAW IN A VERTICAL SETTING; FUNDAMENTAL RIGHTS STANDARDS

Before we embark on our comparison of the different authorities, we must make another point of general interest to all four authorities. As all of these work in close interaction with the national legal orders and because even directly applicable regulations refer back to national law on occasion, the determination of the applicable law is another very important issue for this project. The debate on the applicable fundamental rights standards in cases of vertical interaction between EU authorities and their national partners is one of the most pertinent issues to date and is increasingly attracting attention, also outside the domain of competition law. Looking at the relevant case law of the EU courts and references in the national reports, two criteria are of particular importance to determine the applicable law:

1. The responsible authority,
2. The content of the applicable legal rules at EU level.

Potentially, therefore, there are four types of different situations and we can indeed pinpoint these situations in the analysed frameworks:

- A. An EU authority has the lead in the investigation, applying (only) EU law;
- B. An EU authority has the lead in the investigation, but it applies a mix of EU and national law;
- C. A national authority has the lead, applying a mix of EU and national law;
- D. A national authority has the lead, while (only) applying EU law.

A) With regard to the first situation, the leading case is without doubt *Akzo Nobel/Akcros*.²³ It dealt with the diverging positions of in-house lawyers and legal professional privilege under UK and EU law, but it is likely to be applicable with respect to other fundamental rights standards, too. The case concerned an investigation by the Commission, assisted by the UK Office of Fair Trading, in Manchester in 2003. The principles of legal certainty, national procedural autonomy and conferred powers were relied upon to challenge the adverse consequences of the differences in the legal regimes of the EU order and the national legal order of the UK.

In the view of the Court, the principle of legal certainty does not challenge this situation of diverging (EU and national) standards, because '[t]he Commission's powers under (...) Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it. (...) [W]hilst Arts. 101 TFEU and 102 TFEU view [restrictive practices] in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context.'²⁴ Undertakings can therefore determine their position in the light of the powers of those respective authorities.

23 Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:512. On this case, see also, R. Widdershoven & P. Craig in M. Scholten & M. Luchman (eds.), supra note 2 [forthcoming]; W.P.J. Wils, 'Powers of investigation and procedural rights and guarantees in EU antitrust enforcement: The interplay between European and national legislation and case-law', (2009) 29 *World competition*, no. 1, pp. 3-24.

24 See *Akzo Nobel/Akcros*, supra note 23, paras. 102-103

Thus, the Court suggested that, as it is the leading authority that determines the applicable law,²⁵ there is no real issue of legal certainty, despite the differences between the applicable standards of the (EU and national) legal orders involved.²⁶ This appears to be no different in situations where, on the basis of Art. 20 (5) Reg. 1/2003, national authorities join the Commission; in that case, they have the same powers as the Commission. However, (particularly) where the use of physical force is concerned (a power not available to the Commission), the national authorities will be the responsible actors (cf. Art. 20 (6) Reg. 1/2003).²⁷ Then, however, by way of delineation, the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.²⁸

The Court continued by stating that the system introduced by Regulation 1/2003 does not prejudice the principle of procedural autonomy either. It held that when the case concerns the legality of a decision by an institution of the European Union on the basis of a regulation adopted at European Union level, which, moreover, does not refer back to national law, the uniform interpretation and application of the principle of legal professional privilege at the European Union level are essential. This is to ensure that inspections by the Commission in antitrust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. Should that be different, ‘the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.’²⁹

From the case, we can learn that, first of all, differences between the applicable (fundamental rights) standards of the legal orders involved is not a problem as such, certainly not as long as it is clear which legal order is represented by the relevant authority. Moreover, we know that – as far as the EU legal order is concerned – the uniform application of EU law by an EU authority leaves no room for more protective standards at the national level, where EU law does not refer back to national law. As was reasoned by the Court itself, the reasons for this were explained by AG Kokott: ‘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

25 See also AG Kokott, Opinion, Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:229, para. 127: ‘With regard to the relationship between investigations conducted by the European Commission and investigations conducted at national level, (...) Regulation No. 1/2003, is based on a clear delimitation of the respective competences of the competition authorities. A search is ordered and carried out either by the Commission or by a national competition authority. It is always clear from the decision ordering the investigation (investigation authorisation), which must be presented to the undertaking in writing, which authority has ordered the search.’

26 See the opinion of AG Kokott, *supra* note 25, paras. 123-131.

27 *Ibid.*, para. 119. The Court uses the word ‘particularly’, not ‘solely.’

28 *Ibid.*, para. 119.

29 *Ibid.*, paras. 113-115.

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.³⁰

We submit, therefore, that it follows from *Akzo/Akros* that unless EU law explicitly allows for deviations, the scope and content of investigative powers, as well as the safeguards and defence rights, are determined by EU law (including case law), when EU authorities have the lead in the investigation. Where the investigative powers have been dealt with at the EU level, this finding is also of relevance for the applicable fundamental rights; those are then defined at the EU level, too.

B) It is also possible that EU law does make way for national law, even when investigations are conducted by EU authorities. We see examples of this in OLAF's legal framework. Art. 3(3) Reg. 883/2013 for instance stipulates that during on-the-spot checks and inspections, OLAF staff shall act, subject to the Union law applicable, in compliance with the rules and practices of the Member State concerned and with the procedural guarantees provided for in the OLAF Regulation. In those situations we can still assume that the scope and the content of the powers, and their corresponding safeguards, as well as defence rights are in principle determined by EU law, unless the applicable Regulations refer back to national law. Only in the latter types of situations will there be room for higher (not lower) national standards than those of the regulations or the EU Charter of Fundamental Rights.

C) Situations C and D also occur in the framework of investigations by EU authorities. Where a national authority conducts an investigation, the rules governing the investigation are in principle determined by national law, including the procedural safeguards.³¹ We can think of, in particular, mixed investigations or cases of mutual assistance (*Amtshilfe*), as dealt with by Art. 22 (2) Reg. 1/2003 or those cases where national authorities provide physical assistance to EU authorities.³² Without doubt, such authorities – who then act in their own name, but for the fulfilment of the tasks of their EU partners – act within the scope of EU law,³³ so that the Charter will be applicable (Art. 51 (1) CFR). This means that, first of all, the level of protection can never be lower than that offered by the Charter.³⁴ For instance, the observance of the rights of the defence is a fundamental principle of European Union law, which applies where the authorities are minded to adopt a measure which will adversely affect an individual (cf. Arts 41, 47 and 48 CFR).³⁵ These articles also protect legal privilege, at least as far as this is in the interest of the client's rights of defence. It follows from this that those legal orders which do not recognize legal privilege in administrative proceedings may have to adapt their position in cases of cooperation with EU authorities. Both the German and the Polish report make mention of such situations.

On the other hand, however, in those cases where EU law refers back to or leaves room for national law and national law provides for higher standards,³⁶ procedural autonomy is the rule,

30 Cf. AG Kokott, *supra* note 25, paras. 167-168.

31 *Ibid.*, para. 128.

32 On Art. 20 (6) Regulation No. 1/2003, see *Akzo Nobel/Akros*, *supra* note 23, para. 119.

33 Mixed investigations are after all covered by EU law, cf. Arts. 9 and 18 Regulation No. 515/97.

34 R. Widdershoven & P. Craig in M. Scholten & M. Luchtman, *supra* note 2 [forthcoming].

35 Cf. Case C-349/07, *Sopropé*, [2008] ECR I-10369, ECLI:EU:C:2008:746, paras. 29, 36.

36 An example is found in the regulations on prior judicial authorizations of on-site inspections; *infra* section 10.6.

though national procedures must meet the requirements of effectiveness and equivalence.³⁷ Those procedures cannot – certainly not where such standards are lacking in comparable national cases – introduce standards which may render the enforcement of EU law ineffective. In a similar vein, the EU Court has held with respect to fundamental rights that ‘where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Art. 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.’³⁸ Situations where national fundamental rights may actually challenge the coherence of the EU legal order have not yet been put to the Courts.

Procedural autonomy is not without limits, therefore. National law may on occasion even conflict with EU law. In such cases, *Melloni* is particularly relevant. The Court held that, although national authorities and courts remain free to apply national standards of the protection of fundamental rights, the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law may thereby not be compromised.³⁹ Particularly when EU law achieves a level of harmonization that no longer leaves room for diverging or accompanying national law, the primacy and unity of EU law would be flawed.

D) This brings us to the fourth category of cases and the one which we have encountered the least in this project. This situation appears to come into play particularly in ESMA cases of delegation (Arts 23d (6) and 30 CRAR; Art. 60 EMIR). There we see that ESMA’s national partners may be delegated with the execution of specific acts and apply EU law in doing so. In such situations there appears to be no room for deviating national standards. To date, the qualification of this type of assistance is uncharted territory; there is as yet no case law available.

On the basis of the foregoing, we can make a series of general observations:

I. The Court has thus far dismissed arguments on the basis of the principle of legal certainty (in relation to the applicable law) in dual regimes as discussed here. It connects this position to the division of tasks between national and EU authorities. Indeed, where a task is attributed (only) to a national (or an EU) body, there is no convincing legal argument as to how diverging standards can lead to uncertainty, even when the standards are diverging. Yet in competition law, national authorities not only apply national law; they are co-responsible for Arts 101 and 102 TFEU and they assist the Commission in that. The latter occurs on the basis of Art. 22 (2) Reg. 1/2003, upon the Commission’s specific request.⁴⁰ According to the Regulation, national standards would then apply. National authorities act in their own name, but for the fulfilment of the tasks of the Commission. Art. 22 (2) Reg. 1/2003, as such, does not comprise a full transfer of proceedings from the EU back to the national level. The regulation therefore allows different

37 Case 33-76, *Rewe*, [1976] ECR 01989, ECLI:EU:C:1976:188. For a discussion, see R. Widdershoven & P. Craig in M. Scholten & M. Luchtman, *supra* note 2 [forthcoming].

38 Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 36.

39 Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para 60.

40 See also B. Vesterdorf, ‘Legal Professional Privilege and the Privilege against Self-Incrimination in EC Law: Recent Developments and Current Issues’, (2004) *Fordham International Law Journal*, pp. 1204-1205.

sets of proceedings to realize the same goals. The choice between those proceedings is up to the Commission. As the Court pays no attention to this,⁴¹ it has not yet provided a complete answer as to how the existence of diverging sets of rules within a single legal framework relates to the principle of legal certainty. We therefore submit that – in order to answer and to tackle points of legal certainty in relation to the applicable law – it is necessary not only to look at who is the leading authority and at the degree of harmonization of EU law, but also to take account of the question on whose behalf the acts are performed. That position may have consequences for the degree and level of harmonization, as we will discuss further in chapter 11.

II. Even in those cases where there a watertight distinction is possible between the competences of the national and those of the EU authorities, the fact remains that EU investigations may end up before national authorities, also in competition law and even in banking law.⁴² Where EU standards fall below national ones – in-house lawyers once again being the most vivid example, but also (in some jurisdictions) the privilege against self-incrimination (see *infra*) – it will be wise to already take into account the procedures of the relevant national authorities.⁴³ The question, however, is to which extent this is possible, in light of the primacy and unity of EU law. This means that either EU standards must be raised, and/or national rules on the admissibility of evidence be adapted, so that equivalent standards of fundamental rights protection (above the threshold of the Charter, of course) can be accepted by the trial state.⁴⁴ As it may not always be possible to anticipate the later trial court, a combination of both types of measures is likely to produce the most acceptable results.

III. Finally, we note that there is hardly a coherent picture with respect to the scope of the protection of fundamental rights in the frameworks of the four authorities. This holds true for legal professional privilege, as well as for the privilege against self-incrimination. The right of access to a lawyer has also received little attention thus far.⁴⁵

The standards in competition law were developed by the Court, in the absence of legislation and under pressure from national courts, urging the former not to lose sight of fundamental rights protection. By seeking common ground among the diverging traditions of the Member States, the Court developed a framework for legal privilege in competition law. As, to date, these rights remain embedded in the case law, they have not been codified.⁴⁶ The same holds true for the frameworks of ECB and ESMA; it is generally assumed that the same standards apply for those authorities, but this has not yet been confirmed.

41 AG Kokott does, but to a limited extent, see *supra* note 25, paras. 128-129. Incidentally, the *Akzo/Akcros* case concerned the old Regulation No. 17, i.e. the situation before the decentralization brought about by Regulation No. 1/2003. However, both the Court as well as its AG explicitly took account of those changes in their reasoning.

42 See, for instance, Art. 136 of the SSM Framework Regulation.

43 Cf. R. Widdershoven & P. Craig in M. Scholten & M. Luchtman, *supra* note 2 [forthcoming], referring to the position of the Dutch competition authority when it does not assist the Commission but still applies EU competition law.

44 Cf. Wils, *supra* note 23.

45 See however Case C-136/79, *National Panasonic v Commission*, [1980] ECR 02033, ECLI:EU:C:1980:169, and the Explanatory note on Commission inspections pursuant to Art. 20(4) of Regulation No. 1/2003, September 2015, <http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf> (last visited 10 April 2017).

46 Or only in a very fragmented fashion, as is illustrated in chapter 2.

In competition law, the criterion with respect to the privilege against self-incrimination is that ‘whilst the Commission is entitled (...) to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.’⁴⁷ This is taken to mean that, on the one hand, undertakings must communicate all facts which may be relevant in light of the law relating to restrictive agreements and practices. On the other hand, they may not be questioned on the intention, aim or purpose of particular practices or measures, given that such questions might constrain them to admit infringements.⁴⁸ It may be that this apparent restrictive⁴⁹ approach of the Court in competition law is warranted by the fact that the Commission has no real power to summon persons for questioning. Art. 19 Reg. 1/2003 is limited to situations of consent, whereas Arts 20 and 21 deal with ‘explanations on facts or documents relating to the subject matter and purpose of the inspections.’

By comparison, in the OLAF setting, the legislator seems to have gone beyond the case law of the Court in competition cases.⁵⁰ Art. 9 (2) Reg. 883/2013 states that when OLAF interviews the person concerned or a witness during an investigation, any person interviewed shall have the right to avoid self-incrimination. The scope of protection of the privilege appears to be broader in the OLAF setting, as it a) applies to witnesses, b) also possibly covers ‘factual questions’, and c) may apply before charges are brought. We have to keep in mind that OLAF itself has no sanctioning powers. It is true, however, that Art. 9 Reg. 883/2013 may facilitate a later use of statements as evidence.⁵¹

10.4 COMPARATIVE OVERSIGHT OF ORGANIZATIONAL SET-UP

Before we zoom in on the specific investigative powers and the related procedural safeguards, it is necessary to have a clear picture of the general tasks (competence, mission) and the organisational structure of the relevant bodies and of their counterparts in the Member States, as they form the organisational design in which the investigative powers are embedded. As we will see the tasks of some authorities is not limited to the investigation of illicit behaviour. There are not only enforcement authorities but also general supervision authorities and sometimes even regulatory authorities.

We will first look from a top-down perspective at the selected EU enforcement authorities. What are their tasks and mission and their organisational structure? What are the requirements for opening a case and to which extent do they need to rely on national law in relation to investigative

47 Case 374/87, *Orkem*, [1989] ECR 03283, ECLI:EU:C:1989:387, paras. 34-35; Case T-112/98, *Mannesmannröhren-Werke*, ECLI:EU:T:2001:61, para. 28.

48 Case T-112/98, *Mannesmannröhren-Werke*, [2001] ECR II-00729, ECLI:EU:T:2001:61, para. 29.

49 Restrictive, because factual questions are not covered by the principle. The Strasbourg case law appears to be broader in scope and does not seem to exclude factual questions *per se* from the right to remain silent; cf. Vesterdorf, *supra* note 40.

50 OLAF’s GIP do not provide an unequivocal answer either.

51 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, *supra* note 2 [forthcoming].

powers? Second, we will look from a bottom-up perspective: do the selected Member States provide for specific statutory provisions for vertical investigative cooperation?

10.4.1 OLAF

Tasks and mission

OLAF, different from, for example, the ECB and ESMA, does not have proper supervisory tasks. It is involved, however, in regulatory and policy issues, but the unit dealing with this is separate from the investigative branches of OLAF.

OLAF is competent to exercise the powers of investigation conferred upon the Commission by the relevant Union acts, ‘in order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union’. These financial interests are generally indicated as PIF (protection des intérêts financiers de l’Union). This means that OLAF investigations may ‘horizontally’ cover all areas of EU activity if the EU budget is allegedly affected by illegal activities, in particular all EU expenditures and most of its revenues (e.g. customs duties, agricultural duties, etc.). VAT is however a *specialis*. The ECJ has ruled on several occasions that it is part of the PIF (and thus of the regulatory scope of Art. 325 TFEU). However, it does not fall under the scope of the investigative powers of OLAF. OLAF is only able to coordinate VAT fraud cases, not to investigate them. It is also worth mentioning that the scope of OLAF’s competence concerns not only the revenue and expenditure of the EU institutions, but also the budget of all EU bodies and agencies. This means that OLAF investigations can relate to private actors (economic operators), public actors in the Member States, EU institutions, bodies and agencies and thus to activities at EU level, national level or even in third states (EU representations, PIF-related operations such as, for instance, humanitarian aid). So investigatory powers may be needed for:

1. Autonomous investigations, under the leadership of OLAF. When it comes to the enforcement of investigative acts – either through the use of police powers (*manu militaria*) for gaining access to premises or subpoena powers (the imposition of sanctions) in cases of non-cooperation – national authorities will provide mutual administrative assistance to OLAF and, for that, Member States must provide OLAF’s partners with the same powers as in comparable cases of national law.
2. Mixed investigations for the fulfilment of the national partners’ and OLAF’s tasks, but under the leadership of the national partners. In this setting, OLAF can join national partners in their investigations, under the latter’s lead.⁵² But, as the Office is also performing its own tasks a cumulative regime of applicable laws does apply.⁵³ Most potential conflicts are then mitigated by the fact that OLAF regulations refer back to national law.

52 Cf. Arts. 9 and 18 Regulation No. 515/97. See also Art. 6(4) of the retracted Regulation No. 595/91, stipulating: ‘Where Commission officials participate in an inquiry, that inquiry shall at all times be conducted by the officials of the Member State; Commission officials may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials. Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in any event in searches of premises or the formal questioning of persons under national criminal law. They shall, however, have access to the information thus obtained.’

53 Cf. Art. 3(3) Regulation No. 883/2013, stipulating that during on-the-spot checks and inspections, the staff of the Office will act in compliance with national law and with the procedural guarantees provided in this Regulation.

3. Coordination cases as meant in Art. 1(2) Reg. 883/2013, i.e. activities with the purpose of providing the Member States with assistance in the coordination of their investigations and other PIF-related activities (cf. 8.3/10 GIP), including VAT fraud. Investigatory powers will however not be used for coordination cases (see 10.3 GIP); this situation therefore falls outside the scope of this project

Organisation

The investigative units are separate from the policy units in order to guarantee their independence. They are under the leadership of the Director General.

Opening of an investigation

According to Art. 5 Regulation 883/2013 the decision to open an investigation is made by the OLAF Director General *ex officio*, or following a request by a Member State or the authorities of Member States or other EU bodies. OLAF does receive complaints and information from market operators. This can also be done online. OLAF also has access to some EU databases or is managing them. Overall, OLAF does have a certain starting position when it comes to information. The ‘Investigation Selection and Review Unit’, seconded to the DG, analyses information which may be of possible investigative interest and provides an opinion to the Director-General on whether an investigation or coordination case should be opened or whether the case should be dismissed.⁵⁴ Such a decision takes the following into consideration:

- (a) whether ‘there is sufficient suspicion’ of an illicit activity affecting the EU’s financial interests. This is in line with the CJEU case law whereby the threshold of a sufficient suspicion is a safeguard against the disproportionate use of investigative powers.⁵⁵ This suspicion may ‘also be based on information provided by any third party or anonymous information’;
- (b) whether the investigation falls within the policy priorities and the annual management plan established by the Director-General;⁵⁶
- (c) whether it is ‘necessary and proportionate’ to open an investigation at OLAF. With regard to internal investigations, Art. 5(1) specifies that the decision should consider whether disciplinary authorities within the institutions are better placed to conduct the investigation. With regard to external investigations, the Director-General should consider whether it is more appropriate to limit the role of OLAF to coordination, without conducting autonomous investigations.

Investigative powers, also in relation to the national dimension

OLAF does not operate on the basis of a uniform code of procedure. On the contrary, it uses a patchwork of horizontal and sectoral EU instruments (including customs, common agricultural policies and structural funds) which often refer to national law. As a consequence, in the majority of cases OLAF is dependent on national authorities for the performance of its tasks. This may

⁵⁴ Art. 1 of the 2013 Guidelines.

⁵⁵ See Case C-15/00, *Commission v European Investment Bank*, [2003] ECR I-07281, ECLI:EU:C:2003:396, in particular para. 164; Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-07147, ECLI:EU:C:2003:395, in particular para. 141. See also Report No. 3/2014 from the Supervisory Committee of OLAF to the European Parliament, the Council, the Commission and the Court of Auditors.

⁵⁶ It is worth mentioning that the OLAF Supervisory Committee, in its Activity Report 2015, observed that ‘OLAF refrained from defining a true “investigation policy” and only indicated undocumented criteria, without any impact assessment or evaluation of the implementation of previous Investigation Policy Priorities (IPPs), performance indicators, and no systematic linkage with EU spending priorities and EU policy priorities in fighting against financial crimes’.

lead to paradoxical situations where in certain Member States OLAF has wider powers in ‘mixed inspections’ than in inspections *propriu motu*.⁵⁷ For all these reasons, Art. 3(4) of Reg. 883/2013 stipulates that Member States are to designate a service (‘the anti-fraud coordination service’/ AFCOS) to facilitate effective cooperation and an exchange of information with OLAF.

As said, basically three ways of conducting OLAF’s tasks can be identified:

- (a) OLAF can provide assistance to Member States ‘in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud’ (‘*coordination cases*’).⁵⁸
- (b) OLAF can ask national authorities to conduct an investigation concerning suspected fraud or irregularities, and can participate in such investigations (‘*mixed inspections*’). Since investigations are opened and conducted at the national level, national law applies; OLAF staff act as seconded experts or joint investigators, with the same powers as the national authorities. An example is provided by Art. 18(4) of Regulation No. 515/1997 on mutual assistance in customs and agricultural matters,⁵⁹ whereby ‘[w]here the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall at the earliest opportunity carry out an enquiry, at which Commission officials may be present under the conditions laid down in Arts. 9 (2) and 11 of this Regulation.’ Such provisions clarify that investigative measures are adopted by national authorities. However, the Commission staff shall have access to the same premises and the same documents through the national partners.⁶⁰
- (c) OLAF conducts proper autonomous investigations. As regards external investigations, OLAF can conduct on-the-spot checks according to Regulation No. 2988/95 and Regulation No. 2185/96. These regulations do not lay down an exhaustive EU law procedure, but refer to sectoral regulations⁶¹ and to national law.⁶² This entails that the extent of OLAF’s powers may vary from one country to another. According to these regulations, checks and inspections shall be prepared and conducted in close cooperation with the Member States concerned; Member States’ authorities may participate therein and normally they do this, at least at the beginning of the inspection; however, on-the-spot checks are carried out under OLAF’s authority. In this case, the national law dimension is relevant:
 - (i) as regards the investigative powers as such. The OLAF staff shall act, ‘subject to the Union law applicable’, in compliance with the rules and practice of the Member State concerned and with the procedural safeguards provided in the Regulation. OLAF should be

57 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, *supra* note 2 [forthcoming].

58 Art. 1(2) of Regulation No. 883/2013.

59 Council Regulation (EC) No. 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 [1997] OJ L 82/1.

60 See Art. 9(2) of Regulation No. 515/97. This approach is different from the one adopted by Regulation No. 2185/96 on external checks and by sectoral regulations, for example by Art. 37 of Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005] OJ L 209/1, or by Art. 72 of Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 [2006] OJ L 210/25: in these cases the Commission (OLAF) conducts on-the-spot checks and informs national authorities, while personnel from the Member State concerned may take part in such checks.

61 Art. 9(2) of Regulation No. 2988/95.

62 Art. 8 of Regulation No. 2988/95.

granted access to information and documents under the same conditions as the competent authorities of the Member States concerned.⁶³ OLAF exercises these powers in the Member States on production of the written authorisation showing their identity and capacity. The Director-General issues such authorisation indicating the subject matter and the purpose of the investigation, the legal bases for conducting the investigation and the investigative powers stemming from the bases;⁶⁴

(ii) as regards the assistance from Member States to use coercive powers, since OLAF cannot use force or coercion,⁶⁵ Regulation 883/2013 specifies that Member States ‘shall give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively.’ It is worth mentioning that OLAF has experienced difficulties in identifying the national authority which is competent to provide assistance to its staff. For this reason, Regulation 883/2013 provides that Member States shall ‘designate a service (‘the anti-fraud coordination service’) to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office’ (AFCOS).⁶⁶

10.4.2 DG COMP

Tasks and mission

The mandate of the EU Commission (DG COMP) covers the four traditional pillars of competition law: cartels and other agreements, abuse of a dominant position, mergers, and state aid investigations.

Organisation

DG COMP is mainly an enforcement authority, although it has some policy units.

Opening of an investigation

The threshold which must be met in order for the Commission to commence a sector inquiry is relatively low: the Commission only requires a ‘suggestion’ that competition may be restricted or distorted. It is not specified what is the threshold to open an investigation; this is not surprising given the blurred lines between pre-investigative and investigative phases.

Investigative powers, also in relation to the national dimension

Both the EU Commission and the Member States have enforcement powers and they can exercise them on the same facts. The investigating authorities are part of the European Competition Network (ECN), a ‘network of public authorities’. The ECN as such does not have investigative powers. The powers are exerted by either national authorities or the Commission, which basically may act in two ways:

(a) DG COMP may request national competition authorities to undertake inspections on its behalf using ‘their powers in accordance with their national law’.⁶⁷ In this case, EU officials and other accompanying persons authorised by the Commission may assist the officials of the authority

63 Art.7(1) of Regulation No. 2186/96.

64 Art. 7(2) of Regulation No. 883/2013.

65 Art 3(3) of Regulation No. 883/2013.

66 Art. 3(4) of Regulation No. 883/2013.

67 Art. 22(2) of Regulation No. 1/2003.

- concerned (this power has only been used on two occasions, because inspections carried out by national authorities are considered to be unsuitable for cases involving inspections in more than one Member State).⁶⁸
- (b) Compared with other policy areas, DG COMP also has direct enforcement powers, in the sense that it does not have to rely on the assistance of NCAs. DG COMP can directly conduct investigations on its own, and such investigative powers are defined by EU law. In some cases, depending on the investigative measure concerned, NCAs may be requested to provide assistance to DG COMP (when NCAs assist DG COMP in conducting the inspection they have the same investigative powers provided by EU law for DG COMP). On the other hand, there are obligations for DG COMP to inform NCAs and to consult with them in the execution of certain investigative measures (i) in order to facilitate coordination with investigations on the national level; (ii) in order to enable NCAs to provide for effective assistance.

10.4.3 ECB

Tasks and mission

ECB has become exclusively competent in the financial supervision of ‘significant’ credit institutions, representing almost 85% of total banking assets in the euro area. The following is the legal framework governing this new so-called Single Supervisory Mechanism.

Organisation

Supervision by the ECB entails daily monitoring by Joint Supervisory Teams (JSTs), appointed for each supervised group/entity, and regular/planned on-site inspections, organised by the Centralised On-site Inspections Division. JSTs consist of ECB staff and NCA staff from those MSs where the supervised entity in question is situated. If the JST suspects a violation, it requests a special unit of the ECB, i.e. the Enforcement and Sanctions Division, to conduct an investigation into that alleged breach of EU law, which may lead to the imposition of sanctions by the Governing Council (prepared by the Supervisory Board).

Opening of an investigation

The ECB can conduct investigations and on-site inspections as a matter of daily supervision by Joint Supervisory Teams or the centralised onsite inspections division. When a breach of EU law is suspected, these supervision units shall refer the matter to the Enforcement and Sanctions division.

Investigative powers, also in relation to the national dimension

The ECB has, in principle, all investigative and sanctioning powers on its own. Furthermore, the ECB has all the powers which NCAs shall have under relevant Union law (Art. 9 (1) SSM Regulation) and the ECB may also instruct NCAs to use a ‘purely’ national power (Art. 9(1) SSM Regulation).

⁶⁸ M. Böse, ‘The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases’ in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), vol. 1 pp. 838, 848.

10.4.4 ESMA

Tasks and mission

ESMA's objectives include establishing a sound, effective and consistent level of financial regulation and supervision and preventing regulatory arbitrage and promoting equal conditions of competition. These regulations give ESMA the ultimate responsibility to deal with registration/authorization, the supervision of and enforcement vis-à-vis credit rating agencies (CRAs) and trade repositories (TRs). By the way, the latter financial entities were not previously regulated at the national level as the TRs did not exist before they became regulated by the mentioned legal acts.

Organisation

More specifically, ESMA's Supervision Department has individual persons ('supervisors') monitoring the daily operations of registered CRAs and TRs. ESMA has its own investigation and sanctioning powers. It has the power to request information (by a simple request or by a decision), to conduct general investigations by supervisors on an ongoing basis and investigations into alleged breaches of EU law by independent investigation officers (IIOs), and to impose supervisory measures and administrative fines for breaches of relevant EU laws (Arts 23(e)(5) CRAR and 64 (5) EMIR). ESMA can also withdraw authorisations.

Opening of an investigation

If the supervisory teams, as part of their investigations in a given case, find serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I or III of EMIR and the CRA Regulation respectively, this department informs the Executive Director ('ESMA' in the Regulation). The latter 'shall' appoint a person within ESMA as an independent investigation officer to further investigate the matter (Arts 23e(1) CRAR and 64(1) EMIR); thus far, the investigation officer has been a member of the Legal, Cooperation and Enforcement Department of ESMA. He/she is not involved or has not been involved directly or indirectly in the supervision or the registration process of the trade repository or credit rating agency concerned in order to ensure his/her complete independence. He/she performs his/her functions independently from ESMA's Board of Supervisors.

Investigative powers, also in relation to the national dimension

ESMA can conduct investigations as a matter of daily supervision (by its internal departments mentioned above) and when it suspects a breach of EU law (by an Independent Investigation Officer (IIO)). ESMA has, in principle, all investigative and sanctioning powers on its own. The 'sharing' of tasks with the national level authorities concerns only the possibility for ESMA to ask competent national authorities to carry out specific supervisory and investigatory tasks and on-site inspections on its behalf.⁶⁹ No conditions are prescribed as to when ESMA must or can request this. The delegation of a supervisory task in light of an investigation into an alleged breach of EU law has not happened so far.

⁶⁹ In light of the focus of the project on the investigation by IIOs, the delegation of power by ESMA to an NCA is not discussed here. This possibility exists in accordance with Arts. 30 CRAR and 74 EMIR. These articles allow ESMA to delegate specific supervisory tasks where necessary for the proper performance of a *supervisory* task. In this light, we can conclude that ESMA cannot delegate an investigation task performed by the IIO to an NCA. The latter can also be supported by the fact that ESMA must appoint an IIO within ESMA (Arts. 23e (1) CRAR and 64 (1) EMIR).

10.4.5 Bottom-up perspective: national statutes for vertical cooperation and powers?

The situation differs a great deal between the countries. Some countries have no provisions at all for cooperation with EU enforcement agencies, others do have them, sometimes combining general administrative law and specific statutes relating to certain EU enforcement authorities.

In the UK law enforcement authorities have a general power to act/assume jurisdiction. In any given case a request from an EU body would be enough to allow them to act, so authorities apply the general rules which are applicable to them.

In Germany there is no general comprehensive legal framework at all. For ECB, ESMA and DG Comp the national authorities apply EU regulations. Cooperation with OLAF is not regulated by national law. This has consequences for the AFCOS, of course, as their members do not have investigative powers in this cooperation setting and their role is limited to being a facilitator.

The Italian system does not provide for comprehensive administrative law covering all the activities that are relevant for this research. It rather adopts a fragmented sectorial approach, providing specific rules for every single field in which national counterparts are operating.

In the Netherlands, the vertical cooperation between the European authorities and their Dutch counterparts is primarily regulated by generally applicable rules. In some cases, specific implementation acts have been adopted in which cooperation is regulated, but with regard to the use of investigative powers these acts often refer back to the General Administrative Law Act (*Algemene wet bestuursrecht*), hereafter referred to as GALA. The GALA lays down the generally applicable rules on the supervision of compliance with administrative law. Specific substantive statutes may contain cooperation mechanisms that complement the GALA mechanism. For cooperation with OLAF, a specific statute has been enacted: 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*), hereafter referred to as the 2012 Act.

Assistance (*bijstand*) on the basis of the 2012 Act⁷⁰ comprises all cooperation obligations that national officials have on the basis of Regulation 2185/96, such as the one in Art. 7(2). When Dutch authorities offer assistance in light of the Regulation, they have the administrative powers laid down in Arts. 5:15-5:19 GALA.⁷¹ The 2012 Act also states that the same powers are available to OLAF representatives who are present during on-the-spot check.⁷² However, no criminal powers are available to either the AFCOS officers or the OLAF representatives.

It can be concluded that the powers of ACM, DCB, AFM and AFCOS when they cooperate, in one way or another, with their European counterparts mainly emanate from the General Administrative Law Act. These competences are sometimes complemented by others, such as the right to seal and the right to enter a dwelling, which follow from separate specific acts, such as the Competition Act. In some situations the national authorities derive their powers from the applicable Regulations.

In France, a clear distinction must be made between DG Comp, ESMA and ECB, at the one hand, and OLAF at the other. As for the former three, they have clear counterparts at the national

70 Commission Staff Working Document: Implementation of Art. 325 TFEU by the Member States in 2013, SWD (2014) 243 final, 17 July 2014, p. 55.

71 *Kamerstukken II* 2011/12, 33247, 3, p. 7; *Kamerstukken II* 2011/12, 33247, 4, p. 3.

72 Art. 7(1) Regulation No. 2185/96; *Kamerstukken II* 2011/12, 33247, 3, pp. 2, 7.

level, which are independent administrative authorities⁷³, vested with supervisory, investigative, disciplinary and administrative sanctioning powers, designed according to a common model. This also results in a clear national basis for vertical cooperation. Art. L470-6 ComC offers an explicit and general legal basis for the ADLC to apply all of its investigative powers when applying Arts 101 and 102 TFEU in general and, in particular, when it acts at the request of the Commission.⁷⁴ The same rules apply to proceedings regarding European or domestic cases. The Monetary and Financial Code was revised in 2013 in order to take account of the new powers of ESMA. However, the provisions on TRs are more explicit and detailed (Arts L621-18-1; L621-9, par. 22 MonFinC) than those related to CRs (L544-4 MonFinC). As regards cooperation with ESMA, the AMF exercises the powers of the competent national authority under EU law. The Monetary and Financial Code was revised by Ordinance No. 2014/1332 in order to facilitate cooperation with ECB within the framework of the SSM and specific provisions on cooperation with ECB were introduced (Art. L 612-1 V and Art. L612-38 MonFinC). As regards cooperation with ECB, the ACPR exercises the powers of the competent national authority under EU law.

Unlike the other three European authorities, OLAF cannot rely on a single actor which operates as its national counterpart and whose action is governed by a unitary legal framework, despite the creation of the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude, DNLF*⁷⁵). It does not have any investigative or operational powers. In the absence of explicit and specific provisions, cooperation with OLAF relies on general rules.

In Poland, there are no general rules regarding international cooperation in administrative matters, or, more specifically, horizontal and vertical cooperation within the EU. Only recently has a draft law amending the Code of Administrative Proceedings been prepared and it includes a set of provisions providing for a general legal framework for such cooperation (the new section of the Code is entitled 'European administrative cooperation'). However, currently, due to a lack of such rules, the authorities have to refer to the provisions of particular legal acts or to general rules laid down in the Code of Administrative Procedure, combined with EU provisions. It may be concluded that even though Polish administrative law statutes generally recognize the competences and obligations of the relevant authorities to cooperate with their European counterparts, they hardly ever provide for detailed rules for such cooperation and they usually refer to applicable European acts.

73 An independent administrative authority (AAI) is an authority acting on behalf of the State autonomously, that is to say without being subordinate to the Government or Parliament but subject to the control of the courts and capable of intervening in three distinct areas: the regulation of a specific sector of the economy (which is the case for the counterparts of ECB, ESMA and DG Comp), the protection of freedoms, and the functioning of relations between the administration and the citizens; cf. among an abundant literature: 'Les autorités administratives indépendantes', *Revue Française de Droit Administratif*, 2010, special issue; *Les autorités administratives indépendantes, Rapport public du Conseil d'État*, Études et documents, La Documentation Française, 2001.

74 This text was amended by Ordinance No. 2004-1173 of 4 November 2004 in order to enable investigators to use not only the powers recognized by Book IV of the Commercial Code but also those recognized by Regulation No. 1/2003; P. Arhel, 'Adaptation du droit national au droit communautaire de la concurrence', (2004) *La Semaine Juridique Editions Entreprise*, No. 51, p. 2010; E. Claudel, 'Ordonnance 2004-1173 du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence', (2005) *Revue Trimestrielle de Droit commercial*, p. 60.

75 www.economie.gouv.fr/dnlf (last visited 10 April 2017).

10.4.6 Provisional conclusions

Overall, DG COMP, ECB and ESMA can rely on specific partners in the Member States, largely also because of the harmonizing influence of EU law (*de iure* and *de facto*). When it comes to investigative cooperation, these authorities use EU investigative powers or have specific statutes on which they can rely for domestic investigations (the gathering and sharing of information with EU authorities).

The OLAF situation is complex because of the multiplicity of substantive fields, related national authorities and applicable statutes. However, the OLAF EU regulations to a large extent refer back to national law for 1/ the existence of investigative powers; 2/ the scope of application of these powers; 3/ cooperation with OLAF and 4/ the applicable legal safeguards. One would at least then expect that general administrative law or specific acts regulate the referral to EU law. However, in many countries this is still not the case. The result is uncertainty for inspectors and economic operators. This of course triggers the question of whether there is a need for a further EU regulation of investigative powers and/or the harmonisation of equivalent investigative powers at the national level.

However, let us first concentrate on specific investigative powers, their use and their legal consequences.

10.5 INTERVIEWS AND PRODUCTION ORDERS

10.5.1 Introduction

This section contains an analysis of the legislative frameworks of the four authorities and their interactions with the national partners as far as production orders and interviewing persons are concerned. Production orders are widely defined: they refer to the powers of the authorities to inspect, copy or order the production of data, documents or other objects, in whatever form (oral, written, digital). The interviewing of persons then refers to the questioning of persons, whatever capacity they may have. Interviews may for instance be held with the persons concerned, but also with witnesses. It is particularly in that latter capacity that legal professional privilege and duties of professional secrecy, such as banking secrecy, become relevant.

The analysis below focusses in particular on a number of aspects dealing with a) a comparison of the scope and legal design of the powers (both between the EU authorities, but also between the different national systems), b) the enforceability of the measures, c) the scope of the applicable legal safeguards, and d) where this has not already been dealt with in the specific transversal report or for reasons of coherence, issues of judicial review and legal protection. The analysis will start with the interviewing of persons and will consequently discuss the rules on production orders.

10.5.2 OLAF

Compared to the legal frameworks of the other EU authorities, OLAF's legal framework is the most complicated, particularly in relation to external investigations, which is the area where a comparison with the other EU authorities and their national partners is most relevant.

The **interviewing of persons** is provided for as an autonomous power in Art. 9 Regulation 883/2013, which is also relevant in the framework of on-the-spot checks or sectoral regulations.⁷⁶ The power to interview persons is widely defined, including the persons concerned as well as witnesses. To that extent, OLAF's powers go beyond those of the other EU authorities. At the same time, however, explicit duties to cooperate only exist in relation to EU officials. Even where such duties to cooperate do exist, OLAF itself is not in a position to enforce them.⁷⁷ The same holds true when individuals make false or misleading statements. Such enforcement powers are in the hands of either the IBOAs or the national partners. Here, we see a significant difference with the other EU authorities.

Moreover, we must note that the procedures for interviewing contain a number of safeguards that are lacking under the frameworks of OLAF's EU counterparts:

1. There appears to be a generous recognition of the privilege against self-incrimination, both for witnesses as well as the persons in question. Whereas OLAF may interview a suspected person or a witness at any time during an investigation (a after notice has been given), any person interviewed shall have the right to avoid self-incrimination. The scope of this safeguard appears to go beyond the EU Court's case law in competition law.⁷⁸ A probable explanation for this is that OLAF's field of competence is so closely related to criminal law. But this cannot be a completely satisfactory explanation. First of all, many OLAF proceedings end up in recovery proceedings with no judicial follow-up; secondly, the investigations of the other EU authorities may also end up with the imposition of punitive administrative or criminal law sanctions. Another, more convincing explanation could therefore be that this provision also serves to facilitate later use as evidence in punitive proceedings.⁷⁹
2. Also the right of access to a lawyer is recognized in Art. 9 (2) Reg. 883/2013. A similar provision is lacking for the other authorities, although there are no indications that this is a great practical problem.
3. Art. 9 (5) moreover states that any person interviewed shall be entitled to use any of the official languages of the institutions of the Union.

The situation therefore appears to be that, on the one hand, OLAF lacks binding powers for interviewing persons, but, on the other, it must respect a number of safeguards that are lacking for the other authorities.

As said, it is also possible that interviews are held within the setting of an on-the-spot check or in the setting of mixed investigations. In practice, the distinction between (autonomous) on-the-spot checks and mixed inspections does not make a great difference in terms of the applicable law. On-the-spot checks are led by OLAF (Art. 6 Reg. 2185/96). Yet that regulation does not itself define, unlike the regulations in the other areas of this study, the (minimum set of) powers. Instead, it stipulates that national law must be respected, whereas, at the same time, OLAF inspectors shall have access to all the information and documentation subject to the same conditions as national administrative inspectors and in compliance with national legislation. The inspectors may avail themselves of the same inspection facilities as national administrative

76 By stating that some of the procedural safeguards in that article do not apply to on-the-spot checks and inspections, it implicitly acknowledges that the other safeguards do apply to those settings.

77 EU Report, chapter 2.1.1.4.

78 See supra section 10.3.

79 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, supra note 2 [forthcoming].

inspectors and in particular copy relevant documents. The Regulation therefore does not define powers and refers back to national law on many crucial points, such as the precise scope of the powers, the possibilities to enforce them, the applicable safeguards and the available remedies. Some limitations are determined by the principles of equivalence (or non-discrimination) and effectiveness. The scope of those limitations is as yet unclear and this aspect has not yet been brought before the EU courts.

The foregoing means that even for the investigations for which OLAF is the leading authority, the office is highly dependent on its national partners and their legal systems. To that extent, there is not that big a difference with mixed investigations.

A similar picture emerges with respect to the **production orders**. The EU framework does not provide a coherent legislative framework. For external investigations, Art. 3(3) stipulates that the Member State concerned shall ensure, in accordance with Regulation 2185/96, that the staff of the Office are allowed to have access, under the same terms and conditions as its competent authorities and in compliance with its national law, to all information and documents relating to the matter under investigation which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently. OLAF officials may then avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents. Those checks may concern, *for instance*, professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and the work done, and bank statements held by economic operators, computer data, and budgetary and accounting documents (Art. 7 Reg. 2185/96). The scope of Regulation 2185/96 is limited because on-the-spot checks can only be made concerning economic operators against whom sanctions as referred to in Regulation 2988/95 may be applied (Art. 4).

Here, too, OLAF is therefore not given a set of genuine powers for its autonomous tasks. Rather, Regulation 883/2013 and the other regulations define the outer limits within which national legal systems must remain. We can deduce from this that OLAF cannot be denied any powers which have been granted to national counterparts, in comparable circumstances, but that it is unclear what the scope of these powers is. A level playing field for OLAF is absent.

The foregoing analysis reveals that the interaction between OLAF and national partners is of interest for virtually all types of operational and investigative actions by OLAF. What, then, are the relevant national provisions that guide this cooperation with OLAF? For that we need to look at national legislation which implements the obligations of, in particular, Regulation 883/2013 and Regulation 2185/96 (*autonomous investigations*), but also the national provisions on investigations by OLAF's partners and the possibilities for OLAF to join in (*mixed investigations*).

Germany

In the German system, there is no specific legal framework for cooperation with OLAF for the purpose of autonomous inspections, nor for mixed investigations.⁸⁰ That means that internal laws apply to cooperation with OLAF. Coordination with national authorities is done by the *Bundesministerium der Finanzen*, which does not have operative powers. External investigations are conducted by national authorities which are competent with respect to EU funds (mainly the national authorities of the *Länder*) and by the customs authorities in the area of traditional

80 German report, chapter 3.3.1.

own resources. In the latter case, the rules of the *Abgabenordnung* will apply. Although some of the German partners also have powers in the sphere of criminal law (including the *Ordnungswidrigkeiten*), such powers are not available for cooperation with OLAF. This cooperation is regarded as a matter of administrative law. Of particular relevance are then the rules on on-site tax inspections (*Betriebsprüfungen*).

Within the setting of such on-site inspections, the powers available are considerable. Via § 200 (1) AO powers to request information and documents (and corresponding cooperative duties) are available. Simultaneously, we must also note that the privilege against self-incrimination (as far as it concerns statements) is well protected, both for witnesses and relatives. The taxpayer himself cannot refuse to answer questions, even if criminal prosecution is possible; he/she is protected by other means.⁸¹ Professional secrecy is also covered in a very wide sense (including counsel, solicitors, notaries, tax consultants, auditors, tax representatives), as well as – to a much more limited extent – banking information, § 30a AO.⁸² Representation by counsel is possible.

Requests for information can be enforced by the authorities (where duties to cooperate exist). But in order to be able to do that, such orders must have the form of a *Verwaltungsakt*. To that extent, unlike for instance in the Netherlands, enforceable duties of cooperation and legal protection go hand in hand. The remedies, however, do not have a suspending effect.

The Netherlands

The Netherlands is the only country in this study that has implemented regulations as far as Regulation 2185/96 is concerned. These regulations state that the Minister of Finance is the competent authority in light of Art. 4 Regulation 2185/96. Here, too, we see that the AFCOS is mainly a supportive and coordinating body. With reference to the General Act on Administrative Law/GALA, it ensures that in the setting of on-site inspections GALA powers are available. This also means that further-reaching administrative powers in the area of customs and taxes are not available for OLAF. The situation is less clear in the setting of mixed investigations. There are no explicit provisions relating to mixed investigations, implying that in such a setting the regular provisions apply. Like in Germany, and different from the purely national setting, administrative and criminal law powers are strictly separated. Criminal law powers are not available in autonomous or mixed investigations.⁸³

The power to conduct interviews and to issue production orders are both included in Art. 5:16 GALA; they may also be exercised during on-the-spot checks. The personal and material scope of this provision is broad, being limited mainly by the proportionality principle and the so-called involvement criterion.⁸⁴ Non-cooperation can lead to the commencement of criminal proceedings. Assistance by the police may also be requested. Neither the national inspectors nor OLAF have the power to sanction a person for not providing the information required or for providing false information.

Legal privilege is protected by law. Banking secrecy is not protected. Access to a lawyer has not caused major problems, as there appears to be a willingness to facilitate this when possible. The privilege against self-incrimination does not come into play during administrative cases. Here, Dutch law more or less follows the approach of the Strasbourg Court, differentiating between

81 Particularly via § 30 AO (*Steuergeheimnis*) and § 393 AO; German report, chapter 3.3.1.

82 On this, see M.J.J.P. Luchtman, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities*(2008), pp. 105-106.

83 Chapter 4.2.1.

84 Chapter 4.3.1, sub. b.

situations where punitive proceedings are not anticipated and those where this is the case, and between materials which have an existence which is dependant upon the person concerned and materials that exist independently. This means that, generally, the privilege offers no protection against production orders.

Unlike in German law, the enforceability of the pertinent powers (through force or the imposition of sanctions) is not connected to the legal design of the order. A request for information is not an appealable decision (*besluit*), implying that no remedies under administrative law are available except for an appeal against the final (sanctioning) decision. The civil courts, however, do offer redress via injunction orders.⁸⁵

Italy

Unlike the situation in the Netherlands and Germany, the Italian structures for cooperation with OLAF do provide for the use of criminal law powers. The Italian Anti-fraud Committee (COLAF) of the Department for European Policies provides advice and coordination at the national level concerning fraud and irregularities, but has no direct operational authority. The mixed composition of the Committee reflects the involvement of different agencies, bodies and police corps cooperating to support OLAF at the national level. The investigative powers are conferred on a unit of the *Guardia di Finanza* (the financial police). The COLAF may also rely on the tax police and on the customs police. The distribution of competences depends mostly on the specific case and on the division of competences between the different police units in Italy. It is relevant to highlight that in Italy administrative investigations in fraud cases can rely on the powers of the judicial police in combating fraud. The same set of powers applies when assisting OLAF. This also means that the ordinary rules relating to national cases apply, including the privilege against self-incrimination, the right of access to a lawyer and professional secrecy.⁸⁶

The financial police may invite taxpayers, company managers or any person exercising a business to attend an interview. Italian law also allows the financial police to request the disclosure of relevant data or documents. In these cases, it is not mandatory for the invited person to cooperate in the interview or to submit the documents required; if that person does not cooperate, the relevant documents or data cannot be evaluated *pro reo* in the case of an administrative fine. However, when the level of suspicion suggests that a criminal investigation should be commenced, the relevant rules of the Code of Criminal Procedure will apply and cooperation with the investigative authorities (in several cases, these are the same authorities that were in charge of the administrative investigation) becomes an obligation (Art. 371-bis Penal Code). The enforcement of investigative measures is then done via the coercive measures of criminal law.

The financial police may moreover proceed – also in the setting of OLAF investigations – with onsite inspections of premises belonging to the persons or legal entities concerned.⁸⁷ The aforementioned powers (interviews and production orders) are available in that setting, too.

United Kingdom

For the UK (England and Wales) the AFCOS is the National Police Coordinator's Office for Economic Crime. This is a police authority. It works together with the Serious Fraud Office (SFO), the National Crime Agency (NCA), the Financial Conduct Authority (FCA) and the HM

⁸⁵ Chapter 4.3.1., sub d.

⁸⁶ Italian report, chapter 5.2, sub a.

⁸⁷ See also *infra* section 10.6.2.

Treasury/HM Revenue and Customs (HMRC). Depending on the case, therefore, UK authorities assisting OLAF or joining OLAF in mixed investigations will have powers under tax law as well as criminal law. Cooperation with OLAF – and their participation in inquiries – is not regulated by English law, but (at least as far as the SFO is concerned) is also not excluded.⁸⁸

All of the national partners have the power to compel answers to questions.⁸⁹ The privilege against self-incrimination will not obviate an obligation expressed in a statute to respond to enquiries by the SFO or to a production order from a regulator. Yet unlike, for instance, the situation in German law, where communications between a lawyer and a client are not *per se* privileged in administrative law, this is the case for the UK. Access to a lawyer during questioning is considered to be intrinsically connected to one's status as a legal actor.⁹⁰ Production orders are also available, both with respect to the person under investigation, as well as other persons (except for material carrying LPP or banking confidentiality). A failure to comply is a criminal offence.

Issues pertaining to legal protection (remedies) do not hinge on the availability of force (fines/coercion), like in Germany. Actions for trespass, a breach of privacy, et cetera, are however possible, usually retrospectively. Official action beyond the scope of a warrant, or without authority, will be actionable. And at any subsequent criminal trial, the fact that the evidence has been obtained unlawfully is a reason which might trigger its exclusion from evidence.

Poland

Specific provisions regarding the vertical cooperation of the Polish administrative authorities with their EU counterparts are scarce. Cooperation usually takes place on the basis of the Code of Administrative Procedure of 1960. Recently, however, preparations for the amendment of the Code of Administrative Procedure, including a general legal framework for such cooperation (the new section of the Code is entitled 'European administrative cooperation'), have been set in motion.

The Polish national AFCOS is the Department for the Protection of EU Financial Interests (*Departament Ochrony Interesów Finansowych Unii Europejskiej*). It serves as a contact point for OLAF and operates on the basis of administrative law only. Under that heading, the Department also provides assistance to OLAF, at its request, with regard to on-the-spot controls and inspections carried on the territory of Poland, following Regulation 2185/1996. As in other areas of the law (except competition law), all actions undertaken within the framework of cooperation require proceedings to be opened on the basis of a formal decision.

In fraud cases, the interviewing of persons is possible and is provided for in the Code of Administrative Procedure and in sectoral acts. The authorities may interview witnesses or parties to the proceedings, who are entitled to rely on the privilege against self-incrimination; a witness may refuse to answer a question if such an answer could expose him or her (and close relatives) to criminal liability or could result in a breach of the obligation to maintain professional confidentiality. The interviewing of a party to the proceedings is a separate evidentiary measure; it is always facultative and may be ordered if other evidentiary measures have been exhausted and material facts in the case have not been clarified.

88 UK report, chapter 6.2.4

89 Chapter 6.3.1.

90 Chapter 6.3.2.2.

Generally, Polish public administration authorities rely heavily on documents supplied by the parties or seized during searches. Relevant provisions are found mainly in sectoral legalisation, including tax provisions that oblige undertakings to retain certain documents and to produce them on demand. Neither the Code of Administrative Procedure nor relevant substantive statutes provide for any privilege against self-incrimination which may be invoked against such a production order.

In practice, parties have recourse to professional attorneys. The attorney may take part in all actions within the proceedings, including interviews. He or she may assist the party being interviewed. He or she may also ask questions during the interview, usually after the questions asked by the interviewing official. LPP is not protected as such in administrative law.

In principle, in Polish administrative proceedings the production of any piece of evidence requires a production order to be issued, although many authorities rely on a summons. Both a summons and production orders contain compulsory measures; sanctions apply in both situations and no remedies are available against production orders and a summons as such. The addressee of the production order cannot therefore challenge such acts directly, but he or she does have the possibility to challenge a fine that has been imposed upon him or her for a failure to comply with the order.

France

The French AFCOS is the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude/DNLF*), which is a coordinating body. This Office interacts with a variety of authorities that are more or less easily identifiable according to the sector concerned. First of all, there are a number of administrative services. For revenue, the Customs Administration appears to be particularly important; expenditure control is divided between several administrations. The latter administrations may have powers to request documents and to carry out both on-site and off-site inspections, but they do not in principle have judicial police powers. Secondly, judicial investigation services may be of relevance, depending on the case. In practice, the Financial Prosecutor's Office (*Parquet National Financier*) and a special investigative department (the Central Office for the Fight against Corruption and Financial and Tax Offences (OCLCIFI)) are particularly relevant. A third potential partner is the hybrid investigative services consisting of public officers who are not *stricto sensu* part of the judicial police, but are especially authorised to act on the basis of the Code of Criminal Procedure (e.g. the National Judicial Customs Service).

What appears to hamper the cooperation with OLAF in France is the uncertainty concerning the applicable rules for cooperation with OLAF. The creation of the DNLF has not been accompanied by the explicit and specific recognition of the powers and actions of OLAF in domestic legislation. There is, for instance, no provision on the thresholds to be applied in proceedings carried out at its request. Therefore, national thresholds (if there are any) apply in these circumstances. The French report indicates that cases of fraud affecting the EU budget, including cases referred by OLAF, systematically lead to the initiation of an investigation (though not always of high priority). By consequence, the risk of nullity, which might weaken or even bring the investigative work to a halt, leads the national judicial authorities – which are bound by the secrecy of the investigation – to observe very great caution regarding the communication during the investigation with OLAF.⁹¹

91 Chapter 8.2.2. Interestingly, the French report notes that such communication is often foreseen as being in the public interest for, for instance, the national tax administration or administrative authorities with sanctioning powers (e.g. ADLC).

The foregoing seems to imply that, though theoretically possible, the relevance of judicial powers for OLAF investigations is limited.

Regarding the *administrative* powers (the interviewing of persons), it is possible to distinguish between the power to summon and hear a person, on the one hand, and the power to receive information and justifications within the framework of the power to access business premises, on the other hand (on-site interviews). Such powers are granted to all the counterparts of the EU authorities of this study (including OLAF), either explicitly or implicitly. These are considered non-coercive and mere administrative powers. They may be used against any person, suspected or not. A formal decision is not required.

All counterparts of the EU authorities also have the power to request and obtain records or documents (*droit de communication*), as an autonomous measure or in the setting of an on-the-spot check. This, too, is considered to be a non-coercive measure. Records and documents are submitted ‘on a voluntary basis’, even though a refusal to hand them over is a criminal offence. The measure does not require judicial authorisation or a formal decision, nor special grounds.

Although the right not to contribute to one’s own incrimination already applies at the investigation stage in the various administrative procedures, as well as, *a fortiori*, in the framework of criminal investigations, it is narrowly conceived and resembles the approach of the Court of Justice in competition cases.⁹² For this reason, the powers to have access to all sorts of documents are barely limited by this right. Moreover, within the framework of the investigating powers of the national counterparts of the EU authorities, professional secrecy is always subject to limitations: information, documents, etc. may not be withheld on grounds of professional secrecy (except for ‘officers of the law’, especially lawyers).

Regarding the available remedies, the French approach is that if proceedings are brought against an undertaking following an administrative inquiry or if a penalty payment or penalty is imposed on an undertaking, the legality of the requests for information may then be challenged in such proceedings. Although non-cooperation may lead to sanctions, the measures discussed in the above are not considered as coercive measures; therefore, they do not require judicial authorisation or a formal decision. In that way, coercion seems to refer to the use of physical powers to obtain the information needed.

Interestingly, the French report also makes mention of the fact that the jurisdiction of the Court of Justice under Art. 267 TFEU has not prevented the French Court of Cassation from recognizing the possibility (or even the duty) of French courts to review OLAF’s action once the results of that action are included in the case file and, therefore, form part of the national criminal procedure. This is done in order to – according to the Court of Cassation – ‘guarantee effective judicial protection’.⁹³ It follows that the courts may even, if necessary, annul these acts, in so far as they are included in the case file and are therefore subject to the rules of the CPC. This check also includes a verification that acts and reports adopted by OLAF ‘do not find their necessary basis in definitively cancelled acts,’⁹⁴ in order to prevent a ‘laundering’ of evidence through OLAF investigations.

92 See chapter 8.3.0.

93 Chapter 8.4.

94 Ibid.

Provisional conclusions

All in all, on the basis of this comparative analysis we can draw a number of conclusions with respect to the OLAF framework in relation to interviews and production orders:

- Only the Netherlands seems to have introduced specific legislation implementing the obligation with respect to the relation between OLAF and national partners (in relation to Regulation 2185/96). Polish legislation on cooperation is on its way. This means that in all other cases the national legal bases for the availability of investigative powers for OLAF investigations (autonomous investigations), as well as the competence of OLAF to join national investigations (mixed investigations), remain tacit. This is sometimes remedied by opening national investigations and by allowing OLAF to join. But in other cases, national proceedings may also harm OLAF's interests. Several reports, particularly the French, indicate that this situation clearly affects OLAF's position (but also those of its national partners).
- We have also noticed considerable differences between the statutes and powers of the national partners, ranging from purely administrative powers to coercive powers under criminal law. The Netherlands, Germany and Poland regard OLAF as a purely administrative body and, in doing that, seem to disregard the often intrinsic connection between punitive and non-punitive investigations.⁹⁵ At the other end of the spectrum, the UK, France and Italy have made criminal law powers available, at least in theory. The German report also makes mention of the federal structure of Germany that may impose additional hurdles for smooth cooperation between OLAF and national partners (certainly when compared with competition law, banking law and CRA/TRs, which do have national partners at the federal level).⁹⁶
- Partly (but not only) because of the foregoing, we notice differences in the scope and applicability of the privilege against self-incrimination and LPP; less so for the right to have access to a lawyer. Unlike the right of access to a lawyer, LPP is not specifically included in the EU framework for OLAF. It is recognized as a privilege in the legal orders involved in OLAF investigations. With respect to the *nemo tenetur* principle, Germany seems by far the most protective legal order; it has explicitly recognized *Auskunftsverweigerungsrechte* also for witnesses, unlike, for instance, the Netherlands and the UK. It also recognizes (in some cases) the principle in relation to documents.
- The enforceability of the investigative acts depends on a number of issues, such as the availability of criminal law coercive powers, and the applicability of procedural rights or privileges (LPP for instance). In most of the legal orders involved OLAF partners can avail themselves of some form of coercive power, either through imposing fines/criminal prosecutions (for non-cooperation) or via physical force (police assistance or coercive measures). Practice does however appear to be different and is particularly problematic where the assistance of other national colleagues is needed. The German and Dutch reports make mention of the absence of sanctioning powers. In Italy, we have noticed that – under administrative law – requests for information and interviews cannot be enforced. However, the *Guardia di Finanza* can use – depending on the investigation – its own, more coercive measures.
- Finally, regarding legal protection, we can note significant differences in the availability of remedies. None of the legal orders introduces prior judicial authorizations for the measures discussed here. Germany connects the availability of a remedy to the enforceability of a

⁹⁵ They do recognize this link in purely national investigations.

⁹⁶ Chapter 3.5.

measure; where non-cooperation can lead to sanctions, a *Verwaltungsakt* is necessary. The United Kingdom offers remedies that are connected to the interests involved. The Netherlands, Poland and France, however, provide no remedies against specific investigative acts. Legal protection is said to be offered at the end of the proceedings, or by appealing against the fine that has been imposed for non-cooperation. Dutch civil courts have however stepped in this legal loophole and offer residual protection.

10.5.3 DG COMP

Requests for information (production orders), as well as the interviewing of persons, may take place within the setting of an on-site inspection or as a standalone measure. The **interviewing of persons** can take place on the basis of Art. 19 Reg. 1/2003. This article states that any person may be interviewed for purposes of collecting information, but only on the basis of the consent of that person. If conducted at the sites of the undertaking, national authorities may join in order to provide assistance. In those cases, the interview will remain a competence for DG Comp conducting its own investigation.

Within the setting of on-site inspections, Arts 20 and 21 Reg. 1/2003 offer other possibilities for the Commission. Inspections can take place either on the premises of the undertaking (Art. 20), or somewhere else (including private homes, Art. 21). During on-site inspections, representatives of the undertaking may be asked for explanations concerning facts or documents (cf. Art. 20 (2)(e) Reg. 1/2003). In the case of an inspection of premises, powers are exercised upon the production of a written authorization, or ordered by decision. In the latter case, penalties for a lack of cooperation are possible and legal remedies at the EU Courts are available.⁹⁷ National authorities – upon their request or that of the Commission – may actively assist, using the same powers as the Commission has (Art. 20 (5) Reg. 1/2003). Legal doctrine seems to regard this provision as administrative assistance (*Amtshilfe*), implying that the actions of national partners are performed in their own name, but for the purpose of the Commission's inquiries.⁹⁸ That certainly holds true for the provision of physical assistance in cases of (expected) opposition (Art. 20 (6) Reg. 1/2003).

A third route for interviewing persons is then provided via Art. 22 Reg. 1/2003. Upon the request of the Commission, national authorities shall perform inspections under Art. 20 (apparently not Art. 21!) Reg. 1/2003 in accordance with their own law. The latter also implies that national procedural safeguards, not European ones, are applicable (within the standards of *Melloni*).⁹⁹ This means that – as was the case with OLAF – differences between the national legal systems can become relevant. In practice, however, Art. 22 is rarely used.¹⁰⁰

The same set of rules is *mutatis mutandis* applicable to **production orders**, as far as on-site inspections are concerned. Arts 20 and 21 Reg. 1/2003 2 empower officials and other accompanying persons authorised by the Commission to examine the books and other records related to the business, irrespective of the medium on which they are stored, to take or obtain in any form copies of or extracts from such books or records, to seal any business premises and

97 Chapter 9.3.1.

98 Cf. M. Böse, 'The system of vertical and horizontal cooperation in administrative investigations in EU competition cases', in K. Ligeti (ed.), *Toward a prosecutor for the European Union* (2013), Vol. I, pp. 845-846; F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (2005), p. 75, with further references.

99 Supra section 10.3.

100 This is confirmed by the Dutch and German reports, and during the second expert meeting in November 2016.

books or records for the period and to the extent necessary for the inspection. Non-cooperation in cases of an inspection decision can lead to the imposition of a fine or, with the assistance of national partners, the use of physical force.

Art. 18 provides for the power to require undertakings to produce all necessary information outside the setting of an inspection of premises. This power can take the form of a simple request or a decision. The difference is relevant for the enforceability of the request and the legal remedy available.¹⁰¹ Except for a notification duty, Art. 18 Reg. 1/2003 reserves no specific role for the national authorities.

The foregoing means that European law has set its own autonomous standards in competition law. These standards also concern the applicable defence rights, including the privilege against self-incrimination, LPP and access to a lawyer during investigative acts.¹⁰² As we will see below, these standards are also likely to be applied in ESMA and ECB regulations. Yet despite the relative autonomy of the EU framework from national law, we have noticed that particularly Art. 22 Reg. 1/2003 is a relevant provision in light of the interactions with the national partners of DG Comp. Therefore it is of relevance to OLAF. Under the regime of Art. 20 (5) national authorities moreover provide assistance to the Commission, albeit under the framework of EU law. How have these interactions been given shape by national law? Are there differences between the Member States in this regard?

Germany

Cooperation with the Commission follows the general rules; the investigative powers of the BKartA in domestic cases also apply to investigations at the request of the Commission (Art. 22(2) Reg. 1/2003). However, this option has not yet been used by the Commission. As said, it can still be of interest as a comparison for the OLAF setting.

The rules on administrative proceedings before competition authorities are laid down in the Competition Act. In practice, however, the BKartA does not make use of its administrative powers when cooperating with EU competition authorities. Rather, they usually open an investigation for regulatory offences (*Ordnungswidrigkeiten*). In those cases, the rules of criminal procedure apply, including provisions with respect to the rights of witnesses and defendants protecting the privilege against self-incrimination. Witnesses can refuse to produce documents, which means that production orders are easily rebutted in competition law cases and are therefore not of practical importance.

The application of the powers of the Competition Act (particularly Arts. 57 and 59) are thus of a theoretical nature. One important difference with the *Ordnungswidrigkeitengesetz* is that the privilege against self-incrimination does not apply to production orders. Requests for information on the basis of Art. 59 (not 57) of the Competition Act are formal decisions, implying the availability of remedies. It also means that non-cooperation is an administrative offence.

The Netherlands

Many of the findings pertaining to assistance being provided to OLAF also apply in competition law. This is because the legal framework is to a large extent the same and is based on the General Act on Administrative Law. The Dutch Competition Act does however on occasion pay explicit

101 Chapter 9.3.1.

102 Section 10.3.

attention to the vertical cooperation with DG Comp. Here, too, we can notice that the Netherlands has introduced specific legislation for vertical cooperation. If the Commission requests the ACM to act on its behalf, the appointed ACM officers have the administrative powers contained in Arts 5:15 – 5:19 GALA. These are complemented by those in the Competition Act and the Act establishing the Authority for Consumers and Markets.

The Competition Act covers both the assistance provided to investigations of DG Comp, as well as the execution of requests for assistance. In the latter (hypothetical) case, ACM officers use their national competences, including the power to conduct interviews in Art. 5:16 GALA. In that situation, the national safeguards, including the privilege against self-incrimination, also apply. The scope of this privilege has been extended in the Competition Act and applies to natural persons who work for the market organisation other than the ones that already fall under Art. 5:10a GALA.

In relation to LPP, we can notice a difference between Dutch law and EU law. The Supreme Court has decided that, in principle, both external lawyers and in-house lawyers enjoy legal professional privilege. The ACM has adopted a procedure concerning a lawyer's legal privilege, which states that if the person who needs to provide the information claims that the information in question is protected by legal privilege, this matter can be brought before a so-called legal privilege officer.

The United Kingdom

There are no specific rules on powers in the course of providing assistance to DG Comp. The national powers apply. Where the Competition Market Authority wishes to question an individual under formal powers, the CMA will provide the individual with a formal written notice. The CMA can fine any person who fails, without a reasonable excuse, to comply with a formal notice to answer the CMA's questions. The Competition Act 1998 also gives the CMA the power to require the production of information and documents when conducting a formal investigation into agreements etc. preventing, restricting or distorting competition, or abuse of a dominant position. The CMA can fine any person who fails, without a reasonable excuse, to comply with a formal information request.

With respect to the applicable safeguards – as in the assistance provided to OLAF investigations – any person being formally questioned or interviewed by the FCA or CMA may request to have a legal adviser present to represent his or her interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. And as in OLAF investigations, in English Law, communications between lawyers and clients are privileged and generally do not need to be disclosed. Of course, particularly in competition law, there is some question as to when privilege is actually available ('in-house' lawyers), because those communications are not privileged in EU competition law, but in English law they are.

Like in OLAF investigations, issues pertaining to legal protection (remedies) do not hinge upon the availability of force (fines/coercion), like in Germany. Actions for trespass, breach of privacy, et cetera, are open, usually retrospectively. Official action beyond the scope of a warrant, or without authority, will be actionable. And at any subsequent criminal trial, the fact that the evidence has been obtained unlawfully is a reason which might trigger its exclusion from evidence.

Italy

When it comes to the interaction with the European Commission, Italian law states that where the Competition Authority determines that competence should be attributed to the EU Commission, ‘it shall inform the Commission of the European Communities and forward to it any relevant information at its disposal.’ Also, when the AGCM receives a notification from the Commission that a formal procedure is to be commenced, it shall suspend any investigation, save for any aspects entirely of domestic relevance.

The powers available for national investigations of the AGCM are also applicable when providing assistance to the Commission. Providing information is a duty of the (legal) persons concerned and there is no exception under the right not to incriminate oneself. The AGCM can fine anyone who refuses or fails to provide the information or to produce the documents required without justification. The Authority may also orally request information and the disclosure of documents during the course of hearings or inspections. In such a case, the party concerned shall be notified thereof and a written record will be made with the same content as a written request.

The interview and production orders are therefore *de facto* measures which do not require any judicial authorization and they cannot be challenged before the courts. Their legality can only be challenged at the end of the proceedings if a fine is imposed.

Poland

The situation in competition law in any aspect thereof resembles the picture in PIF cases (regarding powers, safeguards and remedies). The President of the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów/UOKiK*) is the Polish counterpart of DG Competition. It is the competent competition authority for cooperation in proceedings of the Commission or national competition authorities of other Member States, as well as cooperation within the Network of European Competition Authorities (ECN).

The Antimonopoly Act provides for powers regarding cooperation with DG Comp through the provisions on the exchange of information and assistance during inspections. What is worthwhile mentioning is that, though LPP is not officially recognised by Polish administrative law, in competition cases both UOKiK and the Antimonopoly Court follow DG Comp’s practice. Consequently, only external lawyers may invoke a LPP defence; internal lawyers are not protected by LPP.

France

Unlike in the area of PIF, the other three European authorities all have only one counterpart at the national level. For DG Comp this is the Competition Authority (*Autorité de la concurrence/ADLC*). All of these counterparts are independent administrative authorities, vested with supervisory, investigative, disciplinary and administrative sanctioning powers. The ADLC is the competent national authority for cooperation with the Commission or the national competition authorities of other Member States. It takes part in the activities of the European Competition Network (ECN). Competition law offers an explicit and general legal basis for the application by the ADLC of all its investigative powers when applying Arts 101 and 102 TFEU in general and, in particular, when it acts at the request of the Commission.

The powers of all French national counterparts with respect to interviews and production orders are – with some exceptions in customs cases (OLAF) – very comparable and the considerations concerning OLAF in the previous section therefore apply accordingly. At the national level,

French proceedings are characterized by a separation between the exercise of supervisory or monitoring powers and the exercise of investigative powers (which is a matter of regulation, but also judicial enforcement). While the latter is closer to the powers of the judicial authorities, the former borrow more from the administrative tradition and profile of supervision. The former are also considered to be of a non-coercive nature, which means that coercive powers are not applied. Fines are however possible for non-cooperation. Interesting in this respect is the position of the Constitutional Council, holding that ‘only documents voluntarily disclosed can be seized. The fact that a refusal to hand over the information or documents requested may give rise to an injunction under a compulsory penalty imposed by the Competition Authority, an administrative fine imposed by that authority or a penal sanction does not confer a different scope on the powers vested in the authorized agents.’¹⁰³

Provisional conclusions

On the basis of the comparison between the national reports, the following points must be made:

- Practitioners indicate (both DG Comp as well as the national partners) that Art. 22(2) Reg. 1/2003 is hardly used. We do notice on occasion that national authorities support the Commission for practical reasons. The powers of the European Commission are considered to be sufficient to perform the investigations on its own.
- Compared to OLAF, we can also notice much more uniformity in the statutes of the authorities concerned. A likely explanation for this is the converging influence of Reg. 1/2003. All partners are predominantly administrative bodies, with punitive powers. Where deviations occur, this seems to be connected to diverging systems of administrative punitive law. The German system of *Ordnungswidrigkeitenrecht* is, for instance, strongly based on criminal procedure and is also applied in cases of assistance to the Commission (instead of the provisions of the Competition Act). This has consequences for the scope of, e.g., the privilege against self-incrimination (production orders; documents). Dutch competition law, on the other hand (including administrative fines), is primarily still regarded as administrative law. As a result of EU competition law, however, Dutch competition law is the only area of administrative law where administrative authorities (after judicial approval) have the power of search.
- The foregoing analyses also reveal that the competition authorities (at the EU and national level) have autonomous sanctioning powers in cases of non-cooperation (financial sanctions). That, too, is different in the OLAF setting. The latter (and the AFCOS) often require cooperation by other national partners in cases of opposition by economic actors or other individuals.
- It comes as no surprise, given the information already available, that there are differences in the scope of the applicable fundamental rights standards. The issue of in-house lawyers in relation to LPP is well known. The privilege is not recognized as such in Poland and Germany in administrative law. Differences between national law and EU law consequently exist, particularly in the framework of on-site inspections. Yet in the UK and the Netherlands, the standards go beyond those of EU law, particularly with respect to in-house lawyers. The privilege against self-incrimination has received less attention. Many¹⁰⁴ national legal orders

¹⁰³ As cited in the French report, chapter 8.3.1.

¹⁰⁴ Not all, the UK report chapter 6.3.2.2 notes: ‘For present purposes, all that is necessary to note is that the privilege against self-incrimination will not obviate an obligation expressed in a statute to respond to enquiries by the SFO.’

seem to follow the case law of Strasbourg, differentiating between materials that have an existence dependent on the will of the accused and materials that exist independently. The latter are, in principle, not covered by the principle. Regarding the scope of the privilege in relation to statements (interviews), it is not yet fully clear to what extent the Strasbourg case law differs from that of the Luxembourg Court, but there appears to be a difference.¹⁰⁵ On top of that, some legal orders also grant the privilege to witnesses (Germany), whereas others do not (or not explicitly; e.g. the Netherlands). Germany has acknowledged the applicability of the principle in relation to production orders in the *Ordnungswidrigkeiten* procedure. Other countries have not done this (the UK, the Netherlands, Poland, Italy, France) and neither does EU law.

10.5.4 ECB¹⁰⁶

Art. 9 (1) Reg. 1024/2013 notes that, in the cases mentioned therein, the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law. In addition to that, Arts. 10-13 Reg. 20124/2013 and the relevant provisions in the SSM Framework Regulation provide ECB with investigative powers in relation to interviews and productions orders. Those powers are exercised mostly in relation to significant entities.¹⁰⁷ Those articles deal, consecutively, with requests for information, general investigations and on-site inspections. Depending on the stage of the proceedings (from authorization to ongoing supervision to investigations), these powers are available to different divisions of ECB. As soon as an official investigation is started, the investigative powers are available to the Investigating Unit.¹⁰⁸

Art. 10 concerns requests for information by a simple request in relation to the actors mentioned in that article. Unlike in competition law, the article seems to make no distinction between simple requests for information and requests for information by decision. It seems logical to assume that judicial review will be open if the nature of the request is obligatory. This, according to the transversal report, depends on the legal design of the request (a decision or not?). Formal decisions are rare, because it is difficult and time and cost-consuming to secure them.¹⁰⁹ As is obvious, professional secrecy (including banking secrecy) does not exempt the institutions from providing the information required.

Art. 11 Reg. 1024/2013 then deals with general investigations, which can be undertaken by decision. This also means that an appeal to the Court of Justice is open. A general investigation can include both oral and written explanations by the entities mentioned in Art. 10, as well as the interviewing of other persons upon consent. It also includes production orders. Both types of actions are covered by the same ECB decision. Non-cooperation is punishable with a fine. On-site inspections follow the same framework.

Like in competition law, the ECB framework contains very few references to procedural safeguards.¹¹⁰ Recital 48 Reg. 1024/2013 states that LPP is a fundamental principle of Union

105 As to the EU courts' case law, see *supra* section 10.3.

106 The focus of this project has been on cooperation within the SSM framework.

107 The powers apply to LSEs in the cases provided for in Art. 6(5)(d) Regulation No. 1024/2013; see also Art. 138 SSM Framework regulation.

108 Arts. 123-125 SSM Framework Regulation.

109 Chapter 9.3.2.1, sub. a.

110 Art. 126 Framework Regulation is silent on the rights included in this project.

law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case law of the Court of Justice of the European Union (CJEU). The regulation is silent on the privilege against self-incrimination. However, there appears to be consensus among the persons interviewed for this project that the Court's standards in competition law also apply here.

The role of the national authorities in these investigations is partly different from that in competition law. NCAs can, after all, be included within the SSM structures of JSTs and OSITs. When applying the provisions of the regulations this construction resembles a form of *Organleihe*;¹¹¹ the power is granted to the ECB and the applicable law is EU law. The national authorities would then act as agents of the ECB,¹¹² and because the actions are attributable to the ECB, the remedies would have to be offered at the EU level.¹¹³ Yet like in competition law, mention is also made of assistance (*Amtshilfe*) by the national authorities to the ECB (Arts 11 (2) and 12 (5) & 13 Reg. 1024/2013). Those articles resemble the provisions of competition law and include the use of physical force (the opening of doors, so to speak) in cases of obstruction.

It therefore appears that national authorities can be involved in ECB on-site inspections in a threefold capacity: either they are part of the ECB structure (JST/OSIT; *Organleihe*), or they provide assistance (*Amtshilfe*) on the basis of either EU law, or national law (the use of force). Additionally, ECB may instruct national partners to use national powers that go beyond the powers of the ECB (Art. 9 (3) Reg. 1024/2013). Such instructions could for instance cover those situations where national laws (investigative powers) have a wider scope *ratione personae* or *materiae* than EU law.

As there is some overlap with the sections on OLAF and DG Comp in the above, the following will focus mainly on those national features (powers, safeguards, enforceability, remedies) that are specific for banking law (SSM). It must be noted at the outset that the UK and Poland are not part of the SSM. These legal systems are therefore discussed only briefly.

Germany

Banking supervision is a shared task of the BaFin and the German Federal Bank (*Deutsche Bundesbank*). The German Federal Bank is responsible for ongoing supervision, i.e. the evaluation of documentation submitted by banks, inspection reports and annual financial statements and performing on-site inspections, yet the main responsibility lies with the BaFin that issues guidelines regarding the ongoing supervision by the German Federal Bank and is exclusively competent to order inspections and to adopt regulatory measures. Both authorities take part in the activities of the ECB following the rules contained in the *Kreditwesengesetz/KWG*.

The usual inspection powers are available to BaFin and the Bundesbank; they can request information about business activities, documents and, if necessary, copies of relevant documents from institutions or others. The privilege against self-incrimination is taken into account. A person obliged to furnish information may refuse to do so in respect of any questions the answers to which would place him/her or one of his/her relatives at risk of criminal prosecution or proceedings for regulatory offences. Different from competition law, apparently, a request for documents has to

111 See also Arts. 144-146 Framework Regulation on the composition of OSITs.

112 Art. 144 (2) Framework Regulation. The fact that the head can be an NCA staff member does not necessarily make a difference, because (s)he is appointed by the ECB.

113 It is after all an ECB decision. See further supra chapter 9.3.2.1.b.

be complied with, even if the content is incriminating. There is some controversy as to whether this constitutes to a breach of *nemo tenetur*. Recent case law seems to be leaning towards the idea of not using these documents as evidence in criminal proceedings.

As the relevant provisions apply to all types of undertakings that may have provided financial services, the undertaking in question may be a firm of lawyers or tax accountants or it may employ such persons. These persons have a confidentiality obligation, which would be breached if the lawyer or accountant were obliged to disclose information on their clients' conduct. In 2011, the Federal Supreme Administrative Court (*Bundesverwaltungsgericht*) held that the confidentiality obligation does not apply if a separate law demands the disclosure of information. Accordingly, professional secrecy does not hinder the interviewing of persons under the *Kreditwesengesetz*.

The provisions on the available remedies and legal protection further resemble the findings already introduced in the above.

The Netherlands

Assistance by the Dutch Central Bank includes enforcing the cooperation by those subjected to a general investigation or on-site inspection as referred to in Arts 11 and 12 of the SSM Regulation and the sealing of places, books and records. DCB officers exercise their national competences on the basis of Art. 1:71 AFS when the ECB meets resistance to an investigation or an on-site inspection. DCB officials also have the competence to seal.

During supervision by JSTs and inspections by the centralised on-site inspections division, lawyers do not have a very important role. The supervision and inspections take place in consultation and usually without resistance. Since there is no experience as yet with cooperation during investigations by the Enforcement and Sanctions Division, it is not possible to elaborate on the role that a lawyer has in those investigations.

The United Kingdom

The UK is not a participating Member State. The competent authority, the Prudential Regulation Authority (PRA), is a wholly-owned subsidiary of the Bank of England, and is not an arm of government. When it investigates it uses its powers to investigate a matter under the Financial Services and Markets Act.

There is no explicit reference in the statute to interviews, and the procedure will frequently start informally, but the production power includes the authority to require answers to written questions. The FCA and PRA can require authorised persons to provide information or documents that are 'reasonably required' in connection with the exercise by either regulator of its statutory powers. 'Information' is not defined, but the FSA has relied on this provision to include replies to oral and written questions.

Italy

The Consolidated Law on Finance (TUF) gives the Bank of Italy the task of supervision for risk containment, stability and sound and prudent management, while CONSOB is responsible for the transparency and fairness of these entities' behaviour concerning investment products. The Bank of Italy is the designated NCA under the Single Supervisory Mechanism.

There is no specific rule at the national level in order to regulate cooperation with the SSM when it comes to the supervision of significant banks. National rules with respect to interviews and production orders also apply when Banca d'Italia is required to cooperate with the ECB. The interviewing of bank managers, auditors and executives by Banca d'Italia is meant to simplify

the exchange of information between the supervisor and the supervised entity. Production orders may be issued in order to fulfil its functions as the banking supervisor. The inspectors may ask the bank to disclose and produce certain documents and the bank cannot refuse to do so.

There is no specific protection for the right not to incriminate oneself and professional privileges are never mentioned. In fact, any refusal to answer or to disclose documents is a criminal offence. The presence of a lawyer is not explicitly mentioned. In principle this is not forbidden but it occurs very rarely.

Investigatory measures are not autonomously subject to judicial review. They may be challenged only by lodging an appeal against the main decision. In this respect, there are two different avenues: when the final decision by Banca d'Italia is an administrative measure, the judicial review is carried out by the Regional Administrative Tribunal in Rome and the appeal is sent to the Council of State. When the final decision is an administrative sanction, it will be subject to the authority of the civil courts.

Poland

Poland does not have the euro as its currency. It is not a participating member of the SSM System. Moreover, as yet, Poland has not concluded a close cooperation agreement with the ECB.

France

For the ECB, the Prudential Supervision Authority (*Autorité de contrôle prudentiel et de résolution/ACPR*) is the relevant national partner; it is the national supervision authority for France for the purpose of the single supervisory mechanism (SSM). Besides its supervisory powers, it has the power to impose administrative enforcement measures and disciplinary sanctions. The Monetary and Financial Code was revised in 2013 in order to facilitate cooperation with ECB within the framework of the SSM. The powers of the ACPR are similar to those already analyzed in the preceding sections.

Provisional conclusions

- There are a few differences when the ECB framework is compared to that of OLAF or DG Comp (and ESMA). The most striking is, of course, the way national authorities are integrated into the ECB structure. Within the setting of JSTs, but also OSITs, national authorities operate as a part of the ECB structure (*Organleihe*) and this construction appears to have important consequences for the applicable law and the legal remedies. We have also noticed a slight difference (when compared to DG Comp) in the legal design of requests for information (Art. 10 SSM Regulation); it is not entirely clear to which extent such requests need a formal decision (as is the case in competition law and for ESMA) to produce binding effects for individuals.¹¹⁴ Remedies will be open at any rate against a fine for non-cooperation on the basis of Art. 18(7) Reg. 1024/2013.
- In light of this, it comes as no surprise that ECB has a high level of autonomy. This is not only due to its strong information position in the stages of licensing and monitoring. Its powers and its means to enforce its requests for information (including interviews) have also been defined *in extenso* at EU level. There are hardly any references to national law. Quite surprisingly, little information has been provided on the scope and substance of the applicable safeguards. Mention is made of LPP at the EU level, but not of the privilege against self-incrimination or

¹¹⁴ This is why a remedy may be open on the basis of Art. 263 (4) TFEU; see *supra* chapter 9.3.2.1, sub a.

- access to a lawyer. There seems to be consensus on the fact that these are defined at the EU level and follow those applicable in competition law.
- The foregoing also means that, theoretically, the assistance by national authorities is of most relevance in cases of opposition (but there is not yet much experience in that respect) or when ECB uses its powers to instruct NCAs. National reports do not make specific mention of the latter situation. Certainly, however, ECB can instruct NCAs to use national powers that are not available at EU level.¹¹⁵

10.5.5 ESMA

Many provisions from the ESMA framework seem to be derived from Regulation 1/2003, but also resemble the framework of the ECB under the SSM mechanism. Arts 23b, 23c and 23d deal respectively with requests for information (by simple request or decision), general investigations and on-site inspections. The latter two types of investigative action may take the form of decisions; in such cases, non-cooperation can lead to the imposition of penalty payments.¹¹⁶ The powers during an on-site inspection are the same as those of a general investigation. They include: the examination of any records, data, procedures and other materials, the taking of certified copies of or extracts from such materials, the summoning of/ asking for oral or written explanations concerning facts or documents related to the subject matter and purpose of the inspection and to record the answers, the interviewing of any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation, and – this power is provided only to ESMA (not ECB, DG Comp, OLAF) – requesting records of telephone and data traffic.¹¹⁷ These powers are also available to the Independent Investigating Officer (Art. 23e (2) CRAR).

References to safeguards are (only) found in Art. 23a CRAR, stipulating that the powers conferred on ESMA shall not be used to require the disclosure of information or documents which are subject to legal privilege. The article provides no further guidance on the scope and content thereof. Other fundamental rights – such as the privilege against self-incrimination – are not mentioned in the Regulation either.¹¹⁸

Regarding the interaction with national law, both the articles on general investigations and on-site inspections provide for the possibility that national partners provide assistance to ESMA (upon ESMA's request or on their own initiative; Art. 23e (4) and 23d (5) CRAR). Art. 23d (7-9) CRAR obliges NCAs to provide assistance in cases of opposition.

Art. 23 (6) CRAR deals with delegation. It states that ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in that article and in Art. 23c(1) CRAR on its behalf. National partners then have the same powers as ESMA. This article is to be read in conjunction with Art. 30 CRAR. The ESMA Guidelines and Recommendations on Cooperation including delegation between ESMA, the competent authorities and the sectoral competent authorities under Regulation (EU) No. 513/2011 on credit rating agencies provide for additional rules.¹¹⁹ On the basis of those Guidelines, it becomes

115 This could be done, for instance, by requesting or instructing NCAs to refer a matter to the national criminal prosecution authorities.

116 Chapter 9.3.3.1, sub. a.

117 See also section 10.7.5.

118 Art. 22 CRAR provides that each Member State designates a competent authority for purposes of the Regulation.

119 See: <<https://www.esma.europa.eu/sites/default/files/library/2015/11/2011-188.pdf>> (last visited 10 April 2017).

clear that national authorities provide assistance either on the basis of the provisions for mutual assistance or via delegation; other means are not allowed.¹²⁰

As indicated earlier,¹²¹ the question is to which extent Art. 23d (6) truly concerns a delegation, i.e. a transfer of powers. The legal construction of the provision rather resembles a mandated power. This construction does not, after all, affect the responsibility of ESMA and does not limit ESMA's ability to conduct and oversee the delegated activity (Art. 30 (4) CRAR). As this construction seems to reduce the degree of discretion of national partners considerably (if compared to, for instance, mutual assistance), the pertinent question – that has not been answered to date – is to which extent it has consequences for the legal remedies available (at the EU or national level?).

What is also unclear is whether such orders to assist ('delegation') on the basis of Art. 23d (6) CRAR are in themselves (appealable) decisions.¹²² The wording of the provision makes no mention of this; it states that ESMA may 'require' a national partner to conduct investigations.¹²³ Such an action by ESMA does not in itself seem to bring about a change in the legal position of the persons referred to in Art. 23b (1) CRAR. On the other hand, however, such a request means that the competent national authorities shall have the same powers as ESMA (and require an ESMA decision). Moreover, as national authorities appear to be under an obligation to respond to such a request,¹²⁴ there is much to be said for establishing a possible remedy at the EU level. Otherwise, the scope of legal protection to be offered in ESMA investigations would escape judicial control at EU level and become dependent on (diverging) national laws.¹²⁵

Be this as it may, the foregoing implies that we will, once again, compare the national investigative powers, but also how they have been made available to ESMA investigations. Many practitioners indicate, incidentally, that they do not always use those national powers. This seems to be in line with the foregoing analysis, in which there appears to be a role for national authorities only in cases of so-called delegation (which is hardly – if ever – used and even then they would apply EU law) or assistance in cases of physical opposition.

Germany

The BaFin is the competent authority for the supervision of credit rating agencies and trade repositories. As a consequence, it is also the competent authority for cooperation with ESMA. The German report indicates that ESMA may ask the BaFin to investigate a case and to exercise the powers available according to national law; up to now, this has occurred in only a few cases. In its cooperation with ESMA, the BaFin exercises the powers of the competent national authority under EU law (§§ 17 and 18 *Wertpapierhandelsgesetz*). In addition, the general rules on domestic investigations apply.

120 Guidelines, para .36: 'ESMA is not however entitled to request a competent authority to perform an inspection or other supervisory task on its behalf except by means of a delegation pursuant to Art. 30 of the Regulation.' The German report however indicates that there have been cases where ESMA has asked BaFin to inspect business premises according to national law; chapter 3.3.3.

121 Section 10.2.

122 See also Schammo, supra note 3.

123 The Guidelines, para. 21, make mention of an ESMA decision, but it is unclear what this means precisely.

124 There is a consultation procedure (between ESMA and the national partners) in the Guidelines, but the decision to delegate appears to be ultimately in the hands of ESMA.

125 Cf. Witte, supra note 23, with respect to an instructions by the ECB.

Accordingly, the BaFin has the power to request information and documents from anyone. However, the duties of confidentiality (e.g. legal professional privilege) and provisions granting a right to remain silent must be fully respected. Unlike the corresponding provision in banking supervision, the relevant provisions require the BaFin to inform the person concerned of this right and the right to consult with defence counsel. Yet like in banking law (*Kreditwesengesetz*), the privilege against self-incrimination only applies to the disclosure of information, not to the production of documents. Legal professional privilege, however, has not become relevant in practice.

With respect to the enforceability of the measures and the remedies available, the situation more or less resembles our previous observations. The request for information or documents is an administrative act (*Verwaltungsakt*). As a consequence, according to German law, it may be enforced through coercive measures.

The Netherlands

The relevant authority is the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten/AFM*). To date, no Dutch credit rating agency (CRA) has been registered with ESMA and there are no Dutch trade repositories (TR) either. Practical experience is therefore absent. Dutch law does provide for an explicit legal basis for cooperation with ESMA for CRAs, but not for TRs. The legal basis for providing assistance to ESMA is found in Art. 5:89 AFS. It only concerns CRAs; there is no similar provision for TRs.¹²⁶ This article also provides for the types of assistance mentioned in the Regulation (particularly the use of force). Those powers have been discussed above.¹²⁷

Italy

The *Commissione Nazionale per le Società e la Borsa* (CONSOB) is the public authority responsible for regulating the Italian financial markets, in cooperation with Banca d'Italia. When it comes to European Cooperation, CONSOB carries out the tasks of cooperation with ESMA. The Italian report notes that when ESMA requires cooperation under Art. 23c of Regulation 1060/2009, Consob applies the existing rules on internal investigations. As a consequence, there is no special threshold to open an investigation because there is no such requirement even when it comes to ordinary Consob proceedings.

According to Italian law, (the Bank of Italy and) Consob may require authorised intermediaries to communicate data and information and to transmit documents and records in the manner and within the time limits that they establish. Consob may also request information from the staff of such entities. Such persons cannot refuse to cooperate or to answer questions because cooperating with the supervisor amounts to an obligation. In case of a breach of this duty, the persons in question might be prosecuted for the criminal offence of 'obstructing supervisory functions.'

There is formally no protection for the right not to incriminate oneself but usually the Consob staff, if they realise that the person being interviewed is making a self-incriminating statement, will interrupt the questioning. The rationale is to facilitate the exchange of information with criminal law enforcement.

The presence of a defence lawyer is not required by law nor is it contemplated, but it is tolerated in order to ease the use of the interview as evidence in a criminal trial (in Italy that

¹²⁶ See chapter 4.2.1.

¹²⁷ Section 10.5.4..

implies that the defendant should always have the right to request the presence of a lawyer). In practice, leading managers are usually accompanied by lawyers whose presence is allowed by Consob inspectors. They may assist but they usually do not intervene during the interview. Their presence is a means of ensuring the right not to incriminate oneself.

Administrative measures or decisions are subject to judicial review. An appeal can be brought against the decision to apply a sanction.

The United Kingdom

The Financial Conduct Authority (FCA) and the Competition and Markets Authority (CMA) have ‘concurrent powers’ in the area of financial services. As the FCA derives its powers from the Financial Services and Markets Act 2000 the provisions that were discussed for the ECB framework also apply here.¹²⁸

Poland

The Polish counterpart of ESMA is the Financial Supervision Authority (*Komisja Nadzoru Finansowego*/KNF), which has been established to exercise supervision – inter alia – over credit rating agencies and trade repositories. As indicated in the above, there is no general framework (as yet) for cooperation with EU authorities. The Act on Financial Market Supervision however provides KNF with the powers to do so. It has been appointed as the competent Polish authority in the ESMA framework and it provides ESMA with all the information necessary for the exercise of its duties.

The content and scope of the framework very much resemble the applicable rules already discussed above. The interviewing of persons is possible and provided for in the Code of Administrative Procedure and in sectoral acts. The authorities may interview witnesses or parties to the proceedings, who are entitled to rely on the privilege against self-incrimination; a witness may refuse to answer a question if such an answer could expose him or her (and close relatives) to criminal liability or could result in a breach of the obligation to maintain professional confidentiality. The interviewing of a party to the proceedings is a separate evidentiary measure; it is always facultative and may be ordered if other evidentiary measures have been exhausted and material facts in the case have not been clarified.

Generally, therefore, Polish public administration authorities rely heavily on documents supplied by parties or seized during searches. Relevant provisions are found mainly in sectoral legislation, including the Financial Supervision Act that obliges undertakings to retain certain documents and to produce them on demand. Neither the Code of Administrative Procedure nor relevant substantive statutes provide for any privilege against self-incrimination which may be invoked against production orders.

In practice, parties have recourse to professional attorneys. The attorney may take part in all actions within the proceedings, including an interview. He/she may assist the party being interviewed. He/she may also ask questions during the interview, usually after the questions asked by the interviewing official. KNF strictly follows the Code of Administrative Proceeding which is silent on LPP. Therefore, KNF does not recognise LPP as a legitimate and justified defence against a production order. The Polish report makes mention of two decisions by KNF where undertakings were fined for refusing to submit documents, claiming that the documents in question were covered by LPP.

128 Section 10.5.4.

In principle, in Polish administrative proceedings, the production of any piece of evidence requires a production order to be issued, though many authorities rely on a summons. Both summonses and production orders contain compulsory measures; sanctions apply in both situations and no remedies are available against production orders and summonses as such. The addressee of the production order cannot challenge it directly, but does have the possibility to challenge a fine that has been levied against him or her for a failure to comply with the order.

France

The *Autorité des marchés financiers*/AMF is an independent administrative authority with its seat in Paris; it has been granted administrative enforcement powers. The power to impose sanctions is given to the Enforcement Committee which enjoys full decision-making autonomy. The AMF is the competent CRAR authority (and also for EMIR). In 2013, the specific provisions on the power of the AMF to carry out investigations concerning CRA were repealed in order to take account of the new powers of ESMA. Since then, the Authority may apply its powers to comply with the requests of the ESMA on the basis of a general provision in the Monetary and Financial Code. Similar arrangements to those mentioned before in competition law would then apply to the AMF. According to the French report, ESMA has not delegated a supervisory mission to the AMF concerning a credit rating agency and has not requested the assistance of the AMF to carry out its mission. As yet, therefore, there are no precedents in this respect.

10.5.6 Conclusions

What can we learn in respect of the comparative analysis of the legal frameworks of the different authorities and their interactions with the national legal orders?

Organizational issues

- We have already identified different models for such cooperation. It is without doubt that these models have great consequences for a) the designation/appointment of the responsible officials and the modalities for instructing them, b) the applicable law (powers and safeguards), c) the available remedies, and d) possibly – though outside the scope of this project – issues of (civil/criminal) liability for enforcement actions. There appears to be a certain pattern to the extent that ECB and ESMA have more possibilities to influence the actions of national authorities. All the models have in common, however, that they explicitly recognize the need to involve national authorities in enforcement efforts. This helps to deal with language problems and becoming acquainted with local customs, but also removes certain capacity problems at EU level. EU law, in turn, recognizes the need for nation states to retain oversight over the actions of EU authorities on their territories. This is why they are mostly allowed to be present (upon their request) during on-site visits.
- We can clearly notice that the degree of harmonization in the area of PIF is considerably lower than elsewhere. While banking law and CRA/TR supervision have designated the EU authority as the main responsible authority (or as the *primus inter pares* – competition law), they do pay a lot of attention to the set-up and powers of their national partners. That level of harmonization is lacking in the OLAF setting. OLAF partners at the national level can be subject to a criminal law statute, but also to an administrative law statute. We also see a clear difference between cooperation with partners on the revenue side (mostly customs or tax authorities) and expenditure. Particularly the latter appears to be problematic.

- Finally, on occasion, we have noticed that the primary point of reference for the national authorities is still national law, even when EU law is fully harmonized (ECB, ESMA, DG Comp).

Investigatory powers & enforcement (interviews and production orders)

- Specific national rules for providing assistance are mainly found – and this comes as no surprise – in the areas of banking law, ESMA and competition.¹²⁹ Those statutes generally make the corresponding national powers also available to assistance to EU authorities and explicitly allow for the sharing of information. The Netherlands has also introduced such rules for OLAF. But in most other countries national regulations hardly offer any guidance, and the same can be said for the OLAF regulations themselves, referring back to national law on many occasions.
- If compared to the other areas, the framework for OLAF is fragmented. In relation to OLAF's investigative powers, the applicable Regulations mainly define the type of data and information that must be made available, not the powers themselves (cf. Art. 7 Reg. 2185/96). Those are left to national law. We have noticed on occasion that OLAF partners at the national level have no possibility to enforce requests for information (interviews/production orders) by means of imposing sanctions for non-cooperation. They must rely on other actors at the national level for that. This is the situation, for instance, in the Netherlands. The German report also mentions that German authorities have the power to enforce cooperation, but that the sanctioning system does not apply to OLAF investigations.¹³⁰ Both are countries where cooperation with OLAF is seen as a purely administrative matter. Both countries, however, also take a different approach towards tax fraud at the national level, where the tax administration is involved also in criminal proceedings (with intrusive powers).¹³¹

Safeguards

- As regards the applicable safeguards, two main points must be made. First of all, despite the level of harmonization regarding the powers available, the regulations for DG Comp, ECB and ESMA hardly contain references to the applicable safeguards. These have been developed in competition law by the courts. The general assumption is that they also apply to ECB and ESMA. On the other hand, we notice that the OLAF framework does contain quite a number of references to the applicable safeguards, see for instance Art. 9 Reg. 883/2013.
- Moreover, we have noticed differences in the applicable standards, both at the EU and national levels. Those differences exist between the policy areas (differences between the standards for OLAF, ECB, ESMA and DG Comp) and between the different Member States. Those differences are most clearly discernible with respect to LPP, which is for instance not recognized as such in the OLAF framework, but does exist in the case law on competition law and, presumably, also for ECB and ESMA. At the national level, the privilege is not recognized as such in Germany and Poland in administrative proceedings and thereby results in problems during on-site inspections. Differences also appear to exist in relation to the privilege against self-incrimination. Access to a lawyer seems to be recognized, implicitly or explicitly, in all cases. These differences highlight how important it is to clearly delineate the

¹²⁹ See also *supra* section 10.4.6.

¹³⁰ See chapter 3.5.

¹³¹ Cf. Luchtman, *supra* note 82.

different models of cooperation between EU authorities and their national partners (including the choice of the model).

Remedies

- Regarding the availability of remedies at the EU level, there is a connection between the legal design of a specific type of action and the duty to cooperate.¹³² The main rule is that – if taken as a decision – cooperation is mandatory (enforced through punitive sanctions), but, at the same time, remedies are available.¹³³ These decisions, incidentally, usually do not concern specific acts of investigations but a decision to start a general investigation or an on-the-spot check. This regime applies to ECB, ESMA and DG Comp, but not to OLAF. As said, OLAF is highly dependent on the cooperation of other authorities (internal and external investigations).
- Finally, at the national level, regarding legal protection, we must note significant differences in the availability of remedies. None of the legal orders has introduced prior judicial authorization for the measures discussed here. Yet Germany appears to follow (or perhaps: has inspired) the EU approach. (Enforceable) duties to cooperate have been consequently introduced (only) by *Verwaltungsakt*. The United Kingdom offers remedies that are connected to the interests involved. However, remedies against specific investigative acts are not available in the Netherlands, Poland, France, or Italy. In the Netherlands, this is because such duties are said to follow directly from statutes (and therefore do not, by themselves, bring changes to a position); in France, the reasoning seems to be that a duty to cooperate does not amount to true coercive powers, i.e. the use of force. In these countries, remedies are available if a fine for non-cooperation is imposed or against a later decision in the main proceedings. On occasion, the civil courts do offer interim relief (the Netherlands).

10.6 ON-SITE INSPECTIONS

10.6.1 Introduction

This section contains an analysis of the legislative frameworks of the four authorities and their interactions with the national partners as far as on-site inspections are concerned. One-site inspections are defined broadly; they refer to the powers of the authorities to enter premises and inspect. The inspection can include access to places, digital systems and data, etc. The term on-site inspection is not used as a legal term in all fields. Alternative terms are the right to enter premises (*droit de visite*) or just inquiries. It is however limited to administrative site visits and inspections and does not include judicial search and seizure. When the legislative framework provides for the possible conversion of administrative on-site inspections into a judicial search, we will deal with this.

The analysis below focusses in particular on a number of aspects dealing with a) a comparison of the scope and legal design of the powers (both between the EU authorities, but also between the different national systems), b) the enforceability of the measures, c) the scope of the applicable legal safeguards, and d) to the extent that this has not been dealt with already in the specific transversal report or for reasons of coherence, issues of judicial review and legal protection.

¹³² See, in more detail, chapter 9.

¹³³ The exception to this is found in Art. 10 SSM Regulation (a request for information), see section 10.4.4.

According to both European courts not only private persons, but also legal persons, such as undertakings, enjoy the right of respect for the home, as guaranteed in Art. 8 ECtHR and the corresponding Art. 7 CFR. This right is at stake when an European enforcement authority, with the assistance of a national authority, conducts an on-site inspection of professional and commercial premises. The former power is foreseen in the regulatory frameworks of the ECB, ESMA, COM and may play a role in OLAF autonomous investigations as well. To realize the required level of judicial scrutiny the regulatory frameworks of COM, ECB, ESMA foresee a system of a division of tasks between the Union and the national courts, as inspired by the CJEU case of *Roquette Frères*.¹³⁴ In this system, examining the necessity of an on-site inspection by an European enforcement authority is the exclusive competence of the Union courts, while the authenticity of the investigation decision and of the excessiveness and arbitrariness of the means employed is to be assessed by the national courts, *at least if national law requires prior judicial authorization*. There is however no possibility to contest OLAF autonomous investigations in the Member States before the Union courts, as the CJEU has considered in its *Violetti* decision that the OLAF report does not directly affect the rights of the persons concerned.¹³⁵ This is different when OLAF is inspecting within EU premises as civil servants have access to the EU courts.

10.6.2 OLAF/ internal inspections and on-the-spot checks

As we already know, OLAF's legal framework is the most complicated, particularly in relation to external investigations, which is the area where a comparison with the other EU authorities and their national partners is most relevant.

OLAF has broad powers of inspection as regards internal investigations. Regulation 883/2013 provides that the Office has the right of immediate and unannounced access 'to any relevant information, including information in databases, held by institutions, bodies, offices and agencies, and to their premises'. This information, according to OLAF's internal guidelines, includes also 'private documents (including medical records) where they may be relevant to the investigation'. Furthermore, OLAF can inspect the accounts of the institutions, bodies, offices and agencies in question. OLAF can take a copy of any document held by EU bodies and, in addition, it has a power of seizure of sorts: if necessary, it may 'assume custody of such documents or data to ensure that there is no danger of their disappearance'. At the end of the inspection, a report is drawn up and is countersigned by the participants to the inspections.

As regards external investigations, the legal framework is much more complex. Art. 3 of Reg. 883/2013 makes a reference to Art. 9 of Reg. 2988/95 (which makes a further reference to sectoral rules) and to Reg. 2185/96. From these regulations, it emerges that on-the-spot checks and inspections of economic operators must be conducted 'in compliance with the rules and practices of the Member States concerned'. In other words, both EU law and national law define the type and reach of the powers available to OLAF staff. This often makes the scope of the available powers uncertain, like for example in the case of forensic investigations. As for the scope of the investigation, Art. 7 of Regulation 2185/96 provides that on-the-spot checks and inspections may concern, in particular: '- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators, - computer data, - production, packaging and dispatching

¹³⁴ Case C-94/00, *Roquette Frères SA*, [2002] ECR I-09011 ECLI:EU:C:2002:603.

¹³⁵ Cf. chapter 9.3.4.1, sub b, with further references.

systems and methods, - physical checks as to the nature and quantity of goods or completed operations, - the taking and checking of samples, - the progress of works and investments for which financing has been provided, and the use made of completed investments, - budgetary and accounting documents, - the financial and technical implementation of subsidized projects.’ On the other hand, EU law does not provide for the power of sealing premises: ‘[w]here necessary, it shall be for the Member States, at the Commission’s request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.’ Neither does EU law provide for the powers to search and seize.

Both internal and external investigations may aim to gather computer data. Internal rules implement Art. 4(2) of Regulation 883/2013 (as regards internal investigations) and Art. 7(1) of Regulation 2185/96 (as regards external investigations) by specifying the rules for the digital forensic operations conducted by OLAF specialists. The 2013 Guidelines provide that digital forensic operations may be carried out ‘in accordance with the principles of necessity and proportionality’. Furthermore, if conducted in the context of external investigations, they must be carried out ‘in compliance with national legal provisions’. However in many countries such forensic powers are not available, therefore it is not always clear whether OLAF can conduct such investigations during an inspection. When allowed by national law, these operations should be preceded by the ‘preliminary identification of the digital media concerned’. On 15 February 2016 OLAF published more detailed ‘Guidelines on Digital Forensic Procedures for OLAF Staff’, which provide for some safeguards for economic operators.

Under Regulation 595/91, inquiries can be executed by national enforcement authorities at the request of OLAF and with the participation of OLAF inspectors. In that case OLAF inspectors may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials. Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in searches of premises under national criminal law. They shall, however, have access to the information thus obtained. This clearly shows that the inspection powers of OLAF do not include coercive judicial powers such as search and seizure.

Judicial authorization depends on the applicable national law. Art. 3(3) Regulation 883/2013 provides that if the assistance of national authorities – which is necessary to ensure that OLAF’s tasks are carried out effectively – ‘requires authorisation from a judicial authority in accordance with national rules, such authorisation shall be applied for’.

Germany

There is no general German legal framework for this power. The German AFCOS does not have operative competences. The operative part of on-the-spot checks and inspections is carried out by the revenue authorities in the case of revenue fraud. In the case of investigations by OLAF, the revenue authorities typically make use of an external audit. By ordering an external audit, the revenue authorities make sure that they can make use of their rights to enforce an inspection under the general tax law statute. This is especially important as OLAF lacks the power to enforce inspections.

Searches and seizures are not permitted in administrative taxation proceedings. However, in purely national cases, these proceedings are often combined with criminal proceedings where the revenue authorities have further coercive powers, but these are however not available for

OLAF inspections. The auditors may enter and inspect sites and business premises during office and working hours. During inspections, taxpayers have to submit documents to the employees or auditors, unless it would violate confidentiality obligations with their clients. Whether they are obliged to present documents that have been rendered anonymous is a point of controversy. Lawyers can be present during inspections. Ex ante judicial authorisation is not required for inspections. In case of non-cooperation, requests for information are enforced by the tax offices, the main customs offices or the revenue authorities of the Länder.

The Netherlands

In the Netherlands, separate legal provisions exist for the right to enter (see below for further details), the inspection of documents and copies, the right to enter a dwelling, the search of a dwelling, the power to seal, the inspection of property including taking samples and the specific inspection of property (a more specific version of the previous inspection). All the relevant national authorities have the right to enter and the right to inspect documents and copies. However, OLAF and DIC (the counterpart of OLAF) cannot enforce their powers autonomously in case of non-cooperation. Neither can they seal the premises. OLAF and DIC do not have powers to enter private dwellings or to search them.

The right to enter and the right to inspect documents and copies will now be explained, as all relevant NCAs have these rights. Below, the other rights will be discussed for the relevant authorities.

The right to enter:

A supervisory officer, taking with him/her the requisite equipment, may enter any place, except for a dwelling, without the consent of the occupant. The term 'place' includes vehicles, business premises and business sites, which may be entered without the permission of the person in question. The competence to enter does not include the competence to search, only to look around. This power is connected to the duty to cooperate¹³⁶, which has already been mentioned above, with regard to the power to interview persons and issue production orders. The same limitations apply here. Prior judicial authorization is not necessary, and this power may be used without a concrete suspicion of a violation.

The right to inspect documents and copies:

Supervisors may inspect business documents and records. This includes documents containing the administration of an undertaking as well as digital information on, for instance, a computer or hard drive. Only business information may be demanded, not documents or records of a personal nature. In addition, the supervisor may copy and print all documents and records, including digital information, and if the copies cannot be made on the spot, he/she may remove the documents and records for a short period of time. This information has to be returned as soon as possible and therefore Art. 5:17 Awb does not include the competence to seize documents and records.

The privilege against self-incrimination can provide exceptions to this power, as does legal professional privilege. Prior judicial authorization is not necessary, and this power may be used without a concrete suspicion of a violation.

136 Art. 5:20 (1) Awb.

In case OLAF wants to conduct an on-the-spot check it has the powers laid down in Art. 5:18 Awb, i.e. to inspect property and take samples which it needs to exercise in compliance with Dutch law. This means that they are competent to inspect, measure, weigh and take samples of property. For the purposes of exercising these powers the inspector may open packages. If any of the competences cannot be performed on the spot, the inspector may remove the goods for a short period of time.¹³⁷ If possible, the samples will be returned and the interested party may request to be informed of the results. Art. 5:18 Awb does not include the competence to search objects, but merely to investigate them. In addition, when assisting the Commission during an on-the-spot check the officials of the Dutch Customs and Information Centre (DIC) have the powers laid down in Art. 5:19 Awb, i.e. the inspection of property. Art. 5:19 Awb is a more specific version of Art. 5:18 Awb. A separate and specific provision was deemed necessary, because it concerns relative interfering powers which demand explicit safeguards. On the basis of Art. 5:19 Awb a supervisor may inspect means of transport, including vehicles, vessels and aircraft, which fall under the scope of his/her supervision (tasks). This is for instance the case when an inspector checks whether a vehicle fulfils the set conditions for transporting dangerous materials. Inspecting does not include the power to search. If a supervisor may reasonably assume that a means of transport carries cargo which falls under the scope of his/her supervision, he/she may inspect the cargo.

Italy

Unlike the situation in the Netherlands and Germany, the Italian structures for cooperation with OLAF do provide for the use of criminal law powers. The investigative powers are conferred on a unit of the *Guardia di Finanza* (financial police). This Financial Police unit may proceed to on-site inspections on the premises of the persons or legal entities concerned upon authorization of the judicial authority. This authorization is usually a decision of the public prosecutor and might be decided even in derogation of the rules of the criminal procedural code. Judicial authorization is only required when the business premises include a private dwelling, not when it is limited to business usage. Access to private homes is precluded without serious grounds to suspect a VAT breach and only with the aim of collecting business records, commercial registries or other documents that might prove the breach. Judicial authorization is also required to open closed mailboxes, locked boxes or safes. Professional secrecy and specific protection for law firms apply. In any case, a member of the management should be present during an on-site inspection. Seizures are only admitted when it is not possible to copy documents or when the persons concerned refuse to undersign the report contesting the execution of the on-site inspection.

The United Kingdom

For the UK (England and Wales) the AFCOS is the National Police Coordinators Office for Economic Crime. This is a police authority. Depending on the case, UK authorities assisting OLAF or joining OLAF in mixed investigations will have powers under tax law as well as criminal law. In the UK, the power to enter and seize documents is granted to the Serious Fraud Office. This requires a warrant from a Justice of the Peace, certifying that there are reasonable grounds for the appropriate suspicions. Where a search warrant is refused by a court, this can be appealed by the relevant authorities.

¹³⁷ Art. 5:18(4) Awb.

Poland

The Polish national AFCOS is the Department for the Protection of EU Financial Interests (*Departament Ochrony Interesów Finansowych Unii Europejskiej*). It serves as a contact point for OLAF and operates on the basis of administrative law only. Under that heading, the Department also provides assistance to OLAF, at its request, with regard to on-the-spot controls and inspections carried on the territory of Poland, following Regulation 2185/1996.

The Polish public administration authorities do not usually have the authority to directly search the premises of the parties concerned or to directly seize documents or seal offices. These powers typically belong to the police or the public prosecutor who conduct criminal investigations. However, the tax authorities and UOKiK are rare exceptions to this situation. Neither the Ministry of Finance nor KNF has this authority; it is only UOKiK which is competent to search premises and natural persons. KNF may only conduct simple inspections which do not include the competence to directly search premises. Therefore two scenarios must be distinguished. First, a simple inspection may be carried out by UOKiK or KNF. During such an inspection the authority is entitled to enter premises and buildings, to request accessible files, books and all kinds of documents to be made available or to request oral explanations which are relevant for the inspection. Second, an inspection connected with the searching of premises or natural persons may be ordered. This is an extraordinary measure and therefore only the Antimonopoly Court may issue an order to conduct a search upon a motion by UOKiK. KNF is not empowered to conduct searches.

France

The French AFCOS is the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude/DNLF*), which is a coordinating body. As indicated previously, this Office faces a variety of authorities that are more or less easily identifiable according to the sector concerned.¹³⁸

Except for the ACPR (see below), all EU counterparts have the power to ‘search’ professional and private premises and to seize documents. With regard to entering business premises, customs officers are vested with extended powers: they may access all public premises at any moment and without requiring consent. They may control persons, goods and means of transport. They may access business premises as well, after informing the competent public prosecutor beforehand, who may oppose the performance of the measure between 8am and 8pm. Goods or samples may be retained. Where they exercise their power to obtain the communication of documents, they may seize any documents (books, invoices, copies of letters, chequebooks, bank accounts, etc.) which are likely to facilitate the performance of their mission.

Provisional conclusions

All in all, on the basis of this comparative analysis we can draw a number of conclusions with respect to the OLAF framework in relation to on-site inspections:

- OLAF’s powers are in reality quite clear for internal inspections, but very unclear as far as external inspections are concerned. This is mainly due to the fact that EU legislation substantially refers back to similar national powers under administrative law. As far as all countries have introduced specific legislation implementing the obligations and providing for a clear legal set of powers, OLAF is confronted with a legal puzzle that can vary from

138 Chapter 8.2.1.

- one substantive area (customs, structural funds, agriculture, etc.) to another. This gap is only partially filled in by provisions, in some member states, of general administrative law.
- OLAF's powers, although still very dependent upon national powers, seem to be somewhat more explicitly regulated for mixed inspections, such as for instance in Art. 6 of Regulation 595/91, than for autonomous investigations in Art. 7 of Regulation 2185/96. In fact, for a definition of the relevant powers Art. 7 of Regulation 2185/96 merely refers back to national law by stating that Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents. Art. 4 of Regulation 595/91 at least indicates the minimum powers (also by reference to national similar powers) in the case of mixed inspections and it deals with the minimum powers for Commission inspectors when the mixed inspection turns into a judicial investigation.
 - The network structure with the AFCOs does not solve this problem, as they have very different statuses under national law. Many AFCOs have no operational powers at all and are purely coordination units.
 - The operational investigative bodies under national law that can be triggered by requests for opening administrative investigations and that can execute, together with OLAF inspectors, one-site inspections have considerably different statutes and powers in the member states, ranging from purely administrative powers to coercive powers under criminal law. The Netherlands, Germany and Poland consider OLAF to be a purely administrative body and, by doing that, seem to disregard the often intrinsic connection between punitive and non-punitive investigations.
 - This results in considerable problems when it comes to the design of the power to inspect premises. Just to mention a couple: EU law does not provide for the power of sealing premises during an one-site inspection. If and when this can be done thus completely depends on national law. Now that the EU Regulation deals with the gathering of computer data by referring back to national law, in which forensic inspections of documents (including digital images of hard disks) are not always explicitly regulated, it becomes unclear if and to which extent this power can be used.
 - In case of non-cooperation by economic operators, OLAF cannot enforce its inspection powers by using police powers or by imposing daily penalty payments; it depends fully on national enforcement mechanisms. In some countries OLAF national counterparts do not have this power either.

10.6.3 DG COMP

Regulation No. 1/2003 provides for the Commission's powers to conduct 'all necessary' inspections of undertakings or associations of undertakings (Art. 20), or even of 'other premises, land and means of transport, including the homes of directors, managers and other members of the staff of the undertakings and associations of undertakings concerned' (Art. 21). The latter is a real novelty introduced by Regulation 1/2003 compared to its predecessor, Regulation 17/62. However, so far it has rarely been exercised in practice. During the inspection of undertakings Commission officials can:

- enter any premises, land, means of transport;
- examine books and other records (irrespective of the medium where they are stored);
- make a copy of them;
- seal business premises and books or records ‘for the period and to the extent necessary for the inspection’; if the seals are broken, Art. 23(1) provides for the possibility to fine the undertaking.
- ask any representative or member of staff questions in order to explain ‘facts or documents relating to the subject-matter and purpose of the inspection’, and record the answers (see above under interviews conducted during inspections).

According to Art. 21(4) of Regulation 1/2003, during the inspection of private homes/dwellings, the Commission – as in the inspection of undertakings – has the power to enter, examine books and other records and take a copy thereof; on the other hand, the Commission does not have the power to seal premises or to ask for explanations concerning facts and documents.

Regulation 1/2003 does not provide for *ex-ante* judicial authorisation for the inspection of undertakings (by decision). This *ex-ante* judicial authorisation only comes into play when there is opposition or non-cooperation by an undertaking. In that case the Member State concerned shall afford the necessary assistance, where appropriate by the assistance of the police or of an equivalent enforcement authority, so as to enable the inspection to take place. If the assistance requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. This authorisation may also be applied for as a precautionary measure. On several occasions the ECJ had to assess inspections of undertakings without prior judicial authority – in line with national law - in the light of Art. 8 ECHR. The CJEU, although recognising that such measures have an impact on the right to private life, has held that prior judicial authorisation is not necessary, since it is not the only element considered by the ECtHR to assess a violation of Art. 8 ECHR. According to the CJEU, other defence rights – including the possibility to have a post-inspection judicial review – suffice in order not to violate the right to private life.¹³⁹

As regards the inspection of private dwellings, Art. 21(3) Regulation 1/2003 provides that before executing the Commission’s decision, it is necessary to obtain judicial authorisation by a national judicial authority.

Germany

There is no general German legal framework for this power. The German rules on the right to enter premises are thus especially important in the context of cases when the undertaking opposes an inspection. As it is not possible to know in advance whether an undertaking will oppose an inspection, the practice of the BKartA is to prepare for this scenario by asking for a judicial order that can be shown if necessary. The competition authorities have the right to inspect and examine the business documents of undertakings and associations of undertakings on their premises during normal business hours. In order to do so, persons entrusted by the competition authority to carry out an examination may enter the offices of such undertakings. Searches are permitted if there are sufficient grounds to assume that the premises contain documents that could be requested by the competition authorities. This shows that searches are not limited to business premises. § 58 GWB also allows the seizure of objects that may be important as evidence. However, it should be

¹³⁹ See, for instance, joined cases T289/11, T290/11 and T521/11 *Deutsche Bahn e.a. v. Commission*, ECLI:EU:T:2013:404.

noted that searches under § 59 para. 4 GWB and thus under administrative law, albeit admissible in law, do not occur in practice. If the BKartA wants to search the premises of an undertaking, there is usually sufficient ground to suspect a regulatory offence. This means that the rules on criminal proceedings apply.¹⁴⁰ § 59 para. 4 GWB is therefore only important for supporting the Commission under Art. 20 of Regulation No. 1/2003. The right to enter premises can be applied vis-à-vis undertakings that are participants in the proceedings and thus defendants. There is no right to refuse a search or seizure in cases of possible self-incrimination.

German administrative law does not generally protect professional privilege. Accordingly, there is no rule that prohibits, for instance, the seizure of lawyer-client correspondence. However, when national competition authorities are providing assistance under Art. 20 of Reg. No. 1/2003, EU law applies in the manner that has been recognized by the Court of Justice. Yet if the competition authorities act at the request of the Commission, they will use the legal framework provided by national law (cf. Art. 22 (2) Reg. 1/2003). This will mean that there is no protection of lawyer-client confidentiality. Nonetheless, the authorities can be seen as implementing EU law and are thus bound by EU fundamental rights (Art. 51 CFR).¹⁴¹ Therefore, it has been argued that the protection of legal professional privilege under EU law should also apply to national investigations in these cases, even if national law offers a lower degree of protection. Whether German jurisprudence will accept this reasoning in the future, remains to be seen.

There are no special rules for having access to a lawyer. § 14 VwVfG applies. According to this provision, the authorised person can participate in any act during the proceedings. This means that lawyers can be present at any time if they are duly authorised.

The search requires an *ex ante* authorisation by the Local Court (*Amtsgericht*) of the district where the competition authority has its seat, except for cases in which an imminent danger exists. The test is simple: there must be sufficient grounds to assume that documents will be found on the premises to be searched. Moreover, the search must be necessary, so other methods of investigation must be less promising. In practice, a judicial order is usually granted. The decision by the local judge can be appealed against following the complaint procedure in the Code of Criminal Procedure (§ 59 para. 4, 4th sentence GWB and §§ 306 ff. StPO).

There are several additional procedural safeguards. In case of a search, a record of the search and its essential results must be prepared on the spot (§ 59 para. 4, 6th sentence GWB). Moreover, there are specific requirements for a seizure. If neither the person affected nor any adult relative was present during the seizure or if the person affected or, in his/her absence, an adult relative explicitly objected to the seizure, the competition authority must seek judicial confirmation by the Local Court in the district in which the competition authority has its seat within three days of the seizure (§ 58 para. 2 GWB). The person concerned can always ask for judicial confirmation (§ 58 para. 3 GWB). In cases of non-cooperation, the national authorities may enforce investigative powers. They use their own employees, but can also use third parties (e.g. accountants) for the inspection.

The Netherlands

In the Netherlands, separate legal provisions exist for the right to enter, the inspection of documents and copies, the right to enter a dwelling, the search of a dwelling, the power to seal, the inspection of property including taking samples and the specific inspection of property (a more specific

¹⁴⁰ § 81 GWB, §§ 2, 46 para. 1 OWiG.

¹⁴¹ *Supra* section 10.3.

version of the previous inspection). All the relevant national authorities have the right to enter and the right to inspect documents and copies. Only the ACM, the counterpart of DG Comp, has the right to enter a dwelling and to search it. It also has the power to seal and to inspect property, including taking samples and the power to inspect a property (the more specific version).

It is important to note that with respect to the rights/powers mentioned in this section, the ACM – like the DNB and the AFM – has the possibility to enforce its power, autonomously or with the help of the police, in case of non-cooperation. As said, the DIC and OLAF do not have such powers.

The ACM has the power to enter premises and to inspect documents as provided for under general administrative law (see OLAF above). As regards the privilege against self-incrimination with regard to the power to inspect documents and to take copies, Art. 12g Iw ACM extends the scope of a lawyer's legal privilege to correspondence between a lawyer and the market organization that is in possession of the market organization or its *de facto* director. Also, external lawyers and in-house lawyers fall under the scope of Art. 12g Iw ACM, except in the situation in which EU competition law is applied, i.e. when ACM officers assist the Commission with the enforcement of EU competition law. The parliamentary records on Art. 12g Iw ACM do not specify which information falls under the scope of this article.

Furthermore, the ACM is the only national competent authority that has the power to enter a dwelling without the permission of the occupant. It may be used when the Commission asks the ACM to conduct an on-site inspection under Art. 20 Regulation 1/2003, although, contrary to Art. 21 Regulation 1/2003, Art. 20 does not explicitly include the possibility to enter dwellings. The power to enter a dwelling without permission includes the authority to investigate objects that officials encounter and discover by chance. It does not include the right to specifically search a place. Before entering a dwelling without the consent of the occupant ACM officers need to attain authorization from the investigative judge at the District Court of Rotterdam. If the Commission conducts an inspection as referred to in Art. 21 (1) Regulation 1/2003, it needs to gain prior authorization from the investigative judge at the District Court of Rotterdam as well. Moreover, the ACM has the power to search a dwelling when it conducts an on-site inspection on behalf of the Commission. The searching of a dwelling without the permission of the occupant is allowed in so far as the use of this power is reasonably necessary for the exercise of the powers in Art. 5:17 Awb. Before the ACM officers can search a dwelling they also need to obtain authorization from the investigative judge at the District Court of Rotterdam. The ACM also has the power to seal when it conducts an on-site inspection for the Commission.

Lastly, the ACM has the right to inspect property including taking samples. ACM supervisors are competent to inspect, measure, weigh and take samples of property. For the purposes of exercising these powers the supervisor may open packages. If any of the competences cannot be performed on the spot, the supervisor may remove the goods away for a short period of time. Art. 5:18 Awb does not include the competence to search objects, but merely to investigate them. The difference is that in the case of an investigation, the supervisor knows where the desired objects are located. In the case of a search, the investigator looks for something whose precise location is still unknown.

United Kingdom

The most formal links with the EU are in respect of competition law, and here the distinction between the Art. 101/102 investigation of a corporation and the investigation of personal liability

for cartel offences is significant. The CMA directly applies EU competition law (Arts 101 and 102 TFEU) and investigates autonomously, but with the active assistance of national authorities. The CMA has joint responsibility with the Serious Fraud Office (SFO) for the investigation and prosecution of offences involving cartels under the Enterprise Act 2002. The default position in English law is that entry to private premises or land requires a warrant from a Justice of the Peace. The Competition and Markets Authority (CMA) has the power to search, using such force as is reasonably necessary.

What if there is a search of premises and material is seized, or electronic material is accessed, some of which is subject to legal professional privilege and some not? In *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office*, the procedure set out in the SFO's Handbook for isolating material potentially subject to LPP, for the purpose of making it available to an independent lawyer for review, was held to be lawful. The purpose is to ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer to establish whether privilege exists. The court ruled that the SFO may use in-house technical experts to isolate privileged files, rather than external contractors. The use of the SFO's in-house lawyers as 'independent' lawyers to determine whether material was subject to LPP would be unlawful. However, using them to determine whether material may or may not be subject to LPP at the preliminary stage before sending them out to be assessed independently was not.

Italy

Dawn raids relating to the application of EU and Italian competition rules are carried out by the Italian Competition Authority (AGCM), but only when it has sufficient evidence of the existence of an infringement. These elements are set out in the AGCM's decision to open an investigation, which is usually served on the parties at the outset of an on-site inspection. The main goal is to gather evidence, in particular documents. The term 'document' refers to graphic, photographic or cinematographic, electro-magnetic or any other kind of representation of content, including internal and unofficial documents which have been produced and are used for the purposes of the undertaking's operations, as well as any other document that is produced by or is stored on a computer medium.

The AGCM does not have the power to search residential premises.¹⁴² However, where the AGCM accompanies DG Comp on an inspection of residential premises, it can search residential premises, provided that a specific Court order has been issued. The search is limited to the presumed facts indicated in the decision to open formal proceedings. The AGCM can also order the production of specific documents and information during the inspection.

The company is under a duty to cooperate and to provide documents and information that are not misleading. The AGCM may impose fines against companies that refuse or fail, without objective justification, to provide the information or produce the documents requested. The same applies to companies refusing to submit themselves to on-site inspections. The AGCM does not have coercive power to force parties to cooperate, but it can carry out searches of business premises without previous notice with the assistance of the Tax Police. The police do have the power to search for evidence without the consent or cooperation of the undertaking. Only in some specific circumstances (e.g. the searching of a person, locked doors, documents covered by legal privilege) is a prior court order necessary.

¹⁴² Law 287/90 and Art. 10§5 of Decree 217/98.

In national cases, the AGCM board shall authorize inspections proposed by the offices on the premises of any party deemed to be in possession of company documents that are of relevance to the investigation.

Confidentiality and professional secrecy are strictly limited; they only provide exceptions if the AGCM ‘acknowledges particular requirements of this kind that have already been brought to its attention’. The undertaking concerned has the right to receive a copy of the AGCM’s decision to open the investigation, within which the purpose of the dawn raid is set out. It also may have the assistance of legal advisers during a raid, but the inspection cannot be delayed by this.

Poland

Polish public administration authorities do not usually enjoy the power to make on-the-spot visits to the parties concerned or to directly seize documents or seal offices. The rare exceptions to this situation are the *UOKiK* and the FSA (financial services). Both authorities have the right to enter, but only the Office of Competition and Consumer Protection (*UOKiK*) has the right to search.

Two types of searches must be distinguished in Polish competition law. Firstly, with regard to vertical cooperation the law provides for a possibility to conduct a search at the request of the European Commission in the cases described in Art. 22 of Regulation No. 1/2003/EC and in Art. 12 of Regulation No. 139/2004/EC, without instituting separate proceedings (Art. 105i of the Act on Competition and Consumer Protection). There is no need to formally open national administrative proceedings, as such a search is conducted as part of the proceedings opened by the European Commission. In this scenario it is the Commission which conducts the search and the national competition authority assists the EC in this respect. It should be understood that although the undertaking may object to the inspection, the role of the assisting employees of *UOKiK* will be to overcome this objection by producing authorization from the Polish courts to make the search. It is important to note that the role of the employees of the *UOKiK* will be simply to allow the European Commission to continue its search and not to replace the EC during this search.

The second type of search are searches conducted within the framework of national administrative proceedings. In this scenario it is the national competition authority which conducts the search and it will share evidence with the European Commission if required. Such a search may be conducted by the police (Art. 91 of the Act on Competition and Consumer Protection) or by officials from *UOKiK* (Art. 105n of the Act on Competition and Consumer Protection). The results of such a search may be communicated to the Commission. In this event, the Competition Act enables the *UOKiK* to authorize representatives of the European Commission to take part in such a search as assistants.

A search of dwellings may be conducted by the police, but only when this is allowed by the courts at the request of the President of the *UOKiK*. Such a search may only take place if there are reasonable grounds to presume that any objects, files, records, documents and data carriers within the meaning of the regulations on the computerisation of operations of entities performing public tasks are stored in residential premises or any other premises, real property or means of transport, and such objects may affect the determination of facts which are material to pending proceedings. An authorized employee of the Office may participate in such a search.

A search of the premises of an undertaking may be conducted by the President of the *UOKiK*, with the consent of the courts, in cases of competition-restricting practices, in the course of preliminary proceedings and antitrust proceedings, in order to find and obtain information from files, records, official letters, any kind of document or information technology data carriers,

systems and devices, and other items that might amount to evidence in the case, if there are grounds for assuming that the information or items concerned are located in those places. Regarding the material scope of a search, the party conducting the inspection shall be authorised to:

1. enter land and buildings, units within premises, or other areas within premises and means of transport held by the inspected party;
2. request access to files, records, all kinds of official letters and documents and copies and extracts thereof, electronic correspondence, information technology data carriers within the meaning of the regulations on the computerisation of operations of entities performing public tasks, other devices containing information technology data, or of information technology systems, including access to information technology systems owned by another party containing data belonging to the inspected party, related to the subject matter of the inspection, to the extent that the inspected party has access thereto;
3. make notes concerning the materials and correspondence referred to in subparagraph 2;
4. request the inspected party to make copies or printouts of materials, correspondence referred to in subparagraph 2, as well as information collected on the carriers and in devices or systems referred to in subparagraph 2;
5. request the persons concerned to provide oral explanations concerning the subject matter of the inspection;
6. request the persons concerned to provide access to and hand over other items that may be evidence in the case.

The obligation to cooperate during inspections and searches is enforced through an administrative sanctioning mechanism.

France

All the counterparts of the EU authorities have the power to access business premises. This power entails the possibility to enter the premises and to gather explanations on the spot from any person (by means of an interview). As a non-coercive measure, it does not require judicial authorisation or a formal decision (subject to the inspection mission order), nor specific grounds. The scope of the measure is not always explicitly regulated. With respect to the powers of the administrative authorities, be it competition (ADLC), financial markets (AMF) or banking (ACPR), it should be limited to the premises of the legal persons falling within the remit of the Authority.

This power to inspect does not (in principle, see below under the extended powers of customs officials) authorise inspectors and investigators to search the premises or seize documents. The gathering of information and documents cannot be forced. This is why access to business premises does not require judicial authorisation.

Assistance by a lawyer is possible, but this right is rarely explicitly regulated: as regards access to premises by customs officers, ACPR and ADLC investigators, no special provision on legal assistance is foreseen; by contrast, the right to be assisted by a lawyer (and informed of the said right) is set out in Art. L621-11 MonFinC. In any case, the exercise of such a right does not have the effect of postponing the performance of the measure.

In comparison, customs officers are vested with extended powers: they may access all public premises at any moment and without requiring consent. They may control persons, goods and means of transport. With respect to business premises, they may access them after giving prior

information to the competent public prosecutor who may oppose the performance of the measure. Where they exercise their power to obtain the communication of documents, pursuant to Art. 65 CUsC, they may seize any documents (books, invoices, copies of letters, chequebooks, bank accounts, etc.) likely to facilitate the performance of their mission.

Except for the ACPR (see below), all EU counterparts have the power to ‘search’ professional and private premises and seize documents. To exercise this power, common requirements must be met. The overall philosophy lies in the fact that, in order to counterbalance the increased powers given to the investigative officers in the framework of searches and seizures, enhanced judicial scrutiny is organized upstream and downstream of the implementation of the measure. Indeed, prior judicial authorisation in the form of a reasoned ordinance handed down by the liberty and custody judge is first required. An appeal may be lodged against this decision (by the public prosecutor’s office or the person against whom the search was ordered) before the first presiding judge of the Court of Appeal. The appeal is non-suspensive and may be subject to a further appeal on a point of law before the *Cour de cassation*. The judge verifies that the application for authorisation is well founded. The applicant must provide all elements of the information which would justify an inspection. The authorization procedure may be carried out without the prior notification of the undertakings concerned, in particular in order to retain the ‘surprise effect’, as in the case of ADLC investigations.

Searches and seizures take place under the authority and supervision of the authorising judge who may visit the premises during the inspection or decide to suspend or terminate it. He/she appoints police officers required to be present to provide assistance (by performing any requisition necessary) and to inform the judge on the progress of the inspection and make sure that professional secrecy and defence rights (in accordance with Art. 56 of the Criminal Procedure Code) are guaranteed. Where the inspection takes place at the office of a lawyer, the specific procedural safeguards set out in Art. 56-1 of the Criminal Procedure Code will apply. The degree of suspicion required refers to mere suspicions (i.e. information and documents of interest are likely to be found). The power entails hearings, the gathering of relevant information or explanations, the taking of inventories, the placing of seals, and a search and seizure. It concerns both professional and private premises as well as vehicles belonging to the occupant and located within the premises of the enterprise, as far as ADLC and customs officers are concerned. Investigators may seize documents and any information regardless on the medium relating to the prohibited conduct referred to in the judicial authorization. Diaries found on the premises visited may also be seized, as well as documents that are only ‘in part useful’ to the establishment of the conduct in question, the documents thus forming ‘an indivisible and unique whole’.

In any event, investigators are in principle obliged to initiate, prior to a seizure, any measures necessary to ensure the observance of professional secrecy and the rights of the defence. Indeed, communications protected on this basis cannot in principle be seized. They must be returned or destroyed if they have been seized by virtue of an overall measure covering other documents falling within the scope of the investigation. E-mail accounts can therefore be seized, even in their entirety. Thus, for a period of time, the undifferentiated seizure of all of these communications was allowed as long as the mailbox contained documents which were useful for finding the conduct in question. Thus, this practice (global seizure, then restitution, on a case-by-case basis, of those communications that could not be legally seized) had become almost systematic. This situation has been the subject of abundant litigation which has led the Court of Cassation to review this system. Five decisions from 24 April 2013 have led to a change in the case law: ‘The power

conferred on agents of the Autorité de la concurrence (...) to seize documents and information is limited by the principle of defence rights, which requires confidentiality of correspondence between a lawyer and his client'. It follows that it is for the First President of the Court of Appeal to find that the seized documents are subject to the protection of professional secrecy between a lawyer and his/her client and to annul the seizure of such correspondence.

Provisional conclusions

On the basis of the comparison of the national reports, the following points must be made:

- Compared to OLAF, we see substantive differences at the European and at the national level;
- At the EU level, Reg. 1/2003 contains an autonomous set of rules to inspect premises and even private dwellings in some specific circumstances. The 'referral back' to national law construction is not applied.
- At the domestic level we can notice much more uniformity in the statutes of the authorities concerned. A likely explanation for that is the converging influence of Reg. 1/2003. All partners are predominantly administrative bodies, with punitive powers.
- Both at the EU level and the national level there is a clear possibility to use even search powers in an administrative setting, sometimes subject to the condition that judicial authorities authorize it.
- The foregoing analyses also reveal that the competition authorities (at the EU and the national level) have autonomous sanctioning powers in cases of non-cooperation (financial sanctions). That, too, is different in the OLAF setting. The latter (and the AFCOS) often require the cooperation of other national partners in cases of opposition by economic actors or other individuals.

10.6.4 ECB

The ECB does not seem to have been denied any powers in this respect, at least compared to other EU enforcement authorities. The ECB (including its Enforcement and Sanctions Division) may undertake an on-site inspection at the business premises of the legal persons referred to in Art. 10 SSM (Art. 12 SSM). If necessary, the onsite inspection can be undertaken without informing the supervised entity (note: the obligation to notify the NCA is there in any case). The ECB inspectors can enter any business premises and land and have the investigative powers under Art. 11 (1) SSM, such as to require the submission of documents, to examine books and records and to take copies of such documents and obtain explanations (Art. 12 (2) SSM Regulation). Where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Judicial authorization is necessary if national law requires this (Art. 13(2) SSM). Unlike in competition law (Art. 20 Reg. 1/2003), it is not made dependent on (expected) opposition by the undertaking.

Germany

The *Bundesbank* and the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) may carry out inspections on the premises of the undertaking in the context of ongoing supervision. Powers

of search and seizure are not foreseen in the framework of ongoing supervision (§ 44 KWG). Furthermore, German law does not provide for a power to seal premises. There is no protection against self-incrimination, nor are forms of professional privilege mentioned in the law.

The BaFin also has the right to enter and inspect the business premises of those that have to comply with a request for information during business hours.¹⁴³ In order to prevent imminent risks to public order and safety, employees of the BaFin are allowed to enter private homes and business premises outside of general office hours, but only if there are sufficient grounds to suspect an infringement of the WpHG by the person who has to disclose information.

Again, there are no explicit rules for taking into account professional privilege or protection against self-incrimination. However, the right to enter these premises does not apply if someone can completely refuse to disclose information. This is true for private homes that belong to a person with a right to disclose information. In these cases, the rights to refuse information thus have an impact on the right of entry to business premises.

In the case of § 4 WpHG, prior authorisation is not necessary and, in general, ongoing supervision does not require a specific threshold. Accordingly, § 4 para. 4 WpHG allows for entry to premises if this is necessary for the performance of the functions of the BaFin.

In the case of non-cooperation, the BaFin enforces its decisions itself. It uses the measures available for the enforcement of administrative acts under the Administrative Enforcement Act (*VwVG*). These are acting in representation, imposing a coercive fine and the use of force. The BaFin can also use other persons or institutions for fulfilling its tasks.

Netherlands

The Dutch National Bank (DNB) has the powers derived from general administrative law (see above, under OLAF). Furthermore, the DNB has the power to seal, which it may use to assist the ECB when it faces opposition to an inspection.

United Kingdom

Both the Prudential Regulation Authority, the BoE (PRA), and the Financial Conduct Authority (FCA) have the power to search, using such force as is reasonably necessary. A magistrate's warrant is still necessary. The courts have emphasised on many occasions that the issue of a search warrant is never a routine operation.

Italy

The Banca d'Italia (BI) has the power to carry out inspections on the premises of supervised entities or the premises of external providers of the supervised entities. The BI may sometimes ask supervisors in other Member States to carry out an inspection on its behalf. Upon request, BI may carry out inspections on the premises of companies having their parent company in another Member State. BI may also allow foreign supervisors to participate in inspections at a supervised parent company in Italy which has branches subject to the foreign banking supervisor. There are no provisions provided for the case of ECB inspectors, but the last provision may offer a possible solution to allow ECB inspectors to participate as well.

There are two types of inspections: general inspections (the inspection of a whole bank) and sector-based inspections (focused on a bank's specific field of activity). The BI has two independent departments for off-site and on-site inspections. On-site inspections are based on

¹⁴³ § 17 para. 3 WpHG in conjunction with § 4 para. 4 WpHG.

an annual plan for inspections and on confidential banking information and documents collected during supervision, and can consist of: 1) the investigation of a wide spectrum, 2) a targeted/thematic inspection, 3) a follow-up inspection.

A lack of cooperation concerning a dawn raid might lead to a criminal offence. When the supervised entity does not cooperate, BI may request the cooperation of the Italian Financial Police. Upon request, the Special Monetary Police Unit of the Financial Police may proceed to conduct financial investigations and on-site inspections.

Poland

Poland is not part of SSM/euro; on Polish national law, see also our comments in the previous section.

France

The Prudential Supervision Authority (ACPR) does have the general power to access business premises, see above under DG COMP. The ACPR does not have the power to inspect professional and private premises and seize documents. The SG or ACPR issues a letter of assignment specifying the purpose of the inspection and appointing the officials in charge (Art. L. 612-23 and R. 612-22 MonFinC). The mission statement must be brought to the knowledge of the controlled establishment, if it so requests. The SG thus decides to carry out missions of a general scope concerning all the activities of a supervised institution, or thematic missions, targeted at certain activities or lines of business. These missions may take place after prior notification but also unexpectedly. Within the framework of these missions, large-scale powers are conferred on investigators. In addition to the power to request information and documents, investigators may also access the computer equipment and data of the person being checked (Art. R. 612-26 MonFinC). Finally, the SG may, as in the case of permanent controls on documents, have recourse to external services. In practice, supervisors can stay for up to one year on the premises of the audited entity in order to verify, obtain a copy and hear the persons whose hearing is useful for the proper execution of the control.

Provisional conclusions

- There are a few differences when the ECB framework is compared to that of OLAF or DG Comp (and ESMA). The most striking is, of course, the way national authorities are integrated into the ECB structure. Within the setting of JSTs, but also OSITs, national authorities operate as a part of the ECB structure (*Organleihe*) and this construction appears to have important consequences for the applicable law and the legal remedies available.
- In light of this, it comes as no surprise that ECB has a high level of autonomy. There are hardly any references to national law.
- However, there seems to be some contradiction between EU law and domestic regimes when it comes to the sealing of business premises. Although EU law does provide for this, it is not always available at the domestic level.
- Also the need for judicial authorization for the inspection/search is not completely clear and depends to a large extent on the applicable national law.

10.6.5 ESMA

ESMA can enter any business premises and land of the legal persons subject to an investigation decision adopted by ESMA and shall have all the powers stipulated in Art. 23c(1) CRAR/63(1) EMIR, i.e., investigative powers such as examining records, taking copies of data, summoning witnesses, etc. ESMA shall also have the power to seal any business premises and books or records for the period of and to the extent necessary for the inspection (Art. 23d (1) CRAR and Art. 63 (1) EMIR).

As is the case for ECB, judicial authorisation is necessary where national law requires this. Such authorisation may also be applied for as a precautionary measure (Art. 23d (8) CRAR and Art. 63 (8) EMIR). The national judicial authority shall check whether the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. When it controls the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds that ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement as well as the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall only be subject to review by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No. 1095/2010 (Art. 23d (9) CRAR and Art. 63 (9) EMIR).

Germany

See above, BaFin under ECB.

Netherlands

The Authority for the Financial Markets (AFM) has the powers mentioned above, under OLAF. Furthermore, the AFM has the power to seal when it assists ESMA. However, it exercises this competence on the basis of Regulation 513/2011.

United Kingdom

The Financial Conduct Authority (FCA) has the power to apply to a Justice of the Peace for a warrant to enter premises where documents or information are held.¹⁴⁴ The circumstances under which the FCA may apply for a search warrant include: 1) where a person upon whom an information requirement has been imposed fails (wholly or in part) to comply therewith; or 2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates would be removed, tampered with or destroyed. A warrant authorizes (an FCA investigator under the supervision of) a police officer to: enter and search the premises specified in the warrant and take possession of any documents or information appearing to be of a kind in respect of which the warrant was issued or to require, in relation to any such documents or information, any person on the premises to provide an explanation of any document or information that appears to be relevant or to state where it might be found. A firm must allow the FCA to enter its premises with or without notice during business hours.

144 FSMA s.176.

Italy

The *Commissione Nazionale per le Società e la Borsa* (Consob) may conduct inspections as a supervisory measure. Consob (and BI) may carry out inspections of authorized intermediaries and require the display of documents and the completion of acts deemed necessary, also with regard to those to whom the intermediaries have outsourced important business functions. Each authority shall notify the other of inspections it undertakes. Consob (and BI) may request the competent authorities of other Member States to execute on-the-spot verifications with regard to branches of Italian investment companies, asset management companies and banks established on the territory of that Member State. The competent authorities of other Member States may also inspect branches of EU investment companies, asset management companies and banks that are established in Italy and EU AIFMS which they have authorized, but only after notifying BI and Consob. The competent authorities of other Member States may also ask BI and Consob to carry out these inspections on their behalf.

With regard to market abuse and insider trading, Consob may carry out on-site inspections in relation to any person who could be acquainted with the facts. When authorized by the Public Prosecutor, Consob may seize property that may be confiscated or conduct searches using coercive powers conferred upon the Financial Police. Consob may also ask the Financial Police to cooperate in this regard. If, in specific cases, Consob wants to investigate a person other than authorized intermediaries, judicial authorization is required to proceed to inspections.¹⁴⁵

Poland

In financial cases, the Financial Supervision Authority (FSA), when conducting preliminary ‘investigative’ proceedings, is authorized to enter the premises of a business entity. The right of entry refers to the main headquarters of the undertaking, its branches or representatives on working days and during working hours, but in urgent cases also on non-working days and during non-working hours. The FSA has the right to access any documents, books and information carriers and the business entity is obliged to produce them at the demand of the FSA. They may also request to make photocopies, as well as to provide oral or written explanations. The (Vice-)President of the FSA may issue an order seizing a document or other information carrier if necessary for further proceedings. In the case of non-obedience, the police may be called to assist. An order to seize may be subject to an appeal to the acting authority, but this appeal has no suspending effect.

France

The Financial Market Authority (AMF) has the power to enter business premises and to search professional and private premises and seize documents. See above under DGCOMP.

10.6.6 Conclusions

What can we learn in respect of the comparative analysis of the legal frameworks of the different authorities and their interactions with the national legal orders?

145 Art. 187-octies §3 TUF.

Organizational issues

- We have already identified different models for such cooperation. It is without doubt that these models have great consequences for a) the designation/appointment of the responsible officials and the modalities for instructing them, b) the applicable law (powers and safeguards) and c) the available remedies. There appears to be a certain pattern to the extent that ECB and ESMA have more possibilities to influence the actions of national authorities. All the models do have in common, however, that they explicitly recognize the need to involve national authorities in enforcement efforts. During on-site visits national authorities are mostly present. Even in the case of autonomous inspections, including the ones of OLAF under Regulation 2185/96, national authorities will be needed to assist and eventually enforce.
- We can clearly notice that the degree of harmonization in the area of PIF is considerably lower than elsewhere. While banking law and CRA/TR supervision have designated the EU authority as the main responsible authority (or the *primus inter pares* – competition law), they do pay a great deal of attention to the set-up and powers of their national partners. That level of harmonization is lacking in the OLAF setting. OLAF partners at the national level can be subject to a criminal law statute, but also to an administrative law statute. We also see a clear difference between cooperation with partners on the side of revenue (mostly customs or tax authorities) and expenditure. Particularly the latter appears to be problematic. AFCOS partners do not really solve the problem, as their statute and powers are very different from one country to another.
- Finally, on occasion we have noticed that the primary point of reference for the national authorities is still national law, even when EU law is fully harmonized (ECB, ESMA, DG Comp).

Investigatory powers & enforcement (interviews and production orders)

- Specific rules for providing assistance are mainly found – and this comes as no surprise – in the areas of banking law, ESMA and competition. Those statutes generally make the corresponding national powers also available to assist EU authorities and explicitly allow for the sharing of information. The Netherlands has also introduced such rules for OLAF. But in most of the other countries national regulations hardly offer any guidance, and the same can be said for the OLAF regulations themselves as they refer back to national law on many occasions.
- Compared to the other areas, the framework for OLAF is fragmented. In relation to OLAF's investigatory powers, the applicable Regulations mainly define the type of data and information that must be made available, not the powers themselves (cf. Art. 7 Reg. 2185/96). Those are left to national law. This referral is even stronger for autonomous investigations under Regulation 2185/96 than in the setting of mixed inspections under, for instance, Regulation 595/91. We have also noticed on occasion that OLAF partners at the national level have no possibility to enforce cooperation in the case of on-site visits by means of imposing sanctions for non-cooperation. They must rely on other actors at the national level for that.
- What, exactly, can be done during one-site inspections (the powers and the reach of these powers) is also problematic for OLAF, certainly in the light of lacking enforcement powers. Most of our EU agencies have sealing powers. OLAF does not and it is also unclear in many member states if OLAF's counterparts can apply these sealing powers. It is also unclear to which extent OLAF can apply forensic investigation techniques in the domestic legal orders.

- Finally, the borderline between coercive (inspection) and non-coercive (searching) powers is not always very clear. Even EU Regulations (e.g., Art. 6 of Reg. 595/91) take into account the fact that an administrative inspection can be converted into a judicial search. At the national level much depends on who is the counterpart and what is its legal framework.

Safeguards

- As regards the applicable safeguards, two main points must be made. First of all, despite the level of harmonization regarding the powers and regulations of DG Comp, ECB and ESMA hardly contain any references to the applicable safeguards. These have been developed in competition law by the courts. The general assumption is that they also apply to ECB and ESMA. On the other hand, we notice that the OLAF framework does contain quite a number of references to the applicable safeguards, see for instance Art. 9 Reg. 883/2013. These safeguards are, however, very much related to the interviewing of persons and do not deal specifically with one-site inspections.
- Judicial authorization for one-site inspections remains largely dependent upon national provisions, with the exception of an inspection and a search of private dwellings by DG COMP as provided for in Regulation 1/2003. Referring back to national law results in a very diverging picture in the member states.

Remedies

- Regarding the availability of remedies at the EU level, there is a clear distinction between ECB, ESMA and DG Comp, on the one hand, and OLAF on the other. In the Violetti case, the ECJ considered that the final investigation report by OLAF did not change the legal position of the persons concerned and could not therefore trigger action before the ECJ. As the other authorities also take final administrative enforcement decisions, their legal situation is completely different and is subject to control by the ECJ.
- At the national level, regarding legal protection, there is of course the possibility to challenge OLAF inspections if the evidence obtained is to be used in civil, administrative or criminal proceedings. Before the proceedings on the merits of the case, we note that there are significant differences in the availability of remedies. The United Kingdom offers remedies that are connected to the interests involved. However, remedies against specific investigative acts are not available in the Netherlands, Poland, France, or Italy.

10.7 ACCESS TO TRAFFIC DATA AND RECORDINGS OF TELECOMMUNICATIONS

10.7.1 Introduction

The interception of telecommunications is one of the most intrusive investigative powers. It is usually reserved for purposes of criminal law enforcement. The intrusiveness of the measures (in terms of their impact on the right to privacy and related safeguards at the national level)¹⁴⁶ then corresponds to the importance of the interests involved. Practice has however shown that it is very difficult in a large number of areas of socio-economic law to establish misconduct without such

¹⁴⁶ See for instance Art. 10 of the German Basic Law (*Post- und Fernmeldegeheimnis*); supra 3.3.4. The Dutch report also mentions that, because of their intrusiveness, these measures are only available to the police and prosecution services; supra 4.3.4.

measures. This is probably why regulations in the area of market abuse for instance require that the competent authorities shall have, in accordance with national law, at least the power to require the production of existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions and to require, insofar as is permitted by national law, the production of existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to the investigation of certain infringements of market abuse regulations.¹⁴⁷ The importance of such powers increases when EU or national law consequently oblige undertakings or individuals to keep track of their communications (data retention).

This project also seeks to establish to what extent measures like these are also available to the EU authorities involved. We make a distinction between measures involving the content of telecommunications and measures to establish whether there has been contact, between whom and on which date and, possibly, at which place (traffic data). Real-time interception of telecommunications is outside the scope of this study; we have focussed on powers with respect to telecommunications that have occurred in the past.

It turned out that – with the exception of ESMA (see below) – none of the other authorities can explicitly avail itself of powers that relate to the interception of telecommunications. In some cases, data may however be made available through a production order (mostly traffic data).¹⁴⁸ Moreover, we did consider to which extent this also means that the EU authorities are prohibited from asking their national partners to use these powers (where available). Once again, such a possibility is highly dependent on the way the interaction between the EU authority and its national partner has been given shape.

10.7.2 OLAF

The EU report mentions that OLAF itself does not explicitly have this power.¹⁴⁹ Yet Regulation 2185/96 (on-the-spot checks) does not seem to exclude it either. Art. 7 after all stipulates that OLAF shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents.

Where national authorities have such powers for national purposes, the results must also be made available to OLAF in the setting of mixed investigations.¹⁵⁰ Of particular relevance in that setting is the provision of Art. 9 (2) Reg. 515/97 that in so far as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, [OLAF staff] shall not take part in such acts. They shall, however, have access to the information thus obtained subject to the conditions laid down in Art. 3.

Most of the national reports mention that powers in the area of telecommunications (traffic data and recordings of communications) are not available for OLAF investigations. This appears to be different (only) in the UK (the police)¹⁵¹ and France (the customs authorities). For the latter

147 Art. 23 of Regulation No. 596/2014 on market abuse (the market abuse regulation), OJ [2014] EU L 173/1.

148 Supra section 10.5.

149 Supra chapter 2.2.4.

150 Cf. Art. 9 (2) Regulation No. 515/97.

151 Supra chapter 6.6.3.

country, however, as was said before, there is controversy as to whether these powers can also be made available for the specific purpose of OLAF investigations. This is due to the absence of a specific national legal framework that sets out the conditions for cooperation between OLAF and its national partners.¹⁵²

10.7.3 DG COMP

The foregoing considerations apply *mutatis mutandis* to DG Comp. Whereas such powers may be useful for discovering the relationships between undertakings and/or individuals, there are no specific powers with respect to telecommunications in Regulation 1/2003. Production orders fill this gap, at least to a certain extent (particularly traffic data, where available). It might still be the case, moreover, that these powers are made available to the national competent authorities. In that case, upon a request by the Commission on the basis of Art. 22 (2) Reg. 1/2003, they could also be used when assisting the Commission. It seems, however, as is the case with OLAF, that such powers are only available in the UK. The French report notes that the legislator did not extend this power to the competition authority (ADLC) in 2014. Consequently, the Constitutional Council decided in 2015 that the possibility for ADLC investigators to require telecommunications operators to provide access to traffic data was unconstitutional because the safeguards foreseen were incapable of sufficiently protecting the right to privacy.¹⁵³ If and when they exist in other countries, this is mostly in systems that provide for the criminal law enforcement of competition law.

10.7.4 ECB

The foregoing considerations apply *mutatis mutandis* to the ECB. In the setting of the SSM, the ECB can use its power to instruct NCAs to use such powers, when available under national law. However, this is not the case. Unlike in the area of business supervision,¹⁵⁴ EU directives on prudential supervision (CRD IV,¹⁵⁵ for instance) contain no such provisions. The UK report mentions specifically that powers with respect to telecommunications are not available to the PRA.

10.7.5 ESMA

It appears, therefore, that only ESMA has explicit powers in relation to telecommunications. Arts 23c (1)(e) and 23d CRAR¹⁵⁶ provide that ESMA shall have the power to request records of telephone and data traffic. The power is thus limited to traffic and does not cover the substance of conversations, *et cetera*. Despite its limited scope (as indicated, other areas seem to regard this power as a production order), Art. 23c CRAR provides that if the use of this power requires authorisation from a judicial authority according to national rules, such authorisation must be applied for (Art. 23 (5) CRAR). In that case, the national judicial authority shall only check

152 Chapter 8.3.

153 *Supra* 8.3.4.

154 See the aforementioned market abuse regulation and Art. 69 (2)(d) and (r) of Directive 2014/65/EU, OJ [2014] EU L 173/349 (MiFID II).

155 OJ [2013] EU L 176/338.

156 See also Art. 62(1)(e) EMIR.

whether the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the investigations.¹⁵⁷

The question is to which extent national law may supplement these powers, in which case ESMA partners at the national level may use such powers – if available – for the purpose of assisting ESMA investigations. That does not appear to be possible, however. This is because ESMA itself has stipulated that it only cooperates with national powers through delegation, or within the framework of mutual assistance as provided for in the Regulations.¹⁵⁸ But then national authorities use the powers provided for in the Regulations. The only exception to this seems to be Art. 23c (7) CRAR, which provides that national law may still require judicial authorization for requests for records of telephone or data traffic.

In this light, the national reports have looked into the availability of such powers to the national partners of ESMA. The German report mentions in this regard that the provisions of the relevant Regulations have not been transposed into German law and, consequently, there are also no provisions on judicial authorization. The Dutch report also mentions that there are no such powers under Dutch law (at least not for CRAs or TRs).¹⁵⁹ In the United Kingdom, as has been mentioned above, the FCA does have access to such data.

In Italy, the Consob may also require existing telephone records to be produced. Yet when Consob requires that persons other than authorised intermediaries be investigated, then judicial authorization is required in order to obtain existing telephone records. Consob also has the power, with the authorization of the Public Prosecutor's Office, to require the telephone provider to furnish it with traffic records.

In Poland, traffic data and recordings of telecommunications are classified and protected under telecommunication secrecy. The Financial Supervision Authority does have access thereto, at least to some extent, on the basis of the Act on Capital Market Supervision, referring to the supervision of trading repositories. When conducting controlling activities with regard to supervised entities, KNF may request, and the entity is obliged to provide, copies of electronic mail and traffic data in the form of registers of telephone calls and registers of data transmissions. Also in the course of preliminary proceedings instituted by KNF on the basis of the Act on Capital Market Supervision to establish whether there is a need to submit a notification of a suspected crime to the competent authorities, or to open regular administrative proceedings, when necessary, KNF may request the telecommunications service provider to provide information which is protected under telecommunications secrecy regarding traffic data. These measures may be imposed on the persons concerned, which are legal persons. They may not refuse to provide the necessary information. Judicial authorization is not necessary.¹⁶⁰

In France, the situation is not entirely clear, because of apparent conflicting decisions of the Constitutional Council. As mentioned in the previous section, competition authorities have been denied the power to require telecommunications operators to provide access to traffic data. That same power, however, is available to AMF agents. The French report notes that the decision in competition law could in the future challenge the possibility for AMF investigators to require access to traffic data. At any rate, judicial authorization is not required.

157 On this judicial authorization, see also M.P.M. van Rijsbergen & M. Scholten, 'ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement', (2016) 7 *European Journal of Risk Regulation*, no. 3, pp. 569-579; Wissink et al., supra note 15.

158 Supra section 10.5.5.

159 In Germany and the Netherlands such powers are available for cases of market abuse, for instance.

160 Supra chapter 7.3.4.

10.8 ON-LINE MONITORING OF BANK OR FINANCIAL ACCOUNTS

10.8.1 Introduction

The on-line monitoring of bank or financial accounts has to be distinguished from (1) production orders concerning the existence of bank accounts (or similar financial accounts) and (2) production orders on specific banking or financial operations. The latter relate to operations in the past. The on-line monitoring of bank or financial accounts addresses future operations with the eventual freezing thereof related to this. It is thus a real time monitoring of operations during a certain period of time. For a legal example, see Art. 28 of the European Investigation Order (Directive 2014/41).

10.8.2 EU level

At the EU level we can be very brief. Neither DG Comp, ESMA nor OLAF have this power under EU regulations. The ECB also does not have this power under EU law, but could obtain it through the NCAs as the ECB can have additional powers through the NCAs.

10.8.3 At the domestic level

Germany

The German national counterparts do not have this power. However, the authorities can exercise their investigative powers to request documents in order to obtain information on banking accounts.

Netherlands

The Dutch national counterparts do not have this power. However, the authorities can exercise their investigative powers to request documents in order to obtain information on banking accounts.

United Kingdom

A 'targeted equipment interference warrant'¹⁶¹ may be issued by a senior member of the Executive (usually the Home Secretary) and approved, unless the circumstances point to urgency, by the Judicial Commissioner. The practical constraint is that they all need to be approved personally by the Secretary of State.

Italy

In Italy, only the counterpart of the ECB, the Bank of Italy (BI), has this power in its role of combating money laundering (not for ordinary supervision). In such cases, the BI may rely on its Financial Intelligence Unit (FIU) that has the power to monitor bank transactions. The FIU is an independent and autonomous body set up within the BI, and is charged with combating money laundering. The FIU examines the compulsory suspicious transaction reports files by banks and financial institutions, as well as the monthly aggregate reports transmitted by financial intermediaries.¹⁶² It may request additional information from reporting banks. The Unit can also

¹⁶¹ Investigatory Powers Act 2016 Part 5.

¹⁶² Arts. 6 and 40-41 of Legislative Decree 231/2007.

inspect entities subject to anti-money-laundering obligations to examine reported and unreported transactions¹⁶³ and verify compliance with ‘active cooperation requirements’¹⁶⁴. The FIU can freeze transactions for up to five working days. The FIU works closely together with other investigative authorities, both nationally as well as internationally.

Poland

The monitoring of bank accounts in real time is not provided for in the Polish legal system. Therefore, according to Polish law, the administrative authorities do not have this power. It should be mentioned here that Polish law does provide for an obligation to protect information covered by banking secrecy. However, such information covered by banking secrecy may be made available to the Financial Supervision Authority (KNF) and the President of the UOKiK in relation to administrative proceedings that these authorities are conducting. Those authorities may oblige undertakings or banks to directly supply information which is necessary for the purpose of the investigation.

Provided that data covered by banking secrecy is included in a document which forms a part of the administrative files it may be transferred to EU counterparts under the general rules. The transmitting national authority is obliged to indicate which information is covered by statutory protection and the recipient EU authority is under the same obligation not to disclose this information. According to interviews with UOKiK staff the authority hardly ever asks for bank statements but there are no legal obstacles against transmitting such information to DG Comp.

France

Banking secrecy may not be opposed to national counterparts of EU authorities when they exercise their powers to access business premises, obtain information and, where applicable, search and seize documents. However, the power to monitor banking accounts is only granted to tax and customs authorities¹⁶⁵. Tax officers (Art. L96 of the tax procedure book) and customs officers (Arts 65, 1° j, and 455 CustC) may obtain information on bank accounts and banking transactions from banking institutions. It seems that such information may be given in real time. Although it is not an explicit power, according to case law¹⁶⁶, those provisions grant customs officers the same powers as tax officers. They do not require any judicial authorisation. The judges do verify, however, that the information requested concerns transactions and operations within the remit of this administration.

Besides, police officers exercising their general power to order the production of documents and information (within the framework of a flagrant or preliminary investigation) as well as judicial customs officers may also monitor bank accounts. The Public Prosecutor’s Office must be informed of this measure. In practice, on the basis of the CPC (Art. 60-1, 77-1-1 or 99-3 CPC), the officer will have to issue regularly, in order to update the banking transactions, a production order either to the bank or to the Economic Interest Group ‘Credit Card’.

163 Art. 47.1.a of Legislative Decree 231/2007.

164 Art. 53.4 of Legislative Decree 231/2007.

165 They also have access to the FICOBA (the national central database on bank accounts).

166 J. Pannier, ‘Le droit de communication de l’administration des douanes’, (1989) *Revue de droit bancaire et Bourse*, p. 101.

10.8.4 Conclusions regarding the monitoring of banking and financial accounts

- Neither the European authorities, nor almost all of the national counterparts have the power to monitor banking accounts in real time. However, most of the European and national authorities can use their power to request documents in order to obtain information on banking accounts.
- The exceptions to this rule are the UK and, to some extent, France and Italy. In the UK, a senior member of the Executive can issue a ‘targeted equipment interference warrant’, which can consist of the real time monitoring of specified banking accounts. Such a warrant does need to be approved by the Secretary of State. In France, tax and customs authorities can monitor bank accounts and banking transactions. It seems that they can do so in real time.
- From the Italian report it becomes clear that that the Italian Financial Intelligence Unit (FIU) of the Bank of Italy has, in the case of money laundering indications, the power to monitor banking transactions by way of compulsory transactions reports and monthly aggregate reports. Although this is not real time monitoring in a strict sense, it is close to real time monitoring. In Italy the FIU is established within the Bank of Italy; in other states the FIU is however established within the police, the judicial authorities or just an independent authority, which is the reason why it does not appear in our national reports.
- However, it raises an interesting point as OLAF also deals with administrative investigations into money laundering related to PIF offences. If preventive FIUs (of an administrative nature) in the member states can monitor bank and financial accounts in order to detect suspicious transactions, why should OLAF then be deprived of this power?

11. SUMMARY OF MAIN FINDINGS AND OVERALL CONCLUSIONS

*M. Luchtman & J. Vervaele*¹

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 & Akros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:229, paras. 167-168.

7 Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akros 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 *Soci t  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 protection²⁹ – 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 be 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.

ANNEX I: OUTLINE FOR THE REPORTS

Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)

Hercule III, Utrecht University, April 2016

GENERAL REMARKS – GOALS OF THE NATIONAL, TRANSVERSAL AND EU REPORTS

The key goal of the project is to make a significant contribution to OLAF's legislative framework for the gathering of information with respect to alleged infringements of EU law. OLAF faces various problems when it comes to the gathering of evidence, including:

- Difficulties of access to relevant information, e.g. banking accounts;
- Difficulties to enforce investigative powers autonomously from national authorities;
- Uncertainties about the later use of materials as evidence in criminal proceedings;
- A lack of a level playing field of powers and safeguards: differences between national legal systems & forum shopping
- A lack of legal protection for individuals.¹

The idea of this project is to analyse if and how other authorities with comparable tasks are also confronted with these problems. The EU report will focus on the frameworks of the four authorities at EU level (ECB,² ESMA,³ DG Comp and OLAF) and how it is applied in practice. The national reports will focus on the national counterparts of the four EU authorities. The focus is on the partners at the national level, mostly referred to as 'competent [national] authorities' in the relevant provisions. The national reports analyse and identify what powers (including the safeguards) these authorities have when assisting the EU authorities and how judicial protection is organized in that setting. In other words, we are concerned only with the specific setting of vertical cooperation between EU and the national authorities. National and EU authorities cooperate either in the setting of so-called autonomous investigations by EU authorities (with the occasional assistance by national authorities),⁴ or in mixed inspections of EU and national authorities.⁵ Requests for mutual administrative assistance without the participation of the EU authorities in the execution of those requests are excluded from this project.

NB! The foregoing also means that we are not looking for an analysis of all the tasks and powers of the national authorities; we are 'only' interested in their role as 'assistants' to the EU authorities (and in the powers, safeguards, and remedies available in that specific setting).

1 Cf. COM (2011) 293.

2 In the framework of the SSM System.

3 Where ESMA has direct tasks of enforcement *vis-à-vis* market participants (CRA's/TR's). This project does not focus on ESMA's coordinating role in other areas, such as market abuse.

4 Cf. the framework of OLAF regulation 2185/96.

5 Cf. the framework of Regulation 595/91.

The four authorities have in common that they all operate under an administrative law framework and, in principle, have the power to perform investigations on the joint territories of the participating Member States. Their national counterparts will normally also operate under an administrative law framework (banking authorities, competition authorities, members of the AFCOS network, etc). Yet, though administrative in nature, these tasks can have effects on criminal justice (in a wide sense), because 1) the EU authorities have the power to impose punitive sanctions (as defined by the European Courts – Engel and Bonda case law) or 2) because their investigations are relevant to punitive law enforcement (criminal or administrative) at the national level. In light of this, please keep in mind that this project is not on the national criminal law dimension *sensu stricto* of the four policy areas of this study (PIF, banking regulations, credit rating agencies and TR's, and competition law). Rather, we look into how the national partners of the EU authorities assist the latter in their tasks (in terms of powers, safeguards, judicial protection). Only where administrative investigations interfere with criminal proceedings, or *vice versa*, that is of concern to us.

This project is on the powers available in the investigatory stage. We are not concerned with the stages of prosecution or even trial. It may be difficult to define investigations in relation to ongoing market supervision. We define investigations in this project as the stage in which there is already a certain degree of suspicion that EU law has been infringed upon. Sometimes there may be a formal decision to open 'investigations', to which certain consequences are attached (such as a shift of tasks and powers within the investigating authority; 'Chinese walls'), sometimes there are no direct legal consequences. We are interested in the powers, safeguards and remedies available in the stage of investigation.

Therefore, the focus is on the gathering of information during the investigative stage. Sub-questions to be answered also by the national reports are:

1. what powers the national partners of the four EU authorities have at their disposal (and, possibly, why they were denied others);
2. how fundamental rights and procedural safeguards are integrated into these systems and if so, at which level (national or European?);
3. how judicial control has been effectuated;
4. to which extent do parallel punitive proceedings have an influence on cooperation duties?

The focus is on specific investigative measures. It is possible, nor plausible to include all investigative powers and all relevant safeguards into this project. As indicated in the grant application and discussed further during the kick-off meeting in Utrecht, we agreed to focus on a limited number of investigative measures:

1. The interviewing of persons (which includes oral/written questioning) and production orders;
2. The monitoring of banking accounts (live/real time);
3. The right to entry of premises ('droit de visite'), including searches, seizure, sealing, taking samples and forensic images;
4. Access to traffic data and recordings of telecommunications.

We also agreed to include a series of procedural safeguards, but only to the extent that they determine the normative framework for the aforementioned investigative acts:

- a) The privilege against self-incrimination, but only as far as relevant for the interviewing of persons and the production orders. This project is not on the scope of the privilege as such, nor how and when it is breached. Neither is this project on, for instance, the later drawing of inferences from the defendant remaining silent during investigations. Instead, we aim to identify if and how the privilege has been incorporated into the normative framework for interviews and production orders in the setting of (national assistance to) EU authorities' investigations (possible 'Miranda warnings', right to silence,

right to refuse documents).⁶ In addition, we aim to identify to what extent (the possibility of) criminal proceedings at the national level in parallel to the investigations by the four EU authorities affect the duty to cooperate in the investigations by the EU authorities.

- b) The right to access to a lawyer [only in relation to questioning & entering of premises: right to be informed; consultation; presence; assistance]. Again, the focus is on how this safeguard – which normally applies only in the setting of punitive proceedings – has been incorporated in the normative framework for investigations by EU authorities. The focus is not on what happens when this framework is disregarded, which may for instance lead to exclusion of evidence, etc. We are interested in how this safeguard has been incorporated in the design of investigative measures, particularly questioning and entrance of premises. The focus will be on the right to be informed of the right, the right to consultation, the presence of lawyers during investigative acts and to actively provide assistance.
- c) In addition to the foregoing two safeguards, it was discussed during the meeting in Utrecht whether or not it would be possible to exclude legal professional privilege/LPP (lawyers) and professional secrecy (journalists, banks, accountants, tax advisers) from the scope of this project. The outcome of the debate was that these are too important to leave out of the project. Once again, we are interested ‘only’ in these safeguards, where they are relevant to the administrative law investigations of the EU authorities. Which limitations does professional privilege bring to the four types of measures?

OUTLINE FOR THE NATIONAL REPORTS

The focus of this project is on investigatory acts by the four EU authorities. The national reports analyse how the national legal frameworks of the national counterparts are of help, as EU law often refers back to national law in the framework of autonomous inspections or mixed inspections. A few (random) examples of this interaction are:

- *OLAF*: Art. 3(3) of OLAF regulation 883/2013, on the use of national powers for OLAF inspections;⁷
- *ECB*: Art. 13 of the SSM regulation, on the interaction between national and EU courts, when authorizing for on-site inspections.⁸ These provisions are more or less a copy of Regulation 1/2003 (*competition law*)

6 Some of the four authorities have the power to impose punitive sanctions. Yet also others, for instance OLAF, have included these safeguards in their framework (cf. art. 9 Reg. 883/2013).

7 ‘The Member State concerned shall ensure, in accordance with Regulation (Euratom, EC) No 2185/96, that the staff of the Office are allowed access, under the same terms and conditions as its competent authorities and in compliance with its national law, to all information and documents relating to the matter under investigation which prove necessary in order for the onthe-spot checks and inspections to be carried out effectively and efficiently.’

8 Article 13: ‘1. If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorisation by a judicial authority according to national rules, such authorisation shall be applied for. 2. Where authorisation as referred to in paragraph 1 of this Article is applied for, the national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB’s file. The lawfulness of the ECB’s decision shall be subject to review only by the CJEU.’

- *ESMA*: Art. 23c of Regulation 1060/2009, as amended, on credit rating agencies, on access to recordings of telecommunications by ESMA.⁹

NB! Size and deadlines.

We agreed to a size of approx. 20 to 30 pages for the national reports. Good drafts need to be ready at the end of October in light of the meeting on 10-11 November. In light of the final project deadline of March 2017 and because the transversal and comparative reports need input by national reports, please make sure to have all relevant information on national law available to the other rapporteurs before the end of 2016. The final national reports need to be ready at the end of January 2017.

NB! Format, presentation and lay out of the reports.

Please maintain the format below as much as possible, at least as far as the headings and main substance of the different sections – the main structure of the reports – are concerned. This will facilitate the comparison. Within the sections, feel free to organize the answers to the questions in the way that fits you best. Regarding the references and lay out, please use the guidelines of the Utrecht Law Review.¹⁰

Section 1. Introduction

PM

Section 2. Overview of national counterparts of the four authorities

- a) What is the legal architecture of the national counterparts of the four EU authorities (OLAF, ECB, ESMA, DG Comp)? A brief introduction of the relevant national authorities and their legislative framework for vertical cooperation with the four EU authorities in the areas of PIF (AFCOS), competition law, banking law, law on credit rating agencies/trade repositories.
- b) How do these authorities give effect to their duties of cooperation under EU law: are there specific provisions for direct enforcement cooperation, or do national authorities simply apply the general rules (for comparable cases under national law)? The aim is to identify how the EU dimension of national law enforcement been incorporated into the national framework. Is this done explicitly, implicitly, or perhaps even not at all?
- c) To which extent are national thresholds for opening investigations (such as a degree of suspicion or formal decisions by certain national authorities) also applied in proceedings for EU authorities? How is this done precisely?
- d) Are administrative proceedings precluded/to be postponed once national criminal proceedings have started? In some cases, national law and constitutional safeguards preclude that administrative proceedings are continued, because criminal proceedings are already pending (or likely to be opened). We are interested in the ‘why’ and what this means precisely for investigations by EU authorities.
- e) Whatever more you think is of relevance to the overall research project.

Section 3. Analysis of the powers of the national relevant authorities, and how the identified powers are used in the cooperation with EU partners (vertical dimension)

Please, present the results of your analysis in the order, presented below. The national and EU reports are structured around the four types of measures. The main goal is that each section makes a comparison

⁹ ‘1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary investigations of persons referred to in Article 23b(1). To that end, the officials of and other persons authorised by ESMA shall be empowered to: (a) (...); (e) request records of telephone and data traffic.’ Additional requirements are found in section 5 and 6, again referring to national law.

¹⁰ <https://s3-eu-west-1.amazonaws.com/ubiquity-partner-network/uopen/journal/ulr/author-guidelines-ULR.pdf>.

between the frameworks for the national counterparts of the four EU authorities. Where there are differences between these frameworks, please indicate so and – where possible – explain the differences. Some countries, such as the Netherlands, have general laws for all the relevant authorities. In those cases, an analysis of those laws ‘only’ needs to be supplemented by analyses of specific deviations or alterations where these actually exist. In these cases, we are interested to know why these authorities were given additional powers (or were denied others). For instance, in the Netherlands, the Dutch competition authority has the power of search, which is normally not available for administrative law enforcement purposes. It is of interest to us to know how this deviation came about.

a) The interviewing of persons (which includes oral/written questioning) and production orders.

Please, discuss the general framework for these type of measures, available to the national counterparts. Where there are specific arrangements for the specific authorities (national partners of OLAF, DG Comp, ESMA, ECB), please discuss these and, if possible, explain possible differences. Please, deal with the following issues (if relevant in your legal order):

- What is the scope (*ratione materiae/personae*) of this power? Particularly:
 - Can these measures also be applied *vis-à-vis* ‘persons concerned’/defendants? Which (legal/natural) persons can refuse cooperation, because of possible interferences with the privilege against self-incrimination?
 - Which persons can refuse cooperation, because of possible interference with duties of professional secrecy or legal privilege? What is the scope of their duty to cooperate?
- To which extent are lawyers allowed to be of assistance prior to or during interviewing? What is the scope and form of their assistance (consultation; presence; etc.)?
- Is an *ex ante* judicial authorisation necessary for application of the measures? If so, what test do the national (judicial) authorities apply – content and procedure?¹¹ What happens if this authorization is denied – is there a right to appeal?
- Are there other thresholds/procedural safeguards for application of the measures, particularly a degree of suspicion or forms of purpose limitation, i.e. rules that allow only for a specific type of use?
- What is the legal form of the decision by which the action is taken: is it a formal decision (with the possibility of appeal) or a *de facto* measure? What are the legal consequences of this (for instance, increased possibilities of enforcement through coercive measures in cases of a formal decision)?
- How and by whom (national or EU) are the investigative powers enforced in cases of non-cooperation [by coercive measures; sanctions; etc]?
- To which extent are EU authorities allowed to execute the measures autonomously? If not, are EU officials allowed to be present during investigations?

b) The monitoring of banking accounts (real time).

The foregoing questions apply *mutatis mutandis*. Please, specify and, where the frameworks differ per authority, explain the differences. Given the measure at hand, banking secrecy (where applicable) is a particularly relevant topic to discuss.

There may be overlap with production order, particularly where existing banking data are requested. Please indicate where you discuss these overlaps.

c) The right to entry of premises (‘droit de visite’), including searches, seizure, sealing, taking samples and forensic images.

¹¹ See the examples above; supra notes 8 and 9.

The foregoing questions apply *mutatis mutandis*. Please, specify and, where the frameworks differ per authority, explain the differences. Given the measures at hand, attention is also needed for the possible differences between (the different conditions for) the entering of private premises, offices of lawyers, etc, and other premises. Also, the right of access to a lawyer appears to be a matter of particular interest here – to which extent are they allowed to be of assistance during the investigative measure?

d) *Access to traffic data and recordings of telecommunications.*

The foregoing questions apply *mutatis mutandis*. Please, specify and, where the frameworks differ per authority, explain the differences.

e) *Are there other powers that could be interesting for OLAF?*

Section 4. Analysis of how (ex post) legal protection is organized

This section deals with the organization of *ex post* judicial control at the national level. *Ex ante* judicial control is included per measure. The following questions are relevant:

- Are investigatory actions subject to judicial review as such, or taken account in later (sanctioning) decisions? In the latter case, how does this system work when the sanctioning decision is taken at EU level?
- To which extent are decisions to use certain powers as such subject to review/appeal (*Verwaltungsakt*, etc)?
- Do remedies have suspending effect?
- Must internal administrative appeals have been exhausted, before access to a court is open?
- Are there time limits applicable?
- What is the scope of internal and judicial review?
- Are specialized remedies available in cases of access to privileged information (professional secrecy or LPP)?

Section 5. Conclusions - Identification of best practices at the national level

Including:

- To which extent does the national report reveal differences between the national legal frameworks for the various policy areas?
- To which extent are these differences related to the applicable EU rules or the consequences of legislative choices at the national level?

OUTLINE FOR THE EU REPORT

1. Overview of tasks and architecture of EU authorities

- a) What tasks in general and in relation to the investigation of infringements of EU law? (substantive and procedural mandate/mission, including sanctioning powers)
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- b) What tasks in cooperation with national authorities (i.e. autonomous and mixed investigations, request and assistance etc.)? How do EU authorities trigger the national dimension in their investigations?
 - *DG Comp*

- *ECB*
 - *ESMA*
 - *OLAF*
- c) How are investigations opened? (by whom and when?)
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- d) When does the authority switch from market supervision to investigation (i.e. threshold from the pre-investigative to investigative phase)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- e) How is judicial control organized with regard to the investigatory acts in the EU framework? At what level? (*just an overview; the transversal report on judicial protection deals with the ex-post review in detail; we address the ex-ante authorisation when dealing with the investigative measures and the internal review mechanisms*)
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

2. Analysis of their powers, and how they are used in the cooperation with national partners (vertical dimension)

a) interviewing of persons (oral/written questioning) and production orders

- i. What is the scope of the powers? Why do they have the power and, if applicable, why were certain powers denied to authorities?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ii. What is the legal shape (decision/authorisation/de facto/etc)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- iii. What is the threshold (suspicion/indications/etc)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- iv. Is there any purpose limitation?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

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- v. Is ex-ante judicial authorisation necessary? What is the content of such an authorisation?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vi. Is there any internal review mechanism?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vii. How and by whom (national or EU) are investigative powers enforced (coercive measures/sanctions/ etc)? To which extent are EU authorities allowed to execute the measure autonomously? When the assistance of national authorities is necessary, are EU officials allowed to be present during investigations?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- viii. Is the access to a lawyer regulated? If so, how?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ix. What possibilities to refuse to cooperate according to the privilege against self-incrimination?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- x. Are there other relevant limitations to the measures (e.g. legal professional privilege and other professional secrecy)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

b) Monitoring of bank accounts (real time)

- i. What is the scope of the powers? Why do they have the power and, if applicable, why were certain powers denied to authorities?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ii. What is the legal shape (decision/authorisation/de facto/etc)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- iii. What is the threshold (suspicion/indications/etc)?
- *DG Comp*
 - *ECB*
 - *ESMA*

- *OLAF*
- iv. Is there any purpose limitation?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- v. Is ex-ante judicial authorisation necessary? What is the content of such an authorisation?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vi. Is there any internal review mechanism? What is the scope of review; are there suspensive effects; are there time limits; what is the relationship with access to court?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vii. How and by whom (national or EU) are investigative powers enforced (coercive measures/sanctions/ etc)? To which extent are EU authorities allowed to execute the measure autonomously? When the assistance of national authorities is necessary, are EU officials allowed to be present during investigations?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- viii. How is the access to a lawyer regulated?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ix. What possibilities to refuse to cooperate according to the privilege against self-incrimination?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- x. Are there other relevant limitations to the measures (e.g. legal professional privilege and other professional secrecy)?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

c) Right to entry of premises ('droit de visite'), including searches, sealing, taking samples etc.

- i. What is the scope of the powers? Why do they have the power and, if applicable, why were certain powers denied to authorities?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ii. What is the legal shape (decision/authorisation/de facto/etc)?
 - *DG Comp*

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- *ECB*
 - *ESMA*
 - *OLAF*
- iii. What is the threshold (suspicion/indications/etc)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- iv. Is there any purpose limitation?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- v. Is ex-ante judicial authorisation necessary? What is the content of such an authorisation?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vi. Is there any internal review mechanism? What is the scope of review; are there suspensive effects; are there time limits; what is the relationship with access to court?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vii. How and by whom (national or EU) are investigative powers enforced (coercive measures/sanctions/etc)? To which extent are EU authorities allowed to execute the measure autonomously? When the assistance of national authorities is necessary, are EU officials allowed to be present during investigations?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- viii. How is the access to a lawyer regulated?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ix. What possibilities to refuse to cooperate according to the privilege against self-incrimination?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- x. Are there other relevant limitations to the measures (e.g. legal professional privilege and other professional secrecy)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

d) Access to traffic data and recording of telecommunications

- i. What is the scope of the powers? Why do they have the power and, if applicable, why were certain powers denied to authorities?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ii. What is the legal shape (decision/authorisation/de facto/etc)?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- iii. What is the threshold (suspicion/indications/etc)?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- iv. Is there any purpose limitation?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- v. Is ex-ante judicial authorisation necessary? What is the content of such an authorisation?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vi. Is there any internal review mechanism? What is the scope of review; are there suspensive effects; are there time limits; what is the relationship with access to court?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- vii. How and by whom (national or EU) are investigative powers enforced (coercive measures/sanctions/etc)? To which extent are EU authorities allowed to execute the measure autonomously? When the assistance of national authorities is necessary, are EU officials allowed to be present during investigations?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- viii. How is the access to a lawyer regulated?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*
- ix. What possibilities to refuse to cooperate according to the privilege against self-incrimination?
 - *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

- x. Are there other relevant limitations to the measures (e.g. legal professional privilege and other professional secrecy)?
- *DG Comp*
 - *ECB*
 - *ESMA*
 - *OLAF*

3. Conclusions - Identification of best practices at the EU level

Both in terms of ensuring defence rights, as the extent of the investigative powers (& procedural safeguards).

DRAFT OUTLINE FOR THE TRANSVERSAL REPORT ON JUDICIAL PROTECTION

During the meeting in Utrecht, we discussed the following topics of relevance. Simonato and Scholten will deal, in their report, with the rules on general rules on the opening of investigations, ex ante authorizations and internal review boards within the EU framework. Ligeti will deal with the general framework of human rights standards, the overview of court organization at EU level and the remedies available, in particular the actions for annulment and damages.

Section 1. Introduction

Section 2. Applicable human rights framework and court organization

Section 3. Judicial remedies at the national level

Comparative analysis of the national reports in light of the questions – ex ante authorizations and ex post judicial control:

a. The interviewing of persons (which includes oral/written questioning) and production orders.

- Is an ex-ante authorisation necessary? When? What is the content of such an authorisation?
- Are investigatory actions subject to judicial review as such, or taken into account in later (sanctioning) decisions? To which extent are decisions to use certain powers as such subject to review/appeal (*Verwaltungsakt*, etc)?
- Do remedies have suspending effect?
- Must internal administrative appeals have been exhausted, before access to a court is open?
- Are there time limits applicable?
- What is the scope of the internal and judicial review?
- Are specialized remedies available in cases of access to privileged information (professional secrecy or LPP)?

b. The monitoring of banking accounts (real time).

Etc.

c. The right to entry of premises ('droit de visite'), including searches, seizure, sealing, taking samples and forensic images.

d. Access to traffic data and recordings of telecommunications.

e. Potential other powers of interest to OLAF

Section 4. Judicial remedies at the EU level

Scope of review by the courts, depending on a comparison of the tasks of the authorities;
Annulment actions; extra-contractual liability

Section 5. Comparative conclusions

Interactions between the EU and national levels: in search of gaps and duplications. This involves a comparison of the four policy areas, but also a comparison of this interaction in the chosen MS.

DRAFT OUTLINE FOR THE COMPARATIVE REPORT**Section 1. Introduction**

PM – existing problems for OLAF

Section 2. General overview

1. Overview of legal architecture
2. Framework for vertical cooperation at EU and national levels.
3. Opening of investigations.
4. Relationship with criminal proceedings..

Section 3. Analysis of the powers, and how they are used in the cooperation with EU partners (vertical dimension)

- a. The interviewing of persons (which includes oral/written questioning) and production orders.*
- b. The monitoring of banking accounts (real time).*
- c. The right to entry of premises ('droit de visite'), including searches, seizure, sealing, taking samples and forensic images.*
- d. Access to traffic data and recordings of telecommunications.*
- e. Potential other powers of interest to OLAF*

Section 4. Analysis of how (ex post) legal protection is organized**Section 5. Conclusions – Positioning of OLAF vis-à-vis the other authorities**

Looking for gaps in the legislative frame for autonomous/mixed investigations:

ANNEX II: LIST OF INTERVIEWED PERSONS

Name of interviewee	Organisation	Member State/EU	Position
Mr Edwin van Dijk	The Authority for Consumers and Markets (ACM)	The Netherlands	Former Team Manager Section Competition
Mr Sander van Leijenhorst	The Netherlands Authority for the Financial Markets (AFM)	The Netherlands	Senior Supervisor
Ms Ellen Boelema	The Netherlands Authority for the Financial Markets (AFM)	The Netherlands	Strategic Policy Advisor
<i>Anonymous</i>	The Netherlands Authority for the Financial Markets (AFM)	The Netherlands	/
<i>Anonymous</i>	The Dutch Bank (DNB)	The Netherlands	/
Mr Jan Mühle	Bundeskartellamt	Germany	/
Mr Ralf Becker Mrs Stephanie Deblitz and Dr Armin Wölk	Bundesanstalt für Finanzdienstleistungsaufsicht	Germany	/
Mr Martin Leuvering, Mr Thomas Hapke, Mrs Kristin Schabe and Mr Alexander Schoenmakers	Bundesministerium der Finanzen	Germany	/
<i>Anonymous</i>	Direction des affaires criminelles et des Grâce, Ministry of Justice (DACG)	France	Magistrat
<i>Anonymous</i>	Délégation Nationale à la Lutte contre la Fraude (DLNF)	France	Expert de haut niveau à la DNLF, correspondant national de l'OLAF

<i>Anonymous</i>	Direction nationale du renseignement et des enquêtes douanières (DNRED)	France	1ère Division des enquêtes (adjoint)
<i>Anonymous</i>	National Judicial Customs Service, Service National de la Douane Judiciaire (SNDJ)	France	Inspecteur des douanes (judicial investigative officer)
<i>Anonymous</i>	Financial Market Authority, Autorité des Marchés financiers (AMF)	France	Commission des sanctions, Enforcement Committee (Member)
<i>Anonymous</i>	Financial Market Authority, Autorité des Marchés financiers (AMF)	France	Direction de la régulation et des affaires internationales, Division affaires européennes et internationales
Mr Raffaele D'Ambrosio	Banca d'Italia	Italy	/
Mr Andrea Venegoni	OLAF's counterparts	Italy	/
Mr Matteo Gargantini	Commissione Nazionale per le Società e la Borsa (CONSOB)	Italy	/
<i>Anonymous</i>	Ministry of Finance - Department for the EU Financial Interest Protection (currently: Department for Auditing Public Funds)	Poland	/
<i>Anonymous</i>	Financial Supervision Authority	Poland	/
<i>Anonymous</i>	Office of Competition and Consumer Protection	Poland	/
<i>Anonymous (2 persons)</i>	DG Competition	EU	/
<i>Anonymous (3 persons)</i>	ESMA	EU	/
<i>Anonymous</i>	ECB	EU	/
<i>Anonymous (4 persons)</i>	OLAF	EU	/

ANNEX III: AUTHORS OF THIS STUDY

Author (ordered alphabetically)	Position	Organisation	Role within the project
Prof. dr. Peter Alldridge	Drapers' Professor of Law	Queen Mary University of London, United Kingdom	Responsible for the UK national report
Prof. dr. Silvia Allegranza	Associate Professor of Criminal Law	University of Luxembourg, Luxembourg	Responsible for the Italian national report
Ms. Daniëlle Arnold	Student at the Legal Research Master	Utrecht University, the Netherlands	Student-assistant, responsible for the organization of the meetings and preparatory work for the final comparative analysis
Dr. Mateusz Błachucki	Assistant Professor Institute of Law Studies	Polish Academy of Sciences, Poland	Responsible for the Polish national report (together with Celina Nowak)
Prof. dr. Martin Böse	Professor in Criminal Law, Criminal Procedure, International and European Criminal Law	University of Bonn, Germany	Responsible for the German national report (together with Anne Schneider)
Joske Graat, LLM	PhD candidate Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Utrecht University, the Netherlands	Responsible for the Dutch national report

Prof. dr. Katalin Ligeti	Professor of European and International Criminal Law	University of Luxembourg, Luxembourg	Responsible for the transversal report on judicial protection (together with Gavin Robinson)
Prof. dr. Michiel Luchtman	Professor of Transnational law enforcement and fundamental rights Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Utrecht University, the Netherlands	Supervisor of the organization and quality of the overall project and responsible for the final comparative analysis and the recommendations for the OLAF framework (together with John Vervaele)
Dr. Celina Nowak	Assistant Professor Institute of Law Studies	Polish Academy of Sciences, Poland	Responsible for the Polish national report (together with Mateusz Błachucki)
Dr. Gavin Robinson	Post-doctoral researcher	University of Luxembourg, Luxembourg	Responsible for the transversal report on judicial protection (together with Katalin Ligeti)
Dr. Anne Schneider	Post-doctoral researcher at the department of Criminal Law, Criminal Procedure, International and European Criminal Law	University of Bonn, Germany	Responsible for the German national report (together with Martin Böse)
Dr. Mira Scholten	Assistant Professor of EU law Department of International and European Law and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Utrecht University, the Netherlands	Responsible for the report on the general EU legislative frameworks of OLAF, ECN, ECB and ESMA (together with Michele Simonato)
Dr. Michele Simonato	Post-doctoral researcher The Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Utrecht University, the Netherlands	Responsible for the report on the general EU legislative frameworks of OLAF, ECN, ECB and ESMA (together with Mira Scholten)

Prof. dr. Juliette Tricot	Professor at the Centre for Criminal Law and Criminology	Université Paris Ouest Nanterre La Défense, Paris, France	Responsible for the French national report
Prof. dr. John Vervaele	Professor in economic and European criminal law Willem Pompe Institute for Criminal Law and Criminology, the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) and College of Europe, Bruges	Utrecht University, the Netherlands	Responsible for the final comparative report and the preparation of recommendations for the OLAF framework and the supervision of the quality of the EU and national reports (together with Michiel Luchtman)

