



Report

**Exchange of information with EU and national  
enforcement authorities  
Improving OLAF legislative framework through a  
comparison with other EU authorities (ECN/ESMA/ECB)**

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# 1. INTRODUCTION

*M. Simonato*

## 1.1 BACKGROUND

OLAF plays a central role in ‘the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union’.<sup>1</sup> In particular, it does so by: *(i)* providing Member States with assistance ‘in organising close and regular cooperation between their competent authorities in order to coordinate their action’;<sup>2</sup> *(ii)* participating in investigations opened by national authorities at OLAF’s request (‘mixed inspections’);<sup>3</sup> and *(iii)* conducting autonomous investigations, both within the EU institutions and bodies (‘internal investigations’) and in the Member States (‘external investigations’).<sup>4</sup> OLAF, however, does not have direct sanctioning powers: even when it carries out autonomous investigations, these conclude with a report and recommendations on the appropriate follow-up actions, which are sent to the competent EU or national authorities (depending on whether it is an internal or external investigation).<sup>5</sup>

Already from a first glance at the OLAF legal framework, it is evident how OLAF strongly relies on cooperation with other authorities in order to build up an information position, whatever the modalities of its actions are. In other words, OLAF is not the only actor protecting the EU budget, but acts within a sort of network of national and supranational players having tasks related to some aspects of EU revenue or expenditure: in between private actors and OLAF, there is often another public actor that has already received and/or processed relevant information. In order to effectively perform its tasks, OLAF needs to have access to such information held by national and supranational enforcement authorities.

Access to information held by other public enforcement authorities is essential in different phases of OLAF’s investigations, for example: *(a)* in order to detect suspected behaviour, before the beginning of any OLAF investigation; *(b)* in order to decide whether an OLAF investigation should be opened, namely whether there is a ‘sufficient suspicion’, whether the investigation would fall within the ‘policy priorities’ established by OLAF, and whether opening an autonomous investigation rather than coordinating national authorities would be ‘proportionate’;<sup>6</sup> *(c)*

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1 Art. 1 of 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 [2013] OJ L 248/1.

2 Art. 1(2) of Regulation No. 883/2013.

3 See Art. 18(4) of Council Regulation (EC) No. 515/97 of 13 March 1997 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.

4 Art. 3 of Regulation No. 883/2013.

5 Art. 11 of Regulation No. 883/2013.

6 Art. 5, para. 1 of Regulation No. 883/2013.

during the investigation, following OLAF's request or by spontaneous initiative;<sup>7</sup> (d) after the investigation, in order to understand whether investigations have led to effective disciplinary, administrative, financial and/or judicial actions by other EU bodies (in internal investigations) or national authorities (in external investigations); and whether further actions need to be taken by OLAF ('follow-up' actions).<sup>8</sup>

To facilitate access to information held by national authorities, Regulation No. 883/2013 obliges Member States to designate an anti-fraud coordination service to facilitate effective cooperation and the exchange of information (AFCOS).<sup>9</sup> The Regulation, however, does not 'harmonise' the structure and functioning of the AFCOs, hence 'there are considerable differences among the national Coordination Services in terms of relative size and powers. Some have limited coordinating roles, while others have full investigative powers'.<sup>10</sup>

Furthermore, the EU legal framework – both horizontal and sectoral rules<sup>11</sup> – provides for a general obligation for the competent national authorities to share information with OLAF. However, such an obligation is formulated in a way that often refers back to national law.

For example, when laying down the obligation to transmit documents and information to OLAF on (potential or ongoing) cases of EU fraud, Article 8 of Regulation No. 883/2013 specifies that national authorities are only obliged to do this 'in so far as their national law allows'.<sup>12</sup> Also the sectoral legislation, for example concerning the common agricultural policy, acknowledges that national law can limit the exchange of information with the Commission: Article 3(4) of Commission Regulation No. 1848/2006 provides that when 'national provisions provide for the confidentiality of investigations, communication of the information shall be subject to the authorisation of the competent court'.<sup>13</sup> Furthermore, also in the context of mixed (administrative) inspections, national authorities are requested to share information with OLAF subject to conditions laid down 'by common accord'.<sup>14</sup> The existence of legitimate limits to the vertical exchange of information (Member States – Commission) is evident in the legal framework for cooperation in the criminal law field: Article 7(2) of the Second Protocol to the PIF Convention states that national authorities 'may' exchange information and may 'set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed'.<sup>15</sup>

Such a strong reliance on national law and approaches towards the exchange of information with OLAF may make it ineffective in practice, or at least very difficult.<sup>16</sup> National legislation,

7 Art. 8, paras 2 and 3 of Regulation No. 883/2013.

8 Art. 12(3) of Regulation No. 883/2013.

9 Art. 3(4) of Regulation No. 883/2013.

10 OLAF Report 2015, p. 22.

11 See, for example, Regulation (EU) 2015/1525 of 9 September 2015 amending 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 [2015] OJ L 243/1.

12 Also the follow-up information (i.e. after the conclusion of OLAF investigations) is transmitted by national authorities 'without prejudice to their national law' (Art. 12(3) of Regulation No. 883/2013).

13 Art. 3(4) of Commission Regulation (EC) No. 1848/2006 of 14 December 2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Council Regulation (EC) No. 595/91.

14 Art. 18(5) of Regulation No. 515/97.

15 Art. 7(2) of the Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests [1997] OJ C 221/12.

16 This was also highlighted by the EU Commission, *inter alia* in its 2011 Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations (COM 2011, 293).



as well the approaches towards OLAF, seem to differ across the EU, making the level of OLAF's access to relevant information non-uniform.

In 2013, within research conducted by the University of Luxembourg together with Ecorys, several case studies illustrating some of these problems were reported to the interviewers.<sup>17</sup> Some legal issues concerning the exchange of information were identified, for example in some Member States tax authorities were said not to be allowed to share information with EU authorities, but only with national counterparts. At the same time, problems of a different nature were indicated, such as the lack of a single central EU authority analysing all the information related to PIF offences, which makes the exchange of information scattered and complicated; or the strong national focus of national authorities who neglect the EU dimension of the investigated conduct. A recent study on the evaluation of Regulation 883/2013 concludes that, according to the interviewed stakeholders, the exchange of information between OLAF and national authorities has been improving after the adoption of the new Regulation. Nonetheless, it stresses that mixed views persist, and that cooperation with judicial authorities might still be difficult in some countries.<sup>18</sup> Similarly, recent reports by OLAF and the EU Commission on the protection of the EU's financial interests highlight the differences among national approaches, and that it is still the case that 'some national authorities forward very little information to OLAF'.<sup>19</sup>

## 1.2 OBJECTIVE OF THE RESEARCH

Against this background, this project addresses the question of whether there is a need to improve the legal framework for the exchange of information related to suspicions of fraud affecting the EU budget, both regarding the expenditure (in particular, structural funds) and the revenue side (particularly as regards customs). The project focuses on one direction of the flow of information, namely what we have defined as the 'transfer of information' from national authorities to EU bodies. Its threefold objective is:

- (a) to analyse the complex legal framework on the transfer of information from national enforcement authorities to OLAF, and to provide an overview of the interaction between EU and national law;
- (b) to identify legal obstacles to realising OLAF's mandate; and
- (c) to identify models for improving the current legal framework on the exchange of information between OLAF and other EU and national enforcement authorities.

For this purpose, this project explores the way in which certain safeguards and interests have been integrated into the EU and national legal frameworks, and to what extent they represent a limit to the transfer of information to OLAF. Among the various interests at stake, the focus has been on the purpose limitation principle, the secrecy of investigations, and other professional secrets.

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17 Study on the impact of strengthening of administrative and criminal law procedural rules for the protection of the EU's financial interests, JUST/A4/2011/EVAL/01, 11 February 2013.

18 ICF Consulting Services United, *Evaluation of the application of Regulation No. 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Final report* (September 2017, available at: [https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation\\_of\\_the\\_application\\_regulation\\_883\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation_of_the_application_regulation_883_en.pdf), last accessed: 9 February 2018 ) p. 102, 160, 218.

19 OLAF Report 2015, p. 24-25. See also Opinion No. 2/2017 of the OLAF Supervisory Committee accompanying the Commission Evaluation report on the application of Regulation (EU) No. 883/2013 of the European Parliament and of the Council (Article 19) (Brussels, 28 September 2017) p. 16.

By addressing these issues, the research conducted within the framework of this project aims to shed light on several sub-research questions. For example: what are the authorities that share information with OLAF in the pre-investigative and investigative phase? What are their tasks and powers? What type of information can they transfer? Under what conditions are they allowed to provide OLAF with information? Can information originally covered by some form of privilege also be provided? If yes, under what conditions? To what extent may the information be used for different purposes than that for which it was originally received? To what extent does the secrecy of (ongoing or closed) investigations prevent an authority from sharing the information with a EU body? To what extent can information be exchanged if it is established that it was unlawfully obtained?

During the two working group meetings held at Utrecht University in March and November 2017, which were attended by representatives of OLAF, some decisions on the scope of the research were made. First, the project focuses on the transfer of information to EEAs and does not deal with the admissibility and use of evidence gathered by EEAs in national proceedings. Second, data protection rules and practices do not fall within the ambit of the survey. Third, issues concerning the judicial remedies against the exchange of information between enforcement authorities have not been addressed by the rapporteurs. Finally, this project does not deal with the relationship between OLAF and the European Public Prosecutor's Office.

### 1.3 METHODOLOGY AND SCOPE OF THE RESEARCH

The project has a strong comparative approach. The comparative analysis is conducted both at the national and EU level: the OLAF multi-level framework is, indeed, compared with that governing the action of other EU enforcement authorities, namely DG COMP, ECB, and ESMA. These authorities are comparable for a number of reasons: they are administrative authorities capable of operating all over the EU; they need to have access to information held by other authorities; yet, they operate on the basis of a framework that is comprised of EU law and diverging national laws. Given the strong interlinkage between investigative powers and access to information held by other authorities, this project aims also to complement the first Hercule III project concerning OLAF's investigative powers conducted at Utrecht University (alignment with this project was another reason for choosing ECB, ESMA and ECN for a legal comparison).<sup>20</sup> Such a comparison is integrated by a horizontal EU report aiming to show whether the same approach to the exchange of information is adopted when there are no national authorities involved, only other EU actors. As a consequence, this project is composed of four main pillars: (1) A comparison of the OLAF legal framework with that concerning bodies of EU law having similar law enforcement tasks (*comparison of authorities*, see Chapter 2). As explained in Chapter 10, the analysis of the legal framework for the transfer of information to EU authorities follows four distinctions:

- between authorities. The transferring authorities have been divided into three circles: the national counterparts, other administrative authorities, and the judicial authorities;
- between enforcement phases. The questionnaires aimed to clarify what obligations derive from requests made before and after the official opening of an EU investigation.

20 M. Luchtman – J. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (Utrecht University, April 2017).

- Exchanges of information after the conclusion of an EU investigation have been excluded from the scope of the research;
- between the purposes of the transfer of information. The project aimed to distinguish the transfer of operational information – related to an ongoing case or to a potential case – from reporting duties and the exchange of information for policy purposes;
  - between modalities of the transfer. The reports aimed to clarify the different obligations concerning the transfer of information on request, the spontaneous exchange of information, and the automatic sharing of information through databases.
- (2) An analysis of the existing arrangements, as well as their loopholes, concerning the exchange of information between OLAF and other EU authorities, namely Europol, Eurojust, and other units of the Commission (see Chapter 3).
- (3) A comparative analysis of different national approaches to the exchange of information with OLAF and other EU bodies, in Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom (*comparison of the interactions with national legal systems*, see Chapters 4 to 9).
- (4) A final comparative analysis consolidating the threefold results of the research (see Chapter 10). The final comparative analysis is therefore based on eight reports – six national reports and two EU reports – that address similar questions from different perspectives. The design and content of the questionnaires (see Annex I) were discussed on the occasion of the first working group meeting, held in Utrecht on 3 March 2017. The preliminary findings of the research were discussed at a second meeting in Utrecht, which took place on 9 November 2017.

The comparative analysis identifies similarities and differences in the respective legislative frameworks of the EU bodies. Where no reasonable explanation for these differences was found, and these differences may hamper the fight against EU fraud, recommendations for the improvement of the OLAF legislative framework have been made.

This project started on 1 January 2017. It has been carried out by an international team of experts. The report on the EU framework, the legal order of the Netherlands and Hungary, as well as the comparative analysis and overall conclusions have been prepared by the staff of Utrecht University. The national reports on Germany, Italy, Luxembourg and the United Kingdom have been prepared by experts from those legal orders. The transversal report was written by experts from the University of Luxembourg. The overall composition of the project team is included in Annex II.

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 first working group meeting in Utrecht. 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 III to this report. Some of the respondents only wanted to cooperate on the basis of anonymity.



## 2. EU ‘VERTICAL’ REPORT

### The exchange of information between national and EU authorities

*A. Karagianni, M. Scholten, M. Simonato*

#### 2.1 OLAF

##### 2.1.1 General

###### 2.1.1.1 Introduction: tasks of OLAF and information needed to perform these tasks

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 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 performs its tasks by: (i) providing Member States with assistance ‘in organising close and regular cooperation between their competent authorities in order to coordinate their action (‘coordination cases’); (ii) participating in investigations conducted by national authorities opened on OLAF’s request (‘mixed inspections’); and (iii) conducting autonomous investigations, both ‘internal’ and ‘external’. Internal investigations are conducted within the 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.

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 for the appropriate follow-up to be undertaken at the national level. 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.

Also because, compared with other authorities, OLAF does not have real monitoring tasks, it is evident how OLAF strongly relies on cooperation with other authorities in order to build up an information position, whatever the modalities of its action are. In order to effectively perform its tasks, OLAF needs to have access to such information held by national and supranational enforcement authorities. This is essential in different phases of OLAF investigations, for example: (a) in order to detect suspected behaviour, before the beginning of any OLAF investigation ('reporting'); (b) in order to decide whether an OLAF investigation should be opened ('information position'), namely whether there is a 'sufficient suspicion', whether the investigation would fall within the 'policy priorities' established by OLAF, and whether opening an autonomous investigation rather than coordinating national authorities would be 'proportionate';<sup>1</sup> (c) during the investigation, following OLAF's request or by spontaneous initiative;<sup>2</sup> (d) after the investigation, in order to understand whether investigations have led to effective disciplinary, administrative, financial and/or judicial actions by other EU bodies (in internal investigations) or national authorities (in external investigations); and whether further action needs to be taken by OLAF ('follow-up'). This project does not cover the last aspect, but focuses on the pre-investigative and investigative phases.

#### 2.1.1.2 National partners

In order to assist OLAF in accessing information held by national authorities (and to seek their cooperation),<sup>3</sup> Regulation No. 883/2013 obliges Member States to designate an anti-fraud coordination service to facilitate effective cooperation and an exchange of information 'of an operational nature'(AFCOS).<sup>4</sup> The Regulation, however, does not 'harmonise' the structure and functioning of the AFCOs, hence there are considerable differences among the national Coordination Services in terms of their competence, powers, and size. Some have limited coordinating roles, while others have full investigative powers.<sup>5</sup> In a recent evaluation of Regulation 883/2013, such a diversity of roles and profiles has been identified as a factor that may hamper the effectiveness of the cooperation with AFCOS.

AFCOS is just a service to facilitate cooperation between OLAF and the 'competent authorities'. EU law – both in horizontal and sectoral legislation – provides that there must be a 'competent' authority for the purpose of the applicable regulation, but national law is free to determine which authority is competent. In this regard, AFCOS *may* be regarded by national law, 'where appropriate', as the competent authority for the purposes of Regulation 883/2013 (but not necessarily so).<sup>6</sup>

In other words, the national partners of OLAF which are designated as being 'competent' by national law are the 'competent authorities' for the purposes of the applicable instrument (either horizontal or sectoral). OLAF, therefore, is not part of a network composed of a limited number of actors, but interacts with a variety of authorities identified by national law.

1 Art. 5, para. 1 of Regulation No. 883/2013.

2 Art. 8, paras. 2 and 3 of Regulation No. 883/2013.

3 See Recital 10 of Regulation No. 883/2013.

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

5 Commission Staff Working Document of 2 October 2017, SWD(2017) 332 final, p. 24.

6 Art. 3(4) Regulation No. 883/2013.

## 2.1.2 Transfer of information from AFCOS (national counterparts) to OLAF

### 2.1.2.1 Obligations for AFCOS to transfer information to OLAF

There is no special normative regime for exchanging information with AFCOS. As said, this is just a service to 'facilitate cooperation and exchange of information, including information of an operational nature', but the exchange of information takes place between OLAF and the national competent authorities (and it depends on national law whether AFCOS is a 'competent authority' or not).<sup>7</sup> In other words, the 'competent authority' can be either AFCOS or another national authority, or both, and the EU legal framework does not make any difference as regards the obligations to transfer information (therefore, see below, section 2.1.3).

## 2.1.3 Exchange of information with other national administrative authorities

### 2.1.3.1 Obligations for national administrative authorities to transfer information to OLAF

EU law provides for at least three modalities for exchanging information: through shared databases, on request, and spontaneously.

As regards shared digital systems, sectoral legislation provides for 'databases' (or electronic data exchange systems) between the Commission and the Member States. OLAF's access to such databases is regulated by Art. 6 Regulation 883/2013. This Article refers to the pre-investigative phase (prior to the opening of an OLAF investigation).

- For example, as regards customs, Reg. 515/97 (amended in 2003, 2008, and 2015) establishes rules for the exchange of information between the Commission and the competent customs authorities, and establishes an automated information system (CIS), with the aim to 'assist in preventing, investigating and prosecuting operations which are in breach of customs (...) legislation by making information available more rapidly (...)'.<sup>8</sup>

Art. 24 identifies the categories of data that need to be included. Implementing acts specify the items requested for each category (Art. 25).<sup>9</sup> Art. 31 states: 'The inclusion of data in the CIS shall be governed by the laws, regulations and procedures of the supplying Member State and, where appropriate, the corresponding provisions applicable to the Commission in this connection, unless this Regulation lays down more stringent provisions'.

Regulation 1525/2015 introduced two new data directories: the Container Status Message (CSM, Art. 18a Regulation 515/97) and the Import, Export and Transit (IET).

CSM and IET, as well as the Irregularities Management System (IMS) are operated under the AFIS platform, 'a collection of applications facilitating the exchange of anti-fraud information between OLAF and competent administrations in the framework of the Mutual Assistance Regulation (515/97)'.<sup>10</sup>

<sup>7</sup> Art. 3(4) Reg. 883/2013.

<sup>8</sup> Art. 23(2) 515/97. See also Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes [2009] OJ L-323/20, which establishes the CIS 'to assist in preventing, investigating and prosecuting serious contraventions of national law by making information available more rapidly (...)'. See K. Limbach, *Uniformity of Customs Administration in the European Union* (Oxford, Hart, 2015) p. 173; E. Porebska, 'Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud' [2016] *Eucri* 52.

<sup>9</sup> See, for example, Commission Implementing Regulation 2016/346 of 10 March 2016 determining the items to be included in the Customs Information System [2016] OJ L-65/40.

<sup>10</sup> Privacy statement for the Anti-fraud information system (AFIS) user register and IT service management tools (OLAF DPO-81), March 2012.

As regards spontaneous and on request exchange of information, Art. 8(2)(3) Reg. 883/2013 states that: competent authorities ‘shall, at the request of the office or on their own initiative, transmit to the Office any document or information they hold which relates to an ongoing investigation by the Office’. They are also obliged to ‘transmit to the Office any other document or information considered pertinent which they hold relating to the fight against fraud, corruption and any other illegal activity affecting the financial interests of the Union’. Art. 1(5) 883/2013 provides that Member States’ competent authorities may conclude administrative arrangements with OLAF, particularly as regards the transmission of information and the conduct of investigations.<sup>11</sup>

- Similar rules can be found in sectoral legislation, too. As regards customs, Regulation 515/97 regulates the relations between national competent authorities and the Commission in particular as regards a spontaneous exchange of information, providing that national authorities shall communicate to the Commission ‘any information they consider relevant concerning: - goods which have been or are suspected of having been the object of breaches of customs or agricultural legislation, - methods or practices used or suspected of having been used to breach customs or agricultural legislation, - requests for assistance, action taken and information exchanged in application of Articles 4 to 16 which are capable of revealing fraudulent tendencies in the field of customs and agriculture’.<sup>12</sup> Furthermore, they shall communicate to the Commission ‘any relevant information’ when they become aware of operations that constitute, or appear to constitute, breaches of customs legislation that are of particular relevance at the EU level.<sup>13</sup>
- As regards structural funds, Art. 74(3) provides that Member States shall inform the Commission, ‘upon request’, of the results of the examinations of complaints concerning structural funds.

Furthermore, in this field, with regard to the spontaneous exchange of information, national authorities have clear ‘reporting duties’ towards the Commission. Commission-delegated Reg. 2015/1970 clarifies which data are to be provided.<sup>14</sup> This data refers to irregularities affecting an amount exceeding € 10,000 that have been the subject of a primary administrative or judicial finding. Art. 3(5) clarifies that ‘where national provisions provide for the confidentiality of investigations, communication of the information shall be subject to the authorisation of the competent tribunal, court or other body in accordance with national rules’. Commission implementing Reg. 2015/1974 sets out the frequency of and the format for the reporting of irregularities.

Reg. 1303/2013 provides that ‘[A]ll official exchanges of information between the Member States and the Commission shall be carried out using an electronic data exchange system. The Commission shall adopt implementing acts establishing the terms and conditions with which that electronic data exchange system is to comply’ (Art. 74(4)).

It has been observed that in this field, unlike other areas (such as customs), there are no existing instruments to ensure a high level of cooperation between administrative authorities.<sup>15</sup>

11 So far 11 administrative arrangements have been established. See ICF final report, p. 103.

12 Art. 17 Regulation 515/97.

13 Art. 18 Regulation 515/97.

14 Art. 3(2) Commission Regulation 2015/1970.

15 G. Kessler, International Conference to European Parliament, 9 November 2016, in *Cooperation project in the anti-fraud sector* (Milan, Gangemi, 2017) p. 333.



### 2.1.3.2 Type of information

When regulating the modalities of information exchange, EU law often defines what type of information needs to be provided. In such indications, unsurprisingly, one can notice a different level of detail according to the modality used for the exchange. As regards databases, for example, sectoral legislation on customs defines the items to be included in the CIS database (see Art. 24 Regulation 515/97, and Commission Implementing Regulation 2016/346).

As regards reporting duties, one may observe that some more discretion is left for the national legislators' authorities, in the sense that the indicated information has a more evident operational nature and presupposes some kind of analysis and decision made at the national level. For example, as regards irregularities above € 10,000 that have been subject to a primary administrative or judicial finding, Member States shall provide information on (not only the fund, the goal and the number of the operational programme, the identity of the persons concerned etc., but also) the practices employed in committing the irregularity; and, 'where appropriate', whether the practice gives rise to suspected fraud; the manner in which the irregularity was discovered, etc.

When it comes to a spontaneous exchange and an exchange on request, the EU legal framework – both horizontal and sectoral – remains vaguer, and refers to 'any information' or 'any relevant information'. In this sense regard, it becomes relevant to analyse what type of information national authorities are allowed and willing to transmit.

### 2.1.3.3 Consequence of the official opening of an OLAF investigation

The EU legal framework for OLAF investigations distinguishes between access to information prior to the opening of an investigations, and during an official investigation (i.e., it does not outline a clear threefold distinction between the pre-investigative phase, case selection, and investigations).

Before the opening of an investigation, OLAF can receive information giving rise to a suspicion of EU fraud from any third party (it can even be anonymous).<sup>16</sup> Furthermore, Article 6 of Regulation 883/2013 provides for the authority to access information in databases held by EU IBOAs. In reality, Article 5 of the Guidelines on Investigation Procedures seems to go beyond such powers. Besides the access to EU databases, during the case selection OLAF can also collect information within the framework of operational meetings and conduct fact-finding missions in Member States. Nevertheless, before the official opening of an OLAF investigation, OLAF's authority to request information from other authorities is not expressly regulated – and neither is the obligation to comply with an OLAF request.

During the investigation, Article 8(2) Regulation 883/2013 provides for a more general obligation for national authorities to transmit, 'at the request of the Office or on their own initiative, any document or information they hold which relates to an ongoing investigation by the Office'.

As a matter of fact, the distinction between a pre/post official opening of an investigation only seems to be relevant as regards OLAF's power to request information from other authorities. The spontaneous transfer of information to OLAF does not seem to depend on whether an official investigation has been opened or not: Article 8(3) of Regulation 883/2013 provides that IBOAs and national authorities 'shall transmit to the Office any other document or information considered pertinent which they hold relating to the fight against fraud, corruption and any other illegal activity affecting the financial interests of the Union'.

<sup>16</sup> Art. 5 of Regulation 883/2013.

#### **2.1.3.4 Limitations on the exchange of information**

Just a few express limits are provided by EU law. In particular, horizontal legislation provides for limits only before the official opening of an investigation. Article 6 Regulation 883/2013 on the right to access information held by EU IBOAs provides that '[I]n exercising that right of access, the Office shall respect the principles of necessity and proportionality'.

On the other hand, Regulation 883/2013 does not refer to any limit: Article 8 does not refer to any specific principles (based on EU law) limiting the transfer of information to OLAF.

#### **2.1.3.5 References to limits created by national law**

As occurs with regard to investigative powers, also the obligation for national authorities to transfer information to OLAF is strongly dependant on national law. Article 8 Regulation 883/2013 indeed clarifies that national authorities are obliged to transfer information only 'in so far as national law allows' for this.

Similar references to national law can also be found in sectoral legislation. As regards structural funds, Article 3(5) of Commission Regulation 2015/1970 clarifies that 'where national provisions provide for the confidentiality of investigations, communication of the information shall be subject to the authorisation of the competent tribunal, court or other body in accordance with national rules'. Similarly, see Art. 3 of Reg. 515/97 as regards customs.

#### **2.1.3.6 For what purposes can OLAF use the received information?**

There is no specific reference to the purposes in OLAF's horizontal legislation. They seem to be implicit in OLAF's competence and in the phases during which information is received (before the opening of an investigation or during the investigation).

Some further indications can be found in sectoral legislation. For example, as regards customs, Article 30(1) of Regulation 515/97 states that the information included in the databases can only be used for the objective of assisting in preventing, investigating and prosecuting operations which are in breach of customs legislation; it can be used for administrative or other purposes 'with the prior authorisation of the CIS partner which introduced the data into the system subject to conditions imposed by it (...)'.

As regards the reporting duties in the field of structural funds, Article 5 of Commission Regulation 2015/1970 provides that the Commission may use the information provided by Member States to 'perform risk analysis'. It is not clear whether this information can be used to conduct OLAF investigations (and whether it can be included in the final report).

#### **2.1.3.7 Obligations for OLAF to transfer information to national administrative authorities**

Ever since the early 1990s (see the case *Zwartvelt*, C-2/1988), the Court of Justice has clarified that the principle of sincere cooperation also operates in another sense, i.e., from the Commission to the national authorities that are responsible for ensuring that EU law is applied and respected in the national legal systems. In that case, the Commission was ordered to transfer to national judicial authorities reports of inspections and any documents concerning compliance with the Community rules on sea fisheries.

OLAF's horizontal legal framework has now codified this obligation, but has still left some discretion to OLAF. Prior to the initiation of an official investigation, Article 3(6) Regulation 883/2013 provides that '[W]here, before a decision has been taken whether or not to open an *external investigation*, the Office handles information which suggests that there has been fraud,

corruption or any other illegal activity affecting the financial interests of the Union, it *may* inform the competent authorities of the Member States concerned and, where necessary, the competent Commission services’.

After the initiation of an OLAF investigation, Article 12(1) Regulation 883/2013 states that: ‘Without prejudice to Articles 10 and 11 of this Regulation and to the provisions of Regulation (*Euroatom, EC*) No. 2185/96, the Office *may* transmit to the competent authorities of the Member States concerned information obtained in the course of *external investigations* in due time to enable them to take appropriate action in accordance with their national law’.

#### **2.1.4 Exchange of information with national judicial authorities**

##### **2.1.4.1 Obligations for national judicial authorities to transfer information to OLAF**

Normally (with some exceptions, see for example point 2.1.4.7) the EU horizontal legal framework on OLAF does not distinguish between administrative or judicial authorities, but refers to ‘competent authorities’. The obligations as such concerning the transfer of information are, therefore, the same. Nevertheless, the fact that they apply ‘in so far as national law allows’ may imply substantial differences in their modalities and limits.

Furthermore, the Second Protocol to the PIF Convention provides for rules on information exchange between Member States (including judicial authorities) and the Commission to ensure effective actions against fraud, corruption and money laundering affecting the EU budget. This Protocol has recently been replaced by PIF Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law,<sup>17</sup> which will enter into force in 2019. These rules are formulated more like a possibility (‘*may*’) rather than a real obligation.

The applicable instruments refer to a general exchange of information, both on request and spontaneously. No specific modalities (e.g. databases, reporting duties, etc.) are provided as regards the exchange of information with judicial authorities.

##### **2.1.4.2 Type of information**

Since it does not concern specific reporting duties, there is no specification of the type of information to be transferred (‘any information’). This is a deliberate choice, since ‘[t]here are no good reasons for restricting them. Given the wide range of cooperation situations that may arise, information needs will relate to a whole series of practical possibilities depending on the individual case. The concrete nature of the information will depend on progress in investigations at the time when cooperation commences and, of course, on the specific features of the case in which information is required as a basis for further action. The information exchanged (...) might, for instance, concern: - the nature of the fraud and its legal context; - the *modus operandi*; - the persons or bodies corporate involved, and personal data more generally.’<sup>18</sup>

##### **2.1.4.3 Consequence of the official opening of an OLAF investigation**

See 2.1.3.3.

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<sup>17</sup> OJ L 198/29, 28.07.2017.

<sup>18</sup> See the Explanatory Report on the Second Protocol to the Convention on the protection of the European Communities’ financial interests [1999] OJ C-091/8.

#### **2.1.4.4 Limitations on the exchange of information**

Article 7(2) of the Second Protocol to the PIF Convention provides that: ‘The Commission and the competent national authorities shall take account, in each specific case, of the requirements of investigation secrecy and data protection’. A similar provision can be found in the PIF Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law.

#### **2.1.4.5 References to limits created by national law**

Article 7(2) of the Second Protocol to the PIF Convention, as well as the PIF Directive 2017/1371, states that national authorities ‘may’ exchange information. As clarified in the Explanatory Report, for example, ‘the national law of each Member State will apply to the confidentiality of investigations’.

#### **2.1.4.6 For what purposes can OLAF use the received information?**

There is no specific reference to the use of information during the different enforcement phases (pre-investigations, case selection, investigations). Art. 7(2) of the Second Protocol to the PIF Convention provides that Member States may ‘set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed’. A similar provision can be found in the PIF Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law.

#### **2.1.4.7 Obligations for OLAF to transfer information to national judicial authorities**

See 2.1.3.7. It is worth mentioning that, compared to the possibility to transfer information obtained in the course of external investigations to the competent authorities (which may be either administrative or judicial), Article 12(2) Regulation 883/2013 provides for a real obligation for OLAF (*‘shall’*) to transmit information obtained in the course of *internal* investigations to national *judicial* authorities (if such information concerns facts that fall within the jurisdiction of a national judicial authority).

On the other hand, there is no reference to an obligation to inform judicial authorities as regards information obtained in the course of external investigations (Art. 12(1) applies, which states that OLAF may transmit information).

## **2.2 DG COMPETITION**

### **2.2.1 General**

#### **2.2.1.1 Introduction: tasks of DG COMP and information needed to perform these tasks**

The tasks of the EU Commission (DG COMP) pertain to EU competition law enforcement, which is divided into four main areas: anticompetitive agreements between competitors (cartels), abuse of a dominant position, merger control and state aid. EU competition rules are laid down in the Treaty and are directly applicable in the EU Member States.

Generally, EU competition law procedure as carried out by DG COMP can be broken down into two stages.<sup>19</sup> The first one is the fact-finding or investigative stage, during which DG COMP enquires into whether companies are violating or could potentially violate EU competition rules. Following the investigative stage, DG COMP may decide to move on to the second stage, that of

<sup>19</sup> See: Kerse & Khan 2005, para. 38 et seq.

hearing and deciding. Depending on the situation, the final decision can contain a prohibition of certain conduct and the imposition of remedies or fines.

DG COMP enforces EU competition rules together with the national competition authorities (NCAs) of the EU Member States. These authorities and the European Commission exchange information on the implementation of EU competition rules through the European Competition Network (ECN). For the purpose of applying Articles 101 and 102 TFEU, DG COMP and NCAs retain the power to provide one another with, and use in evidence, any matter of fact or of law, including confidential information (Article 12(1) Regulation 1/2003).

*Legal and Institutional Framework:*

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 (Regulation 1/2003) is the Regulation that has marked the decentralization of EU competition law enforcement, by conferring on the EU Commission and the NCAs, in parallel, the authority to enforce EU competition rules. This Regulation establishes the enforcement powers with which the EU Commission is vested. Regulation 773/2004 is the procedural Regulation for EU competition law enforcement.<sup>20</sup> Other important sources include the ECN Notice<sup>21</sup> and the notice on cooperation between the Commission and the national courts.<sup>22</sup>

### **2.2.1.2 National partners**

According to Recital 34 of Regulation 1/2003, Member States should designate and empower authorities to apply Articles 101 and 102 TFEU as *public* enforcers. These authorities are referred to throughout Regulation 1/2003 as 'national competition authorities'. In addition, the same Regulation prescribes that Member States should designate administrative and judicial authorities to carry out functions entrusted to competition authorities by the Regulation.<sup>23</sup> Such designated authorities may thus also include courts.<sup>24</sup>

### **2.2.1.3 Possibility to receive information that cannot be gathered by means of its investigative powers**

The EU Commission – and for that matter DG COMP – is vested with extensive investigative powers.<sup>25</sup> These powers include the performance of sectoral investigations,<sup>26</sup> requests for information,<sup>27</sup> the power to take oral statements<sup>28</sup> and the power to carry out on-the-spot inspections of both business<sup>29</sup> and private premises.<sup>30</sup> DG COMP does not explicitly have the power to record telecommunications or receive information on bank accounts. However, given that within the context of the ECN, Member States can transmit to the EU Commission any matter of fact or

20 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Arts. 81 and 82 of the EC Treaty

21 Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03)

22 Commission Notice on co-operation between the Commission and the courts of the EU Member States in the application of Arts. 81 and 82 EC (2004/C 101/04)

23 Recital 35, Regulation 1/2003.

24 See: Kerse & Khan 2005, p.46.

25 See: Scholten & Simonato, EU Report, 2017.

26 Art. 17, Regulation 1/2003.

27 Art. 18, Regulation 1/2003.

28 Art. 19, Regulation 1/2003.

29 Art. 20, Regulation 1/2003.

30 Art. 21, Regulation 1/2003.

law, including confidential information,<sup>31</sup> it cannot be excluded that if certain NCAs do have the power to record telecommunications and monitor bank accounts, this information can eventually be transmitted to DG COMP.

## 2.2.2 Exchange of information with national counterparts (NCAs)

### 2.2.2.1 Obligations for NCAs to transfer information

No special regime exists with regard to the obligation of NCAs to transfer information to DG COMP; however, from Regulation 1/2003 we can deduce certain possibilities. As a general remark, Regulation 1/2003 is very explicit in that, notwithstanding any national provisions to the contrary, the flow of information between national competition authorities and DG COMP and its use in evidence is allowed, even if such information is confidential. The limitation on this is that the transmitted information can be used for the application of Articles 101 and 102 TFEU or for the application of national competition law, as long as the latter relates to the same case and does not lead to a different outcome.<sup>32</sup> The type of information can range from documents and statements to digital information.<sup>33</sup>

According to Article 11(4) Regulation 1/2003, “at the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case.” Thus, the transmission of information upon DG COM’s request is indeed possible. Finally, the transmission of information primarily takes place digitally.<sup>34</sup>

### 2.2.2.2 Type of information

The type of information that NCAs must transmit to DG COMP is elaborated upon throughout Regulation 1/2003. Important guidance is also to be found in the ECN Notice. Specifically:

- a) *General information*: If the EU Commission so requests, the governments and competition authorities of the Member States shall transfer any information that is necessary to carry out the duties assigned to the EU Commission by Regulation 1/2003.<sup>35</sup>
- b) *Information on the commencement of proceedings*: Whenever a national competition authority starts an investigation it shall inform DG COMP. In addition, information on ongoing investigations shall be communicated to the Commission in writing, after the first formal investigative measure.<sup>36</sup> The rationale behind this obligation is to allow the ECN to detect multiple procedures and to avoid a potential reallocation of the case in question.<sup>37</sup>
- c) *Information on the closure of proceedings*: No later than 30 days before a decision has been adopted, NCAs must inform DG COMP on the closure of proceedings.<sup>38</sup> They do so by providing a summary of the case and a copy of the intended decision. DG COMP can request copies of any additional documents relating to the case.<sup>39</sup>

31 Art. 12(1), Regulation 1/2003.

32 Recital 16, Regulation 1/2003; Art. 12 Regulation 1/2003

33 ECN Notice, para. 26.

34 From an informal conversation with a DG COMP official, November 2017.

35 Art. 18(6), Regulation 1/2003.

36 Paras. 16 and 17 ECN Notice.

37 Regulation 1/2003, Art. 11(3).

38 ECN notice, para. 49.

39 Brammer, S., *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, Hart 2009, p. 141.

- d) *Information concerning inspections carried out by national competition authorities at the request of DG Comp*: Information gathered by an NCA on the basis of Article 22(2) of Regulation 1/2003, at the request of DG COMP, shall be transmitted to DG COMP.

### 2.2.2.3 Consequence of the official opening of a DG COMP investigation

The official opening of a DG COMP investigation does not have any consequence for the transfer of information.<sup>40</sup>

### 2.2.2.4 Limitations on the exchange of information

Generally, the transmission of information does not take place in an unrestricted manner, but is subject to a purpose limitation.

- a) *Purpose limitation*: In the *Dow Benelux* case,<sup>41</sup> the CJEU has clarified what purpose limitation means: information obtained during an investigation must not be used for purposes other than those laid down in the decision ordering the investigation in question.<sup>42</sup> This case law suggests that the decision ordering an investigation must state very clearly the purpose of the investigation. This is important for an additional reason: for preventing fishing expeditions.<sup>43</sup> According to Article 12(1) of Regulation 1/2003, notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the ECN, even where the information is confidential, as long as it serves the purpose of applying Articles 101 and 102 TFEU.<sup>44</sup> Article 12(2) of Regulation 1/2003 however establishes a limitation, but only insofar as the use of information in evidence is concerned, thus it does not per se affect the transmission thereof. Specifically, exchanged information can be used in evidence only in respect of the subject matter for which it was collected by the transmitting NCA.
- b) *Other*: Even though professional secrecy is mentioned in Regulation 1/2003,<sup>45</sup> it does not play any role whatsoever in the nexus between the NCAs and DG COMP, since it does not impose any limits on the exchange of information within the ECN. Rather, it forbids members of the ECN from disclosing information outside the ECN, such as to undertakings or other interested parties that might request access to the file of the case. It has been submitted<sup>46</sup> that this arrangement is not in line with a previous judgment of the CJEU in the *Spanish Banks* case<sup>47</sup> and leaves unanswered the question of what the consequences would be when a specific piece of information is classified as confidential under national law, and is then transmitted to the ECN or DG COMP, and if this information is later disclosed somewhere else.<sup>48</sup>

40 From an informal conversation with a DG COMP official, November 2017.

41 Case 85/87 *Dow Benelux v. European Commission* [1989] ECLI:EU:C:1989:379

42 *Dow Benelux v. European Commission*, para 17.

43 Case C-583/13 P - *Deutsche Bahn and Others v Commission* [2015] ECLI:EU:C:2015:404, para. 66.

44 Recital 16, Regulation 1/2003 and Art. 12(1), Regulation 1/2003

45 Art. 28, Regulation 1/2003.

46 Brammer 2009, p. 147.

47 Case C-67/91 - *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* [1992] ECLI:EU:C:1992, p.330.

48 Brammer 2009, p.157

### **2.2.2.5 References to limits created by national law**

There is a reference to national law, but in the sense that any limits imposed by national law are not applicable insofar as the exchange of information between the members of the ECN are concerned. This information, however, must only be used for the purpose of applying EU competition law.<sup>49</sup>

### **2.2.2.6 For what purposes can DG COMP use the received information?**

DG COMP can first of all use the received information in evidence for the purpose of applying Articles 101 and 102 TFEU and in relation to the subject matter for which this piece of information was collected by the transmitting national authority.<sup>50</sup> At this stage, professional secrecy obligations prescribed by Article 28(2) Regulation 1/2003 can be triggered insofar as – during the hearing period – undertakings or other interested parties request access to the file of the case.

Additionally, according to Article 12(3) of Regulation 1/2003, DG COMP can use transmitted information in evidence to impose sanctions on natural persons subject to the following conditions: if the law of the transmitting authority provides (i) for sanctions of a similar kind in relation to an infringement of Articles 101 and 102 TFEU or, in the absence of such a similar provision, (ii) the information has been collected in a manner that respects the same level of the protection of defence rights of natural persons.

### **2.2.2.7 Obligations for DG COMP to transfer information to NCAs**

DG COMP does not have as many obligations to transfer information to NCAs as NCAs do. The most important possibility is the one found in Article 11(2) of Regulation 1/2003, according to which the EU Commission must transmit to NCAs copies of the most important documents that it has in its possession. These documents include the following: Commission decisions on the finding and termination of an infringement, decisions on interim measures, commitment decisions which find that Articles 101 and 102 TFEU are not applicable to a specific agreement (the finding of inapplicability). In addition, if an NCA so requests, DG COMP must provide it with a copy of other existing documents which are important for assessing a certain case.<sup>51</sup>

## **2.2.3 Exchange of information with other national administrative authorities**

The possibility of the transmission of information by national administrative authorities other than the national ECN counterpart is not provided for in the legal framework. DG COMP does not even consider this to be a necessity and thus far there has been no experience whatsoever.<sup>52</sup> In any case, it is assumed that any transmission would take place through the national competition authorities.

49 Recital 16, Regulation 1/2003.

50 Art. 12(2), Regulation 1/2003.

51 Art. 11(2), Regulation 1/2003,

52 From an informal conversation with a DG COMP official, November 2017.



## 2.2.4 Exchange of information with national judicial authorities

### 2.2.4.1 Obligations for national judicial authorities to transfer information to DG COMP

First of all, it is important to stress which authorities – according to EU legislation and case law – qualify as judicial authorities. The Commission notice on co-operation between the Commission and the courts of the EU Member States<sup>53</sup> (Cooperation Notice) explains that national courts are ‘those courts and tribunals within an EU Member State that can apply Articles 101 and 102 TFEU and are authorised to ask a preliminary question...’<sup>54</sup> In this connection, the CJEU has held that a national competition authority cannot be considered to be a court or a tribunal within the meaning of the Treaty and thus cannot make a reference for a preliminary ruling, since its actions do not lead to a decision which is of a judicial nature.<sup>55</sup>

As a general remark, the CJEU has explained that national judicial authorities acting within the scope of their jurisdiction are under an obligation to cooperate with Union institutions in good faith.<sup>56</sup> This obligation is reciprocal, thus it is also incumbent upon the EU institutions.

Regulation 1/2003 governs cooperation between DG COMP and the national courts. Further details are to be found in the Cooperation Notice and in the Antitrust Manual, i.e. the internal document of DG COMP.

To begin with, in applying Articles 101 and 102 TFEU, the national courts can request the DG COMP to submit an *amicus curiae*. In doing so, they can either send a request in writing to the postal address of DG COMP<sup>57</sup> or make a request electronically by sending an e-mail to DG COMP.<sup>58</sup> By requesting the Commission’s observations, national courts must transmit documents that are necessary for the Commission to assess the case and to submit its views.<sup>59</sup> DG COMP may request a national court to transmit or ensure the transmission of any documents which are necessary for the assessment of a case.<sup>60</sup>

Second, according to Article 15(2) Regulation 1/2003 Member States must transmit to DG COMP a copy of any written judgment of a national court deciding on the application of Articles 101 and 102 TFEU.

Third, the national courts play a significant role when Commission officials carry out an on-site inspection of business premises and the undertaking opposes the inspection, thereby necessitating the assistance of the police or of a national enforcement authority and this requires prior judicial authorization by a national judicial authority.<sup>61</sup> In addition, the Commission can require such an authorization from a national court as a precautionary measure.<sup>62</sup>

The aforementioned suggests that these obligations are triggered on request.

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53 Commission notice on co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/4 (Cooperation Notice)

54 Para. 1, Cooperation Notice.

55 Case C-53/03 - *Syfait and Others v GlaxoSmithKline* [2005] ECLI:EU:C:2005:333, paras. 30 et seq.

56 Case C-94/00 - *Roquette Frères* [2002] ECLI:EU:C:2002:603, para. 31.

57 Para. 18, Cooperation Notice.

58 *Idem*.

59 Art. 15(3), Regulation 1/2003.

60 *Idem*.

61 Art. 20(6), Regulation 1/2003.

62 Art. 20(7), Regulation 1/2003.

#### **2.2.4.2 Type of information**

The legal framework contains a very general provision, namely ‘any documents necessary for the assessment of the case.’<sup>63</sup>

#### **2.2.4.3 Consequence of the official opening of a DG COMP investigation**

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

#### **2.2.4.4 Limitations on the use and exchange of information**

Other than the purpose limitation discussed above, the EU legal framework does not provide for other limits concerning the transmission of information from national judicial authorities to DG COMP. The EU framework contains limits concerning the reverse situation, i.e., that of DG COMP transmitting information to national judicial authorities (see below).

#### **2.2.4.5 References to limits created by national law**

The Cooperation Notice provides that since Regulation 1/2003 does not establish a procedural framework within which the observations of DG COMP to the national courts are to be submitted, national procedural rules and practices determine the applicable procedural framework.<sup>64</sup> However, potential limits imposed by national law are in turn subjected to important EU law principles: the national procedural framework must in any case be compatible with EU law and with the fundamental rights of the persons involved, and in conformity with the principles of effectiveness and equivalence.<sup>65</sup>

#### **2.2.4.6 For what purposes can DG COMP use the received information?**

DG COMP can use the received information for consistency in the application of the competition rules.<sup>66</sup> In addition, DG COMP can use transmitted information so that it can remain informed concerning cases for which it may need to submit observations.<sup>67</sup>

#### **2.2.4.7 Obligations for DG COMP to transfer information to national judicial authorities**

DG COMP has important obligations to transfer information to national judicial authorities. Pursuant to Article 15(1) Regulation 1/2003 the national courts can request the Commission to transmit to them certain information which it has in its possession or an *amicus curiae* regarding the application of EU Competition rules. The Cooperation Notice and the Antitrust Manual clarify the type of information that can be transferred by DG COMP to national judicial authorities. Thus, DG COMP can send documents but also information of a procedural nature, such as, for instance, information on whether DG COMP has initiated proceedings in a certain case.<sup>68</sup>

The transmission of information from DG COMP to the national judicial authorities is not without restriction. First, as regards the submission of observations on the part of DG COMP to the national courts, this is only done if the coherent application of Articles 101 and 102 TFEU so

63 Art. 15(3), Regulation 1/2003.

64 Para. 34, Cooperation Notice.

65 Para. 35, Cooperation Notice.

66 Recital 21, Regulation 1/2003.

67 Para. 37, Cooperation Notice.

68 Para. 21, Cooperation Notice.

requires.<sup>69</sup> Second, before transmitting information covered by professional secrecy to a national authority, DG COMP must ask the national court whether it will guarantee the protection of confidential information and business secrets. If the national court cannot do so, DG COMP will not transmit this information.<sup>70</sup> Second, DG COMP can refuse to transmit information if it believes that there are overriding reasons in relation to the need to safeguard the interests of the EU or to avoid any interference with the EU Commission's independence.<sup>71</sup>

## 2.3 ECB

### 2.3.1 General

#### 2.3.1.1 Introduction: tasks of the ECB and the information needed to perform these tasks

Since November 2014 the ECB is exclusively responsible for the micro-prudential supervision of the euro area's banks.<sup>72</sup> This is attained through the Single Supervisory Mechanism (SSM), an integrated system of banking supervision, which comprises the ECB and national competent authorities (NCAs). A key aspect of this system is that even though NCAs form a necessary element of the SSM, the ECB is responsible for the effective and consistent functioning of the SSM (Article 6[1] SSM Regulation). In this respect, in a recent judgment<sup>73</sup> the General Court took the view that the SSM does not result in a distribution of competences between the ECB and NCAs but is rather a mechanism that allows the *exclusive competences* given to the ECB to be implemented within a decentralised framework.<sup>74</sup>

To facilitate supervision, credit institutions have been classified as 'significant' and as 'less significant'. This classification is based on a number of criteria, such as their size, their importance for the economy and the significance of the banks' cross-border activities.<sup>75</sup> The ECB directly supervises significant banks, while NCAs carry out the day-to-day supervision of less significant ones. However, the ECB can also decide at any time to assume supervision over a less significant bank.<sup>76</sup>

The daily supervision of significant banks is carried out by Joint Supervisory Teams (JSTs), i.e. teams composed of ECB staff and staff from the relevant NCA. If there is a suspicion concerning an infringement of directly applicable EU law or of an ECB decision or regulation, the JST must refer the matter to the independent investigating unit of the ECB (IIU).<sup>77</sup> When a breach is established, the ECB has the power to impose sanctions.

As can be seen, the architecture of the SSM requires that there is a constant flow of information between the ECB and NCAs. Due to their linguistic capabilities, their long experience and their proximity to the credit institutions in question, NCAs can provide the ECB with information that

69 Case C-429/07 *Inspecteur van de Belastingdienst* [2009] ECLI:EU:C:2009, p. 359.

70 Case T-353/94 *Postbank NV v European Commission* [1996] ECLI:EU:T:1996 119, para. 93.

71 *Idem*.

72 The SSM Regulation defines 'credit institutions' by referring to the definition contained in Regulation EU/575/2013. In this respect, the ECB does not only supervise banks, but also undertakings whose business entails taking deposits or other repayable funds from the public and granting credits for its own account. For the sake of simplicity, we use the term 'bank' to refer to the supervised credit institutions.

73 Case T-122/15 - *Landeskreditbank Baden-Württemberg v ECB* [2017] ECLI:EU:T:2017:337.

74 *Ibid.* para. 54.

75 Art. 6(4) SSM Regulation.

76 Recital 5, SSM Framework Regulation.

77 Art. 123, SSM Framework Regulation.

the EU institution may not be able to have access to. Finally, the ECB needs information from NCAs since it is exclusively responsible for the effective functioning of the SSM, thus also for less significant banks.

*Legal Framework:*

Important legal sources are, first, the SSM Regulation,<sup>78</sup> which is the Regulation conferring enforcement tasks and powers upon the ECB in the area of banking supervision and, second, the SSM Framework Regulation,<sup>79</sup> which establishes the framework for cooperation between the ECB and national authorities. Another important piece of legislation is the Capital Requirements Directive,<sup>80</sup> which has to be transposed into national law. The ECB applies the national legislation transposing the Capital Requirements Directive.<sup>81</sup>

### 2.3.1.2 National partners

A ‘*national competent authority*’ means a national competent authority designated by a participating Member State in accordance with Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (1) and Directive 2013/36/EU (Article 2(2) SSM Regulation). According to Directive 2013/36/EU a ‘‘competent authority’ means a public authority or body officially recognized by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned’’(Article 4(1) point 40 of Directive 2013/36/EU).

It is worth mentioning that according to Article 2(9) of the SSM Framework Regulation, the aforementioned definition is without prejudice ‘to arrangements under national law which assign certain supervisory tasks to a national central bank (NCB) not designated as an NCA. In this case, the NCB shall carry out these tasks within the framework set out in national law and this Regulation. A reference to an NCA in this Regulation shall in this case apply as appropriate to the NCB for the tasks assigned to it by national law’.<sup>82</sup>

### 2.3.1.3 Can the ECB receive information that cannot be gathered by means of its investigative powers?

The ECB is vested with extensive investigative powers, including the power to conduct general investigations, to request information, to interview people and to carry out an on-site inspection of the business premises of supervised entities. During the performance of general investigations, the EU institution can examine the books and records of supervised banks and take copies thereof.<sup>83</sup> Thus, even though the power to access recorded telecommunications and to receive information on bank accounts are not *per se* provided for in the legal framework, it cannot be excluded that (a)

78 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 (SSM Regulation).

79 Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

80 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

81 Art. 4(3), SSM Regulation.

82 Art. 2(9), SSM Framework Regulation.

83 Art. 11(1)(b), SSM Regulation.

the ECB can have this power *indirectly* and (b) that it may eventually receive such information if NCAs do have the power to monitor bank accounts and/or record telecommunications on the basis of their national law.

It should be noted that to what extent the ECB needs additional powers is questionable,<sup>84</sup> as its information position is already very strong.

### 2.3.2 Exchange of information with national counterparts

#### 2.3.2.1 Obligations for national counterparts to transfer information to the ECB

As a general remark, the obligation to exchange information is formulated quite broadly in the SSM Regulation. Specifically, Article 6(2) states that 'both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information. Without prejudice to the ECB's power to receive directly, or have direct access to information reported, on an ongoing basis, by credit institutions, the national competent authorities shall in particular provide the ECB with all information necessary for the purposes of carrying out the tasks conferred on the ECB by this Regulation.' Thus, it becomes apparent from this provision that the obligations for national counterparts are very broad in their scope and the only explicit limitation – as far as the EU legal framework is concerned – is the purpose limitation.

Otherwise, we may distinguish between information that has to be transmitted at *recurring intervals*, because EU law so requires, and information that must be transmitted on the NCAs' initiative (*spontaneously*). Below we provide a few examples of each type of obligation. It goes without saying that the ECB can always *request* the NCAs to transmit 'any information necessary' to carry out its tasks.

*Information at recurring intervals.* NCAs are under an obligation to report to the ECB, on a regular basis, on the performance of their activities concerning the supervision of the banks for which they are responsible. For example, they have to notify the ECB of any material supervisory procedure.<sup>85</sup> In addition, they must transmit information stemming from their verification and on-site activities.<sup>86</sup> NCAs must also report *ex post* to the ECB in relation to the supervision of less significant banks. To that end, the ECB can require NCAs to report to it on a regular basis.<sup>87</sup> At the same time, NCAs must transmit information to the ECB regarding less significant banks in the form of an annual report.<sup>88</sup>

*Spontaneously.* There are a number of circumstances under which the initiative for transmitting information to the ECB rests with the NCA. For example, whenever an NCA receives an application for authorising a bank in a euro area Member State, the NCA must inform, on its own initiative, the ECB within 15 working days.<sup>89</sup> The same holds true when an NCA is of the opinion that an authorization must be withdrawn.<sup>90</sup>

84 See: Scholten & Simonato 2017, p. 16.

85 Art. 6(7)(c) point (i).

86 Art. 21(1), SSM FR.

87 Art. 99(1) SSM FR.

88 Art. 100 SSM FR.

89 Art. 73(1) SSM FR.

90 Art. 80(1) SSM FR.

### 2.3.2.2 Type of information

As stated above, the obligation for NCAs to transmit information to the ECB is formulated very broadly. This means that virtually any type of information – subject to the purpose limitation – can be transferred. The legal framework does not make any other more specific distinction as regards the purpose of the transfer.

### 2.3.2.3 Consequence of the official opening of a ECB investigation

The official opening of an ECB investigation does not affect the transfer of information. First of all, it is important to note that the ECB has established an independent investigating unit (IIU),<sup>91</sup> which is responsible for handling matters referred to it by the ECB whenever the latter suspects one or more breaches.<sup>92</sup> The IIU may exercise any power afforded to the ECB by the SSM Regulation.<sup>93</sup> In addition, the IIU has access to all documents and information collected by the ECB and by the NCAs.<sup>94</sup> Having said this, it becomes evident that it does not make a difference if the ECB needs information before the official initiation of the investigation, since the ECB and the IIU have the same powers and have access to the same information anyway.<sup>95</sup>

### 2.3.2.4 Limitations on the exchange of information

EU law does not provide for limits that are relevant for the interaction between the ECB and the NCAs.

Both the ECB staff and NCA staff are bound by the provisions of the Capital Requirements Directive. Pursuant to Article 53(1) of CRD/IV, persons working or who have worked for competent authorities are bound by the obligation of professional secrecy. At the same time, Article 53(2) CRD/ IV prescribes that professional secrecy obligations prevent competent authorities from exchanging information with each other. Thus, professional secrecy provisions only limit the circulation of information *outside* this closed circle of authorities and does not impose any limits on the circulation of information within the SSM.

### 2.3.2.5 References to limits created by national law

There are no references to limits created by national law.

### 2.3.2.6 For what purposes can the ECB use the received information?

As a general rule, the ECB can use the received information for any purpose, as long as it serves the objectives for which it is responsible and the tasks that have been conferred on it (Article 4 SSM Regulation). Here and there the legal framework also refers to more specific – albeit general – purposes. For example, the ECB may use the received information to exercise its oversight function,<sup>96</sup> to identify risks in individual banks and thus to take measures at an early stage in order to review how NCAs apply SSM standards in relation to less significant banks.

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91 Art. 123, SSM FR.

92 Art. 124, SSM FR.

93 Art. 125(1), SSM FR.

94 Art. 125(3), SSM FR.

95 Art. 125(1), SSM FR.

96 Art. 97.1. SSM Framework Regulation.

### **2.3.2.7 Obligations for the ECB to transfer information to national counterparts**

Like the NCAs, the ECB is also bound by the general obligation to exchange information within the SSM, as enshrined in Article 6(2) of the SSM Regulation. In addition to this general legal provision, obligations on the part of the ECB to transmit information to NCAs can be found in the SSM Framework Regulation. Specifically, the ECB must transfer to NCAs any information which is necessary for NCAs to carry out their role in assisting the ECB.<sup>97</sup> Also information that is necessary so that the NCAs are able to carry out their tasks related to prudential supervision.<sup>98</sup> Finally, if a significant bank is later classified as being less significant, there is an obligation on the part of the ECB to provide the NCA concerned with all necessary information after a change in competence occurs.<sup>99</sup>

### **2.3.3 Exchange of information with other national administrative authorities**

The interaction between the ECB and other national administrative authorities is not as clear-cut as is the interaction between the ECB and the NCAs. In Recital 33 and Article 3(1) of the SSM Regulation, we can find the general proposition that, if necessary, the ECB should enter into memoranda of understanding (MoUs) with authorities which are responsible for markets in financial instruments. These MoUs must indicate how the cooperation between the ECB and the relevant authority will take place in performing their supervisory tasks under Union law in relation to the financial institutions that are covered by the SSM Regulation.

It does not follow from the SSM legal framework (the SSM Regulation and the SSM Framework Regulation) that other national administrative authorities have an obligation to transfer information to the ECB. However, provisions of the Capital Requirements Directive may be relevant in this regard. For example, according to Article 56 CRD IV, notwithstanding professional secrecy and confidentiality obligations, the competent supervisory authorities, thus the ECB included, in the discharge of their supervisory functions can exchange information with authorities which are responsible for the supervision of the financial markets, with authorities which are responsible for maintaining financial stability in the Member States through the use of macro-prudential rules, with reorganisation bodies and with bodies involved in the liquidation and bankruptcy of institutions, as well as with persons responsible for carrying out statutory audits of the accounts of banks.

### **2.3.4 Exchange of information with national judicial authorities**

#### **2.3.4.1 Obligations for national judicial authorities to transfer information to the ECB**

The EU legal framework does not make any reference to obligations for national judicial authorities to transfer information to the ECB. One can see that under the circumstances laid down in Article 13 SSMR, i.e. when the ECB needs to carry out an on-site inspection and this – according to national law – requires *ex ante* authorisation by a national judicial authority, there will inevitably be a need for information exchange. However, the EU legal framework does not contain any such provisions. It is assumed that more information concerning under what

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97 Art. 21(1), SSM FR.

98 Art. 21(3), SSM FR.

99 Art. 48(1), SSM FR.

conditions national judicial authorities may transmit information to the ECB can be found in national laws. Furthermore, it is likely that – if necessary – the transmission of information on the part of judicial authorities will not take place directly between them and the ECB, but will instead be done through the NCAs.<sup>100</sup>

The reverse situation, namely the possibility for the ECB to transmit information to the national judicial authorities, is foreseen in the legal framework (see below 3.7).

#### **2.3.4.2 Type of information**

Not specified by the EU legal framework.

#### **2.3.4.3 Consequence of the official opening of an ECB investigation**

Not applicable.

#### **2.3.4.4 Limitations on the exchange of information**

Not applicable

#### **2.3.4.5 References to limits**

Not applicable.

#### **2.3.4.6 For what purposes can the ECB use the received information?**

Not applicable

#### **2.3.4.7 Obligations for the ECB to transfer information to national judicial authorities**

According to Article 136 SSM Framework Regulation, whenever the ECB suspects – while carrying out the tasks entrusted to it by the SSM Regulation - that a criminal offence may have been committed, it should ask the relevant NCA to inform and refer the matter to the national authorities for investigation and a possible criminal prosecution, in accordance with national law. This is subject to a limitation, particularly if the transmission is prohibited by a specific provision under Union or national law related to the disclosure of such confidential information.<sup>101</sup>

Concerning requests received by the ECB which have been submitted by national criminal investigation authorities, the ECB may provide confidential information subject to three conditions (see Article 2, Decision EU/2016/1162). The NCA concerned ‘commits to acting on behalf of the ECB in responding to such a request’; b) ‘either: (i) there is an express obligation to disclose such information to a national criminal investigation authority under Union or national law; **or** (ii) the relevant legal framework permits the disclosure of such confidential information and there are no overriding reasons for refusing to disclose such information relating to the need to safeguard the interests of the Union or to avoid any interference with the functioning and independence of the ECB, in particular by jeopardising the accomplishment of its tasks’; and c) The NCA in question commits itself to asking the requesting national criminal investigation authority to guarantee that the confidential information provided will be protected from public disclosure.

<sup>100</sup> From an informal telephone conversation with an ECB official (October 2017).

<sup>101</sup> Art. 2(2), Decision(EU) 2016/1162 of the European Central Bank of 30 June 2016 on the disclosure of confidential information in the context of criminal investigations (ECB/2016/19).



## 2.4 ESMA

### 2.4.1 General

#### 2.4.1.1 Introduction: tasks of ESMA and information needed to perform these tasks

ESMA has been established with the purpose of establishing a sound, effective and consistent level of financial regulation and supervision, 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:

- Regulations (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,<sup>102</sup>
- 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).<sup>103</sup> It should be added that 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.<sup>104</sup>

The information that ESMA needs in order to fulfil its supervisory and enforcement aims and tasks includes 'information and data provided by the CRAs and through TRs' as well as 'overall market dynamics' and 'industry-wide developments through engagement with the supervised entities and other external stakeholders.'<sup>105</sup> ESMA has been given extensive direct powers to access the necessary information directly from private actors (CRAs and TRs). ESMA is empowered to conduct three stages of enforcement, i.e., monitoring the application of EU law by CRAs and TRs, investigating alleged breaches of EU law and punishing private actors if investigations reveal a breach. To this end, ESMA has the necessary (investigatory) powers: the

102 Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No. 1060/2009 on credit rating agencies amending the CRAR framework on a few aspects concerning mainly conflicts of interest due to the issuer-pays model and disclosure for structured finance instruments (Recital 1).

103 'A credit rating agency assigns credit ratings, which rate the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories. A trade repository centrally collects and maintain the records of derivatives.' (M. van Rijsbergen (2017), 'Rating' ESMA's accountability for its enforcement powers: 'AAA' status', blog post: <http://eulawenforcement.com/?p=356#more-356> (last visit October 2017).

104 Luchtman, M.J.J.P., Vervaele, J.A.E., Graat, J.J.M., Scholten, M., Simonato, M., Alldridge, P., Ligeti, K., Allegranza, S., Tricot, J., Robinson, G., Blachucki, M., Böse, M., Schneider, A. & Nowak, C. (2017). *Investigatory powers and procedural safeguards - Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities* (ECN/ESMA/ECB). Utrecht: Utrecht University.

105 <https://www.esma.europa.eu/supervision/supervision> (last accessed 19 May 2017)

power to request information directly from CRAs and TRs, which shall supply the information requested, and to examine and obtain copies of or extracts from any records, data, procedures and any other relevant material.

Whereas ESMA thus has, in principle, all the necessary powers to gain direct access to information from the private actors that it supervises and can investigate, there is one difference between two very similar regimes (in relation to CRAs and TRs) concerning supervision and enforcement. In relation to TRs, which collect data from their counterparties (CCPs), ESMA may (at least in theory) need to have access to information gathered by or directly provided to the CCPs. Here, ESMA's supervisory work may require closer cooperation with NCAs as the latter are responsible for supervising the CCPs reporting to TRs. NCAs are amongst the key users of TR data.<sup>106</sup>

#### 2.4.1.2 National partners

ESMA's national partners include a variety of national authorities which are competent for ensuring compliance with EU legislation in the field of ESMA's operations. Concerning the 'inner circle', the Board of Supervisors, the main governing organ of the agency, comprises a list of national competent authorities, such as the Financial Conduct Authority (FCA) in the UK; the list is to be found [here](#).<sup>107</sup> The emerging academic research on ESMA's supervisory powers indeed discusses ESMA's cooperation with the authorities listed on that list.<sup>108</sup> At the same time, looking more closely at the legal framework it becomes clear that depending on the national allocation of competences for some sectoral legislation in the field of ESMA's operations, several national authorities may become partners of ESMA.

Before the creation of ESMA, Regulation 1060/2009 established a system for CRAs to be supervised by national authorities. Its Article 22 (on competent authorities) introduced the following definition of 'competent authorities' in this respect: '1. By 7 June 2010, each Member State shall designate a competent authority for the purpose of this Regulation. 2. Competent authorities shall be adequately staffed, with regard to capacity and expertise, in order to be able to apply this Regulation.' Once ESMA was established by its founding regulation in 2010, CRAR Article 1 amended Regulation 1060/2009 (on the supervision of CRAs before ESMA) by adding: '(p) 'competent authorities' means the authorities designated by each Member State in accordance with Article 22'. The same applied to the EMIR framework (Article 2 (13)).

At the same time, CRAR, EMIR and ESMA's founding regulations also refer to additional/sectoral EU legislation in defining the (outer) 'circle' of ESMA's national partners. To be more specific:

- ESMA's founding Regulation (Article 4): '(3) 'competent authorities' means: (i) competent authorities and/or supervisory authorities as defined in the legislation referred to in Article 1(2); (ii) with regard to Directives 2002/65/EC and 2005/60/EC, the authorities competent for ensuring compliance with the requirements of those Directives by firms providing investment

<sup>106</sup> ESMA's Annual Supervision Report 2016, p. 7

<sup>107</sup> <https://www.esma.europa.eu/about-esma/governance/board-supervisors-and-ncas#title-paragrah-4> (last check October 2017).

<sup>108</sup> Rijsbergen, M.P.M. van and Foster, J. (2017), 'Rating' ESMA's accountability: 'AAA' status in: M. Scholten and M. Luchtman (eds) *Law Enforcement by EU Authorities. Political and judicial accountability in shared enforcement*, Edward Elgar, forthcoming. Rijsbergen, M.P.M. van and Scholten, M. (2016), *ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement*, *European Journal of Risk Regulation*, volume 7, no. 3, pp. 569-579.

services and by collective investment undertakings marketing their units or shares; (iii) with regard to investor compensation schemes, bodies which administer national compensation schemes pursuant to Directive 97/9/EC, or in the case where the operation of the investor compensation scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive.”

- CRAR’s Article 1 also includes ‘sectoral competent authorities’; they imply: ‘national competent authorities designated under the relevant sectoral legislation for the supervision of credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, management companies, investment companies, alternative investment fund managers, central counterparties and prospectuses’ (Article 1 Regulation (EU) No. 462/2013).
- EMIR Article 2 (13) defines a competent authority as: ‘‘competent authority’ means the competent authority referred to in the legislation referred to in point (8) of this Article, the competent authority referred to in Article 10(5) or the authority designated by each Member State in accordance with Article 22.’ Point 8 lists the following legislation: Directive 2004/39/EC (on markets in financial instruments), Directive 2006/48/EC (relating to the taking up and pursuit of the business of credit institutions), Directive 73/239/EEC (on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance), Directive 2002/83/EC (concerning life assurance), Directive 2005/68/EC (on reinsurance), Directive 2009/65/EC (on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)), Directive 2003/41/EC (on the activities and supervision of institutions for occupational retirement provision), Directive 2011/61/EU (on Alternative Investment Fund Managers). Article 10 (5) states that ‘each Member State shall designate an authority responsible for ensuring ... the obligation’ under Article 10 (on non-financial counterparties). Article 22 is specifically devoted to the obligation of MS to assign competent authorities in relation to the supervision and oversight of CCPs.

#### **2.4.1.3 Possibility to receive information that cannot be gathered by means of its investigative powers**

Firstly, it is unlikely that ESMA cannot obtain access to the necessary information as ESMA has extensive powers to request ‘all information that is necessary in order to carry out its duties’ (Articles 61 (1) EMIR and 23b (1) CRAR), including during the monitoring and investigative stages of enforcement – requesting records of telephone and data traffic (Articles 62 (1e) EMIR and 23c (1e) CRAR). Secondly, it can request relevant national authorities to obtain the information that it needs (see the answers to question 1.1. below).

### **2.4.2 Exchange of information with national counterparts**

#### **2.4.2.1 Obligations for national counterparts to transfer information to the ESM**

The legal framework (CRAR and EMIR) provides very general provisions on the obligation of NCAs to transfer information; it does not establish any special regime, but it does seem to allow ESMA to have access to the information which it needs. More specifically:

In the EMIR framework, one can find the following provisions:

- ‘it is necessary to reinforce provisions on exchange of information between competent authorities, ESMA and other relevant authorities and to strengthen the duties of assistance and cooperation between them. Due to increasing cross-border activity, those authorities should provide each other with the relevant information for the exercise of their functions to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions’ (Recital 58);
- ‘ESMA and the relevant competent authority shall exchange all information that is necessary for the registration of the trade repository as well as for the supervision of the entity’s compliance with the conditions of its registration or authorisation in the Member State where it is established (Article 57 (2)).
- ‘Competent authorities, ESMA, and other relevant authorities [such as tax authorities and energy regulators; this example is referred to in the regulation in a number of different places] shall, without undue delay, provide one another with the information required for the purposes of carrying out their duties’ (Article 84 (1)).

In the CRAR framework, one can find the following provisions:

- ‘the competent authorities should communicate any information required pursuant to Regulation (EC) No. 1060/2009 and assist and cooperate with ESMA’ (Recital 12);
- ‘ESMA, the competent authorities, and the sectoral competent authorities shall, without undue delay, supply each other with the information required for the purposes of carrying out their duties under this Regulation and under the relevant sectoral legislation’ (Article 27 (1)).  
CRAR’s definition of ‘sectoral authorities’ is provided above under 0.2.

#### **2.4.2.2 Type of information**

The legal framework is not that elaborate and is rather general on this point:

EMIR: ‘relevant information for the exercise of their functions’ (Recital 58) and ‘information required for the purposes of carrying out their duties’ (Article 84(1))

CRAR: ‘any information required pursuant to Regulation (EC) No. 1060/2009’ (Recital 12) and ‘information required for the purposes of carrying out their duties under this Regulation and under the relevant sectoral legislation’ (Article 27 (1)).

#### **2.4.2.3 Consequence of the official opening of a ESMA investigation**

The legislative framework does not make any distinction in this respect. Recital 58 of EMIR is somewhat more elaborate in this sense; it talks about the exchange of information including ‘in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States’.

#### 2.4.2.4 Limitations on the exchange of information

The EMIR framework regulates this matter as follows. According to Recital 78, 'without prejudice to cases covered by criminal or tax law, the competent authorities, ESMA, bodies or natural or legal persons other than the competent authorities, which receive confidential information should *use it only in the performance of their duties and for the exercise of their functions. However, this should not prevent the exercise, in accordance with national law, of the functions of national bodies responsible for the prevention, investigation or correction of cases of maladministration*'. Article 84 (2) restates this: 'competent authorities, ESMA, other relevant authorities and other bodies or natural and legal persons receiving confidential information in the exercise of their duties under this Regulation shall *use it only in the course of their duties.*' According to Article 60 (on the exercise of the powers referred to in Articles 61 to 63), 'the powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 61 to 63 shall not be used to require the disclosure of information or documents which are subject to *legal privilege*.' Article 83 regulates *professional secrecy*. Interestingly, Article 83 (5) states that 'paragraphs 1, 2 and 3 shall not prevent the competent authorities from exchanging or transmitting confidential information, *in accordance with national law*, that has not been received from a competent authority of another Member State' (emphasis added).

Concerning the CRAR framework, Article 23a states that 'the powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d shall not be used to require the disclosure of information or documents which are subject to *legal privilege*'. Article 32 regulates the *professional secrecy* obligation, but: 'information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings.'

#### 2.4.2.5 References to limits created by national law

No.

#### 2.4.2.6 For what purposes can ESMA use the received information?

EMIR: 'for the exercise of [its] functions' (Recital 58) and 'for the purposes of carrying out [its] duties' (Article 84 (1)).

CRAR: 'any information required pursuant to Regulation (EC) No. 1060/2009' (Recital 12 cited in 1.1.) and 'for the purposes of carrying out [its] duties under this Regulation and under the relevant sectoral legislation' (Article 27 (1)).

#### 2.4.2.7 Obligations for ESMA to transfer information to national counterparts

EMIR: the same recital 58, Articles 57 (2) and 84 apply. In addition, '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 fact or facts which are substantially the same has already acquired the force of *res judicata* as the result of criminal proceedings under national law' (Article 64 (8)).

CRAR: the same Article 27 applies (cited in 1.1.). In addition, ‘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’ (Article 23e).

The same limits apply.

#### **2.4.3 Exchange of information with other national administrative authorities.**

For the exchange of information with sectoral national administrative authorities, see the regime above.

For the exchange of information with other national administrative authorities, there is no obligation or an official channel for communication. It is likely that the exchange of information with those entities will take place via NCAs.<sup>109</sup>

#### **2.4.4 Exchange of information with national judicial authorities**

An exchange of information with a national judicial authority can only occur when ESMA has to refer matters to the relevant national authorities for the purposes of a criminal prosecution (Articles 64 EMIR and 23eCRAR). So, if these authorities are judicial, then there is an obligation in this respect.<sup>110</sup>

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<sup>109</sup> An informal telephone conversation with an official from ESMA (June 2017).

<sup>110</sup> *Ibid.*

### 3. EU ‘HORIZONTAL’ REPORT

#### Exchange of information between OLAF and EU Institutions, Bodies and Agencies

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#### 3.1 INTRODUCTION: OLAF AND EXCHANGE OF INFORMATION

Due to the nature and complexities underlying the EU budget management, both on the side of the expenditure and the revenue, ‘PIF’<sup>1</sup> investigations present an inherently cross-sectoral and multi-level nature. Acquiring adequate information and building up information positions in order to better target enforcement actions and to achieve better coordination with the other actors active in the PIF domain may prove challenging but still crucial for the European Anti-Fraud Office (OLAF). From a research perspective, information exchange in the PIF field represents an important operational facet and rather uncharted territory. Legal provisions at the supranational level are not lacking, but the degree of fragmentation in the design of the informational cooperation between the various enforcement actors makes it difficult to grasp the concrete contours of activities that while essential to ensure effectiveness, ultimately, may also interfere with the fundamental rights of the individual.

As concerns OLAF, the main general provisions currently in force are Art. 3 para. 5, Art. 4 para. 2, Art. 6 and Art. 8 of the 2013 OLAF Regulation<sup>2</sup>. Those provisions sketch the general framework under which OLAF can exchange information with – and in particular, obtain information from – other EU institutions, bodies and agencies (EU IBOAs) as well as national competent authorities.

According to Art. 3 para 5, when conducting external investigations OLAF shall have access to ‘any relevant information, including information in databases held by the EU IBOAs necessary in order to establish whether there has been fraud, corruption or any other illegal activity affecting the EU’s financial interests’. This right to access is further strengthened in the context of internal investigations where the Office is entitled to an ‘immediate and unannounced access to any relevant information’ held by EU IBOAs.<sup>3</sup> Art. 6 of the Regulation, furthermore, enables the Office to access information held by EU IBOAs prior to the opening of an investigation. Access to ‘any relevant information’ is granted in such cases to OLAF only when it is ‘indispensable’ in order to assess the basis in fact of allegations. The terminological distinction (the use of ‘indispensable’ instead of the adjective necessary’ in Art. 3 para. 5) suggests a stricter proportionality assessment for granting access to information and databases in such cases. IBOAs must carry such assessment in light of the general duty of sincere cooperation. Completing the frame, Art. 8 of the OLAF

1 The acronym ‘PIF’ refers to the ‘protection of the EU’s financial interests’ (in French ‘*protection des intérêts financiers de l’UE*’).

2 Regulation (EU, Euratom) No 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 248, 18.9.2013, p. 1.

3 See Art. 4 para. 2 (a) of the 2013 OLAF Regulation.

Regulation spells out a general ‘duty to inform the Office for EU IBOAs and the competent national authorities of the Member States. The duty must be fulfilled at the request of the Office or on their own initiative and covers any information or document directly ‘relating’ to an OLAF investigation<sup>4</sup> or any other information or document ‘considered pertinent’ for PIF protection.<sup>5</sup> National competent authorities, however, are bound to supply information to OLAF only ‘in so far as their national law allows’. This framework, however, is general but not exhaustive and still needs to be completed and complemented with other specific provisions relating to the ‘counterparts’ involved in the exchange.

Following this premise, this report will present the current framework for the exchange of information in the ‘horizontal’ and supranational dimension of OLAF activities; notably, the exchange of information between OLAF and other EU IBOAs. Maintaining the scope and the structure of the questionnaire, the following paragraphs will therefore address the exchange of information between OLAF and other Commission services and DGs; the exchange of information between OLAF and Europol and the exchange of information between OLAF and Eurojust.

### **3.2 EXCHANGE OF INFORMATION BETWEEN COMMISSION SERVICES AND OLAF**

Cooperation and exchange of information in the field of customs and structural funds within the European Commission Services represent a central element of the European Commission Anti-Fraud Strategy.<sup>6</sup> Specific modalities of cooperation and information exchange between Commission Services and OLAF are laid down in ‘Administrative arrangements on co-operation and timely exchange of information between the European Commission and the European Anti-Fraud Office’. The content of such arrangements, however, is not yet publicly available. The analysis of the exchange of information with the Commission services will therefore present the automated exchange of information under the Anti-Fraud Information System (AFIS) and the duty to inform OLAF in the context of internal investigations.

#### **3.2.1 The Anti-Fraud Information System (AFIS)**

AFIS is an ‘umbrella system’ clustering a set of applications facilitating the exchange of anti-fraud information between national administrations and the European Commission. The dynamics of the system are not truly ‘horizontal’, since the data are largely uploaded by national authorities and pooled with the relevant Commission Services and OLAF, which manages the system. However, to the extent that data from different databases are integrated within the system, a brief analysis is relevant for the scope of the present report.

In general, AFIS covers two main areas:

- Customs cooperation (CIS, FIDE, IET)
- Irregularity Management System (IMS)

The following paragraphs will focus on information exchange in the context of customs cooperation and, in particular, on the new Import, Export and Transit Directory (IET).

<sup>4</sup> See Art. 8 para. 2 OLAF Regulation.

<sup>5</sup> See Art. 8 para. 3 OLAF Regulation.

<sup>6</sup> See the Commission Communication on the Commission Anti-Fraud Strategy, COM (2011) 376 final, p. 14



### 3.2.2 The Customs Information System (CIS)

The Customs Information System (CIS) is a central database managed by OLAF and accessible to the national authorities competent to enforce legislation on customs and agricultural matters. The CIS is part of the AFIS and contains information and data – uploaded by the national authorities – on irregularities and breaches of customs legislation. The legal basis for its establishment is provided by Art. 23-41d of Regulation 515/97 and by Council Decision 2009/917/JHA.

The data contained in the CIS are structured in 8 categories: (a) commodities; (b) means of transport; (c) businesses; (d) persons; (e) fraud trends; (f) availability of expertise; (g) goods detained, seized or confiscated (h) cash detained, seized or confiscated. In regard to categories (a) to (d), the database may contain several items of information:

(a) name, maiden name, forenames, former surnames and aliases; (b) date and place of birth; (c) nationality; (d) sex; (e) number and place and date of issue of the identity papers (passports, identity cards, driving licences); (f) address; (g) particular objective and permanent physical characteristics; (h) a warning code indicating any history of being armed or violent or of having escaped; (i) reason for inclusion of data; (j) suggested action; (k) registration number of the means of transport.

According to Art. 27 of Regulation 515/97, the suggested actions may entail: (a) sighting and reporting; (b) discreet surveillance; (c) specific checks; and (d) operational analysis. Most importantly, if such actions are carried out, further information may be collected and transmitted to the CIS partner which suggested the action.<sup>7</sup>

The data contained in the CIS, generally, can only be used to fulfil the specific objectives indicated under Art. 23 para 2 of Regulation 515/97, namely 'preventing, investigating and prosecuting operations in breach of customs or agricultural legislation'. However, CIS partners (including OLAF) may use the data 'for administrative or other purposes' with the prior authorisation of the partner which introduced the data in the system and subject to the conditions imposed by that partner.<sup>8</sup>

### 3.2.3 The Import, Export and Transit Directory (IET)

Within the domain of customs cooperation, the recently-established Import, Export and Transit Directory (IET) is worth a specific mention. IET is a directory – part of the AFIS system – which stores declarations for the import and export of sensitive goods (alcohol, tobacco, energy products) and the international transit of goods. The purpose of the IET is to allow the analysis of movements of goods and to prevent, investigate and prosecute breaches of customs and agricultural legislation. Both national authorities and OLAF have access to the IET.

7 According to art. 28 of Regulation 515/97. This information may include: (a) the fact that the commodity, means of transport, business or person reported has been found; (b) the place, time and reason for the check; (c) route and destination of the journey; (d) persons accompanying the person concerned or occupants of the means of transport; (e) means of transport used; (f) objects carried; (g) the circumstances under which the commodity, means of transport, business or person was found.

8 See Art. 30 para. 1 of Regulation 515/97.

The legal basis of the IET is provided by the new Article 18d of Regulation 515/97.<sup>9</sup> As concerns the scope of this report, it is important to highlight that the data sources of the IET are provided by other databases operated under the responsibility of DG TAXUD:

- the Import Control System (ICS),
- the Export Control System (ECS) and
- the New Computerized Transit Information System (NCTS).

The data contained in those directories are automatically connected to the IET directory, according to the provision of Article 18d, third subparagraph of Regulation 515/97.<sup>10</sup>

### 3.2.4 Internal investigations and duty to provide information to OLAF

Back in 1999, the three main EU Institutions adopted an interinstitutional agreement aiming at establishing ‘equivalent conditions’ and common rules for the conducting of internal investigations by OLAF. Attached to the agreement, a model decision – to be endorsed internally and autonomously by each institution – laid down certain rules and, in particular, a duty to supply information to OLAF.<sup>11</sup>

The European Commission enacted the 1999 Interinstitutional Agreement by adopting the Commission Decision 1999/396/EC.<sup>12</sup> Having regard to the duty to inform OLAF, Art. 2 of the mentioned Commission Decision provided that any official or servant of the European Commission must inform without delay his Head of Service or Director General, or, if he considers it useful, the Secretary General or OLAF directly, when he becomes aware of evidence which may give ‘rise to a presumption of existence’ of:

- possible cases of fraud, corruption and any illegal activity detrimental to the EU financial interests, or
- serious situations relating to the discharge of professional duties (which may constitute a failure to comply with the obligations of EU officials), or
- a failure to comply with the analogous obligations of Members of the Commission or Commission staff not subject to the Staff Regulations.

The hierarchical superiors (the Secretary General, Directors General and Heads of Services) are, in turn, under an obligation to transmit to OLAF any evidence from which the existence of the aforementioned irregularities ‘may be presumed’. With regard to the strictness of this obligation,

<sup>9</sup> Introduced by Regulation 1525/2015.

<sup>10</sup> On the functioning of the system see the Prior Checking Opinion of the European Data Protection Supervisor issued on 7 December 2016, Case 2016-0674 available at <[https://edps.europa.eu/data-protection/our-role-supervisor/register\\_en](https://edps.europa.eu/data-protection/our-role-supervisor/register_en)>.

<sup>11</sup> According to J 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*, Europa Law Publishing, 2011, p. 99 the duty to supply information ‘is in essence, an obligation of whistle-blowing which applies to any official, servant or Member of a EU institution or body’.

<sup>12</sup> See the Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests in OJ L 149, 16.6.1999, p. 57.

the EU Civil Service Tribunal specified in the *Giraudy* judgment<sup>13</sup> that – notwithstanding the mandatory wording of the provision – the use of the term ‘presumption’ implied a minimal assessment of the relevance of the evidence and conferred a certain degree of discretion on the hierarchical superiors.<sup>14</sup> Members of the Commission, in the same circumstances, shall inform the President of the Commission or OLAF directly, if they consider that it would be useful to do so.

For the sake of completeness, it ought to be recalled that since 2004, Art. 22a of the Staff Regulations lays down – and generalizes – the obligation to inform the hierarchical superior (or, where appropriate, OLAF directly) to every EU official.<sup>15</sup>

### 3.3 EXCHANGE OF INFORMATION BETWEEN OLAF AND THE EU PARLIAMENT

#### 3.3.1 Legal bases

The exchange of information between the European Parliament and OLAF is based on the following legal bases:

- Art. 3 para. 5 of the OLAF Regulation (external investigations);
- Art. 4 para. 2 of the OLAF Regulation (internal investigations);
- Art. 8 of the OLAF Regulation;
- The 1999 Interinstitutional Agreement on internal investigations by the European Anti-Fraud Office;<sup>16</sup>
- The 1999 Internal Decision of the European Parliament concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests;<sup>17</sup>
- Art. 22a of the EU Staff Regulations.

#### 3.3.2 Internal investigations and the internal decision of 1999

The European Parliament acceded to the 1999 Interinstitutional Agreement and adopted an internal decision on the terms and conditions relating to OLAF’s internal investigations on 18 November 1999. Pursuant to the internal decision, which was modelled on the 1999 Interinstitutional

13 See EU Civil Service Tribunal, 2 May 2007, F-23/05, *Giraudy v. European Commission*; in particular paras 98-99.

14 See Inghelram (n 12) p. 100 and V Covolo, *L’émergence d’un droit penal en réseau. Analyse critique du système européen de lutte antifraude*, Nomos, 2013, p. 297. In *Giraudy*, the Civil Service Tribunal addressed the nature and the scope of the duty to supply information in relation to an action for damages and the possibility of engaging the non-contractual liability of the EU in cases of a manifest and grave disregard of the limits of his discretion” (Civil Service Tribunal, *Giraudy*, cit., para. 99) by the hierarchical superior. Following this approach, the forwarding of clearly irrelevant information on an official” to OLAF may trigger the non-contractual liability of the EU (See in this regard Inghelram (n 12), *ibid*).

15 See Art. 22a of Regulation (EC) 31/1962 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ P 45, 14.6.1962, p. 1385) as amended by Regulation 723/2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ L 124, 27.4.2004, p.1

16 See Interinstitutional Agreement between the European Parliament, the Council and the Commission concerning internal investigations by the European Anti-Fraud Office, OJ L 136, 31.5.1999, p. 15.

17 See the Decision of the European Parliament concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests, OJ C 189, 7.7.2000, p. 210.

Agreement, the Secretary General, the services and any official or servant of the institution have the general duty to cooperate with the Office, including the duty to supply the Office's agents with 'all useful information and explanations'.<sup>18</sup>

With specific regard to the duty to supply information, the internal decision provides that any official or servant of the European Parliament who becomes aware of evidence pointing to the existence of a possible case of fraud, corruption or any other illegal activity affecting EU financial interests or the discharge of professional duties which may constitute a failure to comply with the obligations of EU officials or servants shall inform without delay:

- his Head of Service or Director General,
- the President of the Parliament, if the aforementioned facts concern a MEP.<sup>19</sup>

In the same circumstances, MEPs shall inform the President of the Parliament or, if they consider it useful, the Office directly.<sup>20</sup>

The President of the Parliament, the Secretary-General, the Directors General and the Heads of Service are obliged to transmit without delay to OLAF any evidence of which they are aware from which the existence of irregularities may be presumed".<sup>21</sup>

Similarly to the observation made in section 2 above in relation to the exchange of information between OLAF and other Commission Services, in the context of internal investigations the reference to the 'presumption' of existence of an irregularity entails a minimal assessment of the relevance of the evidence and confers a minimal degree of discretion upon the subjects bound to transmit the information.<sup>22</sup>

### 3.3.3 Immunities and limitations

Art. 4 of the 1999 internal decision states that the rules governing MEPs' parliamentary immunities, in particular the right to refuse to testify, remain unaffected by the duties to cooperate and supply information. According to the EP Rules of Procedure, this right covers 'information obtained confidentially in the exercise of their mandate which they do not see fit to disclose'.<sup>23</sup>

## 3.4 EXCHANGE OF INFORMATION BETWEEN OLAF AND EUROPOL

### 3.4.1 Legal bases

According to Art. 88 TFEU, Europol's mission is to support the action and the mutual cooperation between the Member States' police and law enforcement services in preventing and combating serious transnational crime, terrorism and other forms of crime affecting a common interest covered by a Union policy. Established in 1995,<sup>24</sup> Europol has over time developed remarkable

18 See Art. 1 of the EP Internal Decision.

19 See Art. 2 of the EP Internal Decision.

20 See Art. 2 para. 4 of the EP Internal Decision.

21 See Art. 2 para. 2 of the EP Internal Decision.

22 See, mutatis mutandis, the judgment of the EU Civil Service Tribunal, 2 may 2007, F-23/05, *Giraudy v. Commission* para. 98.

23 See Rule 6 para. 2 of the European Parliament's Rules of Procedure.

24 Europol was established by a Convention adopted under the former Art. K.3 of the TEU. See OJ C 316, 27.11.1995, p. 2. In 2009 a Decision of the Council (the 2009 Europol Decision) transformed Europol in a EU entity, similar in status to Eurojust. See Inghelram (n 12), p. 114.

informational capacities and analytical resources which appear essential for investigating and countering complex forms of transnational crime.

Europol's present mandate expressly covers crimes against the financial interests of the EU<sup>25</sup> and, undoubtedly, efficient cooperative relations and exchange of information with OLAF represent an essential asset for effective PIF enforcement. Focusing on information exchange, the main legal bases are currently represented by Art. 13 of the OLAF Regulation and Art. 21 of the new Europol Regulation. The two legal bases have to be read in a complementary way.

Art. 13 para. 1 of the OLAF Regulation, on the one hand, enables OLAF to conclude administrative working arrangements with Europol for the exchange of 'operational, strategic or technical information, including personal data and classified information'.<sup>26</sup> As explained in more detail in the following section, such working arrangements are still under negotiation, while those currently in force pre-date both the new OLAF and Europol Regulations and raise some interpretative doubts as to the scope of the possible exchange between the two entities.

Art. 21 of the Europol Regulation, on the other hand, establishes that OLAF shall have 'indirect access' to information stored by Europol on the basis of a 'hit/no hit' system. The hit/no hit system will allow for the preliminary identification of matching relevant information in the Europol Information System (EIS)<sup>27</sup> and, in case of a 'hit', a procedure to share the information with OLAF shall be initiated.

The details of this procedure are not described by the Europol Regulation and, arguably, will have to be regulated in the future working arrangement. Some important limitations, however, are expressly spelled out and worth mentioning. In the first place – and rather obviously – Europol will be enabled to share data only to the extent that the data generating the hit are necessary for the performance of [...] OLAF's tasks".<sup>28</sup> Secondly, and most importantly, the sharing of information with OLAF will be possible, and must conform to the restrictions and conditions set by the provider of the information (to Europol). Indeed, according to Art. 19 para 2 of the 2016 Europol Regulation, Member States (which are the main providers of information) may indicate any restriction on the access to or use of the information they provide to Europol. This indication, which may be given at the moment of the provision of the information or later, also binds Europol when exchanging information with OLAF. In this regard, Art. 21 para 6 of the Europol Regulation further specifies that OLAF shall respect any restriction on access or use, in general or specific terms, indicated by" the provider of the information.

Considering the administrative nature of OLAF's activities, obstacles to the exchange may arise should the Member State providing the information to Europol generally object to the possibility of granting access or use thereof to non-judicial authorities.

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25 See the Annex I to Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Agency for Law Enforcement Cooperation (Europol), OJ L 135, 24.5.2016, p. 53 (hereinafter: new Europol Regulation).

26 According to the provision, administrative working arrangements should also provide for the exchange between OLAF and Europol of progress reports 'on request'.

27 The EIS is the central Europol database. It contains data and information about suspects, convicted persons, and persons regarding whom there are factual indications that they might commit a crime within the mandate of Europol. In particular, the EIS can contain social security numbers, identification data, dactyloscopic data, and biometric data (DNA profiles).

28 See Art. 21 para. 1, first indent of the new Europol Regulation.

### 3.4.2 The 2004 Administrative Arrangement and the issue of personal data

As briefly mentioned above, the current framework for information exchange between Europol and OLAF is provided by the Administrative Arrangement pre-dating the post-Lisbon reform of the two Offices. The current Administrative Arrangement was concluded by OLAF and Europol<sup>29</sup> in 2004 in enactment of a previous Administrative Agreement of Cooperation between the Commission and Europol.<sup>30</sup>

The 2004 Arrangement allows OLAF and Europol to exchange, spontaneously or on specific request, the strategic or technical information they hold in their respective databases when necessary for the fulfilment of their respective tasks.<sup>31</sup> The Arrangement defines the concepts of ‘strategic’ and ‘technical’ information and provides for general guidelines on cooperation in the field of intelligence sharing and technical support between the two Offices. In particular, ‘strategic information’ is defined as information on:

- trends of criminality in the areas of common interest (fraud, corruption, money laundering and ‘any other illegal activity in the framework of international organised crime affecting the financial interests of the European Union’;
- operational structures of the organisations implicated in the relevant criminal activities, including the links between these organizations operating inside or outside the EU;
- strategies, *modus operandi*, techniques and the financing of the organizations.

Technical information, on the other hand is defined as information on:

- technical investigation tools,
- methods in treatment and analysis of data,
- IT equipment or knowledge.

As concerns ‘intelligence cooperation’, the 2004 Arrangement also states that Europol and OLAF should consult regularly and provide mutual assistance, spontaneously or on request, in the field of threat assessment and risk analysis.<sup>32</sup>

29 See the Administrative Arrangement between the European Police Office (Europol) and the European Anti-Fraud Office (OLAF) signed on 8 of April 2004. The text of the Arrangement is available at < <https://www.europol.europa.eu/agreements/european-anti-fraud-office-olaf>>.

30 See the Administrative Agreement on Cooperation between the European Commission and Europol of 18 February 2003, in particular Art. 9 which provided the basis for the conclusion of additional specific arrangements ‘within the scope of OLAF’s operational activities’ and regarding the protection of the Euro. The text of the Administrative Agreement is available at < <https://www.europol.europa.eu/partners-agreements/strategic-agreements>>.

31 Under Art. 14 para. 8 of the 2009 Europol Decision it was theoretically possible to associate OLAF’s experts to specific Europol Focal Points (in particular those on cigarette smuggling, intellectual property and VAT Fraud). The provision, apparently, has not been recast in the new Europol Regulation but that possibility could yet be provided for in the context of a new working arrangement between Europol and OLAF. A Focal Point is ‘an area within an Analysis Work File (AWF) which focuses on a certain phenomenon from a commodity based, thematic or regional angle. It allows Europol to provide analysis, prioritize resources, ensure purpose limitation and maintain focus expertise’; in this sense the Europol’s *New AWF Concept – Guide for MS and Third Parties*, 2012, p. 5. On this specific aspect, see also A Marletta, *Interinstitutional Relationship of European Bodies in the fight against crimes affecting the EU’s financial interests – Past experiences and future models*, (2016), *Eucri*, 3, p. 142 and Covolo (n 15), p. 399.

32 See Art. 4 of the 2004 Cooperation Arrangement.

It is important to highlight that the 2004 Administrative Arrangement does expressly exclude the exchange of personal data between OLAF and Europol.<sup>33</sup> Similarly to the Cooperation Agreement signed between the Commission and Europol in 2003, the issue of the exchange of personal data was postponed to future consideration.<sup>34</sup> The express exclusion of the possibility to exchange personal data has been debated in literature<sup>35</sup>, especially after the introduction in the (now-repealed) 2009 Council Decision on Europol<sup>36</sup> of a derogation provisionally authorising Europol to receive from and directly transmit to OLAF information, including personal data, before the entry into force of the new agreement or working arrangements.<sup>37</sup>

Art. 24 of the new Europol Regulation of 2016 includes a similar – although not identical – provision,<sup>38</sup> but the current OLAF Regulation 883/2013, on the other hand, still requires the conclusion of a new formal working arrangement in order to legitimately exchange personal data. Given the express exclusion in the – still in force – 2004 Arrangement, some authors have argued that – to date – OLAF and Europol are not yet enabled to exchange personal data and that, at least, the legal basis for such exchange is ‘far from being clear’.<sup>39</sup>

A new agreement between OLAF and Europol, allowing also for the exchange of personal data, has been announced since 2009<sup>40</sup> but, to date, it is still under negotiation.

### 3.4.3 Exchange of information and internal investigations

Exchange of information between OLAF and Europol may also be relevant for the internal investigations conducted by the Office in cases of fraud, corruption or other illegal activities under Regulation 883/2013 committed within Europol.<sup>41</sup> In this regard, according to Art. 66 of the 2016 Europol Regulation, Europol had to accede by 30 October 2017 to the Interinstitutional Agreement of 1999 and to adopt a decision on the conditions for internal investigations of OLAF, including provisions on information exchange; to date, however, no decision has been adopted.

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33 The express exclusion of personal data was already foreseen in the 2003 Administrative Agreement of Cooperation between the European Commission and Europol (see Art. 5.1)

34 See point 2 of the 2004 Arrangement and the Preamble of the 2003 Administrative Agreement between the European Commission and Europol

35 See F Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice. Towards Harmonised Data Protection Principles for Information Exchange at EU-level*, Springer, 2012, p. 332; Covolo (n 15), p. 308.

36 Council Decision 2009/371/JHA Art. 22 para. 3.

37 More specifically, Art. 22 para. 3 of the 2009 Europol Decision provision enabled the exchange of personal data insofar ‘necessary for the legitimate performance of the recipient’s tasks’.

38 Art. 24 of the new Europol Regulation states that ‘Subject to any possible restrictions pursuant to Art.19 (2) or (3) and without prejudice to Art. 67, Europol may directly transfer personal data to a Union body, insofar as such transfer is necessary for the performance of its task or those of the recipient Union body’.

39 Boehm (n 36), p. 332

40 See the 2008 OLAF Annual Report.

41 Since the 2009 Europol Decision expressly conferred the status of EU entity on Europol, the part of OLAF Regulation relating to internal investigations does apply to it. In this specific regard, see Inghelram (n 12), p.115.

### 3.5 EXCHANGE OF INFORMATION BETWEEN OLAF AND EUROJUST

#### 3.5.1 The legal bases for the exchange of information

Similarly to Europol, the material competence of Eurojust also covers PIF offences.<sup>42</sup> Since the establishment of Eurojust, the need for cooperation with OLAF has always been acknowledged by the relevant legal framework, particularly with regard to the exchange of information. A first Memorandum of Understanding between the two entities was adopted in 2003, shortly after the establishment of Eurojust<sup>43</sup> in 2002.

Under the current legal framework, the legal bases for information exchange between Eurojust and OLAF are the following:

- Art. 13 para. 1 of the OLAF Regulation, which – similarly to Europol – enables OLAF to conclude administrative working arrangements for the purposes of the exchange of information, including personal data;<sup>44</sup>
- Art. 26 para. 2 of the Consolidated Eurojust Decision currently in force, which allows Eurojust to conclude agreements or working arrangements with other EU IBOAs, such as OLAF, for the exchange of information, including personal data.
- The ‘Practical Agreement of Cooperation’ signed by Eurojust and OLAF in 2008,<sup>45</sup> the main features of which are presented in the following paragraph.

#### 3.5.2 The 2008 Cooperation Agreement and the procedure to exchange personal data

After a first Memorandum of Understanding signed in 2003, Eurojust and OLAF concluded a Practical Agreement of Cooperation in 2008 which, differently to the 2003 MoU and the 2004 Working Arrangement between OLAF and Europol, expressly provided for the possibility of exchanging personal data. For this purpose, the 2008 Agreement lays down a ‘two-step’ procedure characterised by:

42 Under Art. 4 para. 1 (a) of the current Eurojust Decision (Council Decision 2009/426/JHA; for the consolidated text see the Council Doc. 5347/3/09 REV 3), Eurojust material competence covers: ‘the types of crime and the offences in respect of which Europol is at all times competent to act’.

43 Nonetheless, in literature, the institutional relationship between OLAF and Eurojust has often been reported as characterized by an initial antagonism and a certain reluctance on the part of the Member States to share information on criminal investigations and prosecutions with OLAF. See A Weyembergh, I Armada and C Brière, *The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area, Study for the LIBE Committee of the European Parliament*, 2014, p. 37. The study is publicly available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU%282014%29510000](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282014%29510000). See also V Covolo, *From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?*, (2012), *Eucrim*, 2, p. 85.

44 Additionally, the first indent of the provision, specifically dedicated to cooperation with Eurojust, establishes that OLAF shall transmit to Eurojust relevant information ‘where this may support and strengthen coordination and cooperation between national investigating authorities, or where the Office has forwarded to the competent authorities of the Member States information giving grounds for the existence of’ PIF offences.

45 Practical Agreement on Arrangements of Cooperation between Eurojust and OLAF signed on 24 September 2008 and published in OJ C 314, 9.12.2008, p. 3.



- A first phase, based on regular contact between OLAF and Eurojust<sup>46</sup>, during which the parties of the 2004 Agreement are required to exchange 'case summaries'.<sup>47</sup> 'Case summaries' in this context are defined as: 'general information on a case dealt with either by Eurojust or OLAF and describing the main features of elements of the case, but without containing any personal data'.<sup>48</sup> The exchange of 'case summaries' should occur as soon as possible and is aimed at 'identifying appropriate cases for cooperation'.<sup>49</sup> A case should be deemed 'appropriate' for cooperation when:
  - in respect to Eurojust, it is 'related to fraud, corruption or any criminal offence affecting' the financial interests of the EU;
  - in respect to OLAF, 'it appears that the case directly involves judicial cooperation between the competent national authorities of two or more Member States, or where the case concerns a Member State and the Community'.
- A second phase, starting once an 'appropriate case for cooperation' has been identified and during which case-related information<sup>50</sup>, including personal data, may be exchanged between OLAF and Eurojust National Members. More precisely, during this phase, and within the limits of their respective competences, the two bodies can exchange 'any necessary information, including personal data'.<sup>51</sup> It is important to highlight, as concerns Eurojust as a provider of information, that the Practical Agreement establishes that only National Members are allowed to transmit personal data to OLAF<sup>52</sup>; the Eurojust College, instead, is enabled to receive such data from OLAF but not to transmit it to OLAF.<sup>53</sup>

In regard to this last point, it has to be recalled that Art. 26 para. 5 of the (currently in force) Consolidated Eurojust Decision provides that 'for the purposes of the receipt and transmission of information between Eurojust and OLAF [...] Eurojust national members shall be regarded as competent authorities in the meaning of the OLAF Regulation'.<sup>54</sup> As national competent authorities, thus, Eurojust national members can exchange information with OLAF 'in so far as their national law allows' and, notably, to the extent that such an exchange is compatible with national provisions on the secrecy of the investigation.<sup>55</sup>

46 Contact teams composed of designated National Members and/or their Assistants are set up for this purpose at Eurojust, while a competent Unit is designated at OLAF, according to point 3.1. of the Practical Agreement of Cooperation.

47 See point 3.3 of the Practical Agreement of Cooperation.

48 See point 1.17 of the Practical Agreement of Cooperation.

49 See point 5 of the Practical Agreement of Cooperation.

50 The agreement distinguishes between the exchange of 'case summaries' (point 5 of the Agreement) and the exchange of 'case-related information' (point 6 of the Agreement). While 'case summaries' cannot include personal data, 'case-related information' may also involve personal data.

51 See point 6 of the Practical Agreement of Cooperation.

52 See point 6.4 of the Practical Agreement of Cooperation.

53 See point 6.3 second indent of the Practical Agreement of Cooperation.

54 Art. 26 para. 5 of the Consolidated Eurojust Consolidated Decision states: 'For the purposes of the receipt and transmission of information between Eurojust and OLAF, and without prejudice to Article 9, Member States shall ensure that the national members of Eurojust shall be regarded as competent authorities of the Member States solely for the purposes of Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The exchange of information between OLAF and national members shall be without prejudice to the information which must be given to other competent authorities under those Regulations'.

55 Art. 8 para. 2 of the OLAF Regulation 883/2013 requires the competent authorities of the Member States to transmit to the Office any document or information which relates to an ongoing OLAF investigation, but only

As for what concerns restrictions and limitations, The Practical Agreement of Cooperation expressly states that when spontaneously transmitting information, Eurojust national members shall notify OLAF of the purpose for which the information is provided<sup>56</sup> and that each party (OLAF or Eurojust) may notify – at any time – the other of any restriction on access, use, or further transmission to national authorities as well as deletion or destruction of the information provided.<sup>57</sup>

Finally, Eurojust and OLAF can exchange, either spontaneously or on specific request, ‘strategic information’. ‘Strategic information’ is defined as information on:

- trends on criminality related to fraud, corruption or any other illegal activities affecting the EU’s financial interests;
- operational structures of organisations implicated in those forms of criminality, including the links existing between the organisations operating inside or outside the EU;
- strategies, *modus operandi*, techniques and the financing of these organisations.<sup>58</sup>

### 3.5.3 Internal investigations

Eurojust is subject to the OLAF Regulation concerning internal investigations for possible cases of fraud, corruption, or any other illegal activity detrimental to the EU’s financial interests committed within Eurojust<sup>59</sup>. For this purpose, the College of Eurojust adopted an internal decision concerning internal investigations conducted by OLAF (hereinafter: ‘*Eurojust Internal Decision*’).<sup>60</sup> The Decision restates a general duty to cooperate with<sup>61</sup> and to supply information to<sup>62</sup> OLAF.

On the ‘duty to supply information’, in particular, the Eurojust Internal Decision establishes that:

- any official or other servant of Eurojust who becomes aware of a possible case of fraud, corruption or any other illegal activity detrimental to the EU financial interests committed within Eurojust is under an obligation to inform without delay the Administrative Director of Eurojust;<sup>63</sup>
- the National Members of Eurojust, their Assistants and the Administrative Director of Eurojust, in the same circumstances, are under an obligation to inform without delay the President of the College;<sup>64</sup>
- the President of the College and the Administrative Director are both under an obligation to transmit without delay to OLAF ‘any evidence of which they are aware’ relating to the

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‘in so far as their national law allows’. In this regard see Covolo (n 15), p. 410.

56 Point 6.2 of the Practical Agreement of Cooperation.

57 See point 11.2 of the Practical Agreement of Cooperation.

58 See point 7 of the Practical Agreement of Cooperation. The definition is coherent with the one included in the 2004 Europol-OLAF Administrative Arrangement.

59 See Art. 38 para. 4 of the Eurojust Consolidated Decision.

60 See the Decision on the implementation of Regulation (EC) No 1073/99 concerning investigations conducted by the European Anti-Fraud Office adopted by the College of Eurojust on 13 July 2004 and publicly available at: <<http://www.eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx>>.

61 See Art. 1 of the Eurojust Internal Decision.

62 See Art. 2 of the Eurojust Internal Decision.

63 Art. 2 para. 1 of the Eurojust Internal Decision.

64 Art. 2 para. 3 of the Eurojust Internal Decision.

aforementioned irregularities<sup>65</sup>; however, before referring any matter to OLAF, the President of the College and the Administrative Director shall inform each other and the College.

- direct reporting to OLAF is, however, allowed when there are 'justified reasons to consider that' a previous hierarchical reporting and/or informing the College would prevent a proper reporting of the evidence to OLAF.<sup>66</sup>

Importantly, Art. 3 of the Eurojust Internal Decision excludes 'case-related documents' from the duty to transmit information to OLAF in the context of internal investigations, meaning 'documents, evidence, reports, notes or any other information, in whatever form, which are held or created in the course of case-related activities of Eurojust in the context of investigations and prosecutions, whether in progress or already concluded'.<sup>67</sup> The transmission of such information and documents is expressly prohibited.

### 3.5.4 The Eurojust Reform Regulation

To conclude as regards Eurojust, a brief mention of the pending reform is called for. In 2013 the European Commission submitted a Proposal for a new Eurojust Regulation which is currently under negotiation between the European Parliament and the Council<sup>68</sup>. The text of the General Approach endorsed by the Council dedicates draft Art. 42 to cooperation with OLAF. Whereas the draft provision on the exchange of information (para. 3)<sup>69</sup> appears to maintain the current setting, it remains silent on the exchange of personal data (which is, in contrast, expressly recalled in Art. 26 para 2 of the current Eurojust Decision). This silence, if confirmed in the final version of the Regulation, might raise doubts as to the future ability of Eurojust and OLAF to exchange personal data, especially considering that the current draft common provision on working arrangements between Eurojust and other EU IBOAs expressly states that 'those working arrangements shall not form the basis for allowing the exchange of personal data'.<sup>70</sup>

## 3.6 CONCLUSIONS

When aiming to provide a synthetic assessment of the current state of the art regarding information exchange between OLAF and other IBOAs, two specific 'weaknesses', in the first place, must be highlighted: the fragmentation and complexity of the legal framework, and the considerable difficulty – for an external observer – of concretely discerning the practical contours of that information exchange.

65 Art. 2 para. 5 of the Eurojust Internal Decision.

66 Art. 2 para. 6 of the Eurojust Internal Decision.

67 See Art. 3 of the Eurojust Internal Decision.

68 See Interinstitutional file 2013/0256 (COD). The Council adopted its General Approach on 27 February 2015 (see Council Doc. 6643/15). At the time of writing (February 2018) the file is still awaiting for the first reading by the European Parliament.

69 Art. 42 para. 3 of the current General Approach of the Council states: 'For purposes of the receipt and transmission of information between Eurojust and OLAF, and without prejudice to Article 8, Member States shall ensure that the national members of Eurojust shall be regarded as competent authorities of the Member States solely for the purposes of Regulation (EU, Euratom) of the European Parliament and of the Council No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The exchange of information between OLAF and national members shall be without prejudice to the information which must be given to other competent authorities under those Regulations'.

70 See the draft Art. 38 para. 2a of the Council General Approach.

Whilst on the one hand some interviews conducted with Commission officials during the preparation of this report provided very valuable input for mapping the web of implementing provisions which constitutes the horizontal ‘information exchange environment’ of OLAF, on the other hand a comprehensive picture of the actual functioning of such a fragmented and complex environment remains elusive.

Secondly, specific challenges are posed by the possibility (and necessity) of an effective exchange of personal data between OLAF and other IBOAs, particularly with those actors operating on the criminal side of PIF enforcement (Europol and Eurojust). The asymmetries and uncertainties as to the possibility of such exchanges have not been clarified by the reform of Europol in 2016 and, as mentioned above, might also multiply with the future reform of Eurojust.<sup>71</sup>

Finally, a brief mention of the major theme of the reform of data protection rules cannot be avoided. Differently to Europol and Eurojust and due to its hybrid nature, OLAF is subject to the regime of Regulation 45/2001<sup>72</sup>, the specific framework for processing personal data by EU IBOAs, which is to be adapted to the principles and rules of the General Data Protection Regulation (‘GDPR’).<sup>73</sup> The GDPR sets very high standards for processing personal data. Will the OLAF legal framework be able to meet, at the same time, the challenges posed by the new reform and those raised by the efficient fulfilment of its institutional mandate? Striking an adequate balance in the adaptation of the new legal framework will require careful assessment and reconsideration of the weaknesses in the current state of the art.

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71 See supra 5.5.

72 Regulation (EC) n. 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions, OJ L 8, 12.1.2001, p. 1.

73 See Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (‘GDPR’) OJ L 119, 4.5.2016, p.1. In this particular regard, see Recital (17) and Art. 2 para. 3 of the GDPR.

## 4. GERMANY

*M. Böse, A. Schneider*

The following report will provide a comparative overview of the vertical transfer of information from the national authorities in Germany to the corresponding EU institutions. The main focus of the report lies on the exchange of information with the *Office de Lutte Antifraude* (OLAF) that is compared to the well-established framework of the European Competition Network (ECN) and the more recently developed cooperation mechanisms within the Single Supervisory Mechanism for banking supervision (SSM) and with the European Securities and Markets Authority (ESMA).

### 4.1 OLAF

#### 4.1.1 Transfer of information from national counterparts (AFCOS) to OLAF

The national partner of OLAF is the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF).<sup>1</sup> The function of the Ministry of Finance as AFCOS is not regulated at all. Nor are there any rules on exchanging information. As the Ministry itself does not gather information, its role is limited to coordinating investigations and providing contacts with the relevant national enforcement authorities. The Ministry is not even always informed about the transfer of information.<sup>2</sup> Accordingly, for the purposes of this project, it is mainly the other administrative and judicial authorities that are relevant (see *infra* 1.2.2.)

#### 4.1.2 Transfer of information from other administrative authorities to OLAF

##### 4.1.2.1 Legal bases

There are several administrative authorities that are competent to transmit information to OLAF. Which of them has jurisdiction to do so depends on the area of law in which they cooperate.<sup>3</sup> There is no central authority for cooperating with OLAF in all areas of the law.

In the area of customs, the Customs Investigations Bureau (*Zollkriminalamt – ZKA*) is the central office for coordinating the proceedings of the Customs Investigations Offices (*Zollfahndungsdienst*) and the Customs Intelligence Services, see § 2 Customs Investigations Service Act (*Zollfahndungsdienstgesetz – ZfdG*).<sup>4</sup> The task of the ZKA is to enforce income taxes and to

1 See M. Böse & A. Schneider, in: M. Luchtman/J. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (2017), pp. 58-59 .

2 Böse & Schneider, *supra* note 1, pp. 59-60.

3 See H.-M. Wolfgang, in: D. Birk (ed.), *Handbuch des Europäischen Steuer- und Abgabenrechts* (1995), § 32 no. 1.

4 See, on cooperation with OLAF, B. Fehn, 'Die Informationspartner der Zollfahndung', (2003) *Kriminalistik*, pp. 751 (754-755).

oversee EU subsidies (§ 3 (1) no. 1 ZfdG), but also the investigation of criminal and administrative offences (§ 3 (1) no. 2 ZfdG); accordingly it has investigative powers in both administrative and criminal proceedings.<sup>5</sup> The ZKA is also the competent authority for providing legal and administrative assistance to EU authorities.<sup>6</sup> According to § 3 (6) no. 1b ZfdG, the ZKA as the central office of the customs authorities deals with all matters of legal and administrative assistance to EU authorities as are provided by EC or EU Law and which fall within the competence of the customs authorities. This includes cooperation that is required by the OLAF Regulation<sup>7</sup> and EU Customs Law, e.g. the Union Customs Code<sup>8</sup>. However, the decentralised system of legal and administrative assistance in the EU means that the customs authorities themselves can be directly addressed for the purpose of legal and administrative assistance.<sup>9</sup>

In the area of structural funds, the rules are different. In Germany, structural funds are coordinated by the Federal Ministry of Economy.<sup>10</sup> The administration and supervision of the programmes is generally undertaken by Ministries or offices of the *Länder*.<sup>11</sup> The relevant rights and necessary investigative measures for gathering information are included in the grant agreement.<sup>12</sup> This agreement, which is generally a very long document, typically includes so-called “general additional clauses for grants that are meant to support certain projects” (*Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung – ANBest-P*).<sup>13</sup> The ANBest-P contain clauses that oblige the beneficiary to transfer information about the grant to the granting EU authority (*Bewilligungsbehörde*).<sup>14</sup> This authority can also ask for information on the use of the grant (Art. 7.1 ANBest-P). In the case of non-compliance, the grant can be revoked.<sup>15</sup> A special provision for informing OLAF is generally not included. Nor are there any secrecy clauses in the ANBest-P. One might argue that, by concluding the grant agreement, the beneficiary implicitly consents to transferring relevant information to OLAF, but this does not comply with the requirement of express consent (§ 4a Federal Data Protection Act, *Bundesdatenschutzgesetz – BDSG*). Instead, the transfer of data to OLAF may be based upon the general provisions of the applicable data protection acts (BDSG and the corresponding statutory acts of the *Länder*).<sup>16</sup>

5 See P. Wamers, in: P. Wamers/B. Fehn, *Handbuch Zollfahndung* (2006), Chapter A margin no. 133 ff.

6 However, in a few cases the Ministry of Finance has retained the right to decide, M. Harder, in: H.-B. Wabnitz/T. Janovsky (eds.), *Handbuch des Wirtschafts- und Steuerstrafrechts* (2014), ch. 22 no. 199.

7 Regulation (EU, EURATOM) No. 883/2013 of the European Parliament and of the Council 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 2013 L 248/1.

8 Regulation (EU) No. 952/2013 of the European Parliament and the Council of 9 October 2013 laying down the Union Customs Code, OJ 2013 L 269/1. See, also, H.-M. Wolfgang (fn. 3), § 32 nos. 28 f.

9 G. Zöllner, in: U. König (ed.), *Abgabenordnung* (2014), § 117 no. 29.

10 W. Frenz, ‘Die gemeinsame Verwaltung der Gelder der Union am Beispiel der Strukturfonds’, (2016) *Europäisches Wirtschafts- und Steuerrecht*, p. 308.

11 Frenz, supra note 9, p. 309.

12 Böse & Schneider, supra note 1, p. 71. See also S. Strobel, *Die Untersuchungen des Europäischen Amtes für Betrugsbekämpfung (OLAF)* (2012), p. 244 f.; A. Bal, ‘Europäische Strukturfonds in behördlicher Praxis’, (2011) *Kommunaljurist*, pp. 241(242-243).

13 Bal, supra note 11, p. 243.

14 Art. 5 ANBest-P. The ANBest-P in the newest version (29 November 2016) are available at the homepage of the Federal Administrative Office: [http://www.bva.bund.de/SharedDocs/Downloads/DE/BVA/Zuwendungen/ANBest-P.pdf;jsessionid=C2FAC4AD7F3C100491A45D18A19D0DEC.1\\_cid361?\\_\\_blob=publicationFile&v=5](http://www.bva.bund.de/SharedDocs/Downloads/DE/BVA/Zuwendungen/ANBest-P.pdf;jsessionid=C2FAC4AD7F3C100491A45D18A19D0DEC.1_cid361?__blob=publicationFile&v=5) (last access on 12 October 2017).

15 Böse & Schneider, supra note 1, p. 60.

16 See for the internal dimension (the processing, transfer and use of personal data by domestic authorities): M. Böse, *Wirtschaftsaufsicht und Strafverfolgung* (2005), p. 294 ff.

According to these provisions, an administrative authority may transmit personal data to an EU authority if the transfer is necessary for performing the duties of the transferring authority or the EU institution to which the data are transmitted (§ 4b (1) no. 3, § 15 (1) BDSG; see also the corresponding statutory acts of the *Länder*, e.g. § 17 (1) 1, § 14 (1) 1 *Datenschutzgesetz Nordrhein-Westfalen – DSG NRW*). Recourse to these rather general provisions has raised serious concerns as to whether this is in conformity with the constitutional requirement of a precise and area-specific (“bereichsspezifisch”) legal basis.<sup>17</sup> If, however, the transfer data is transferred for purposes closely linked to the context in which the data has been previously collected, the interference with the right to privacy cannot be considered to be of such gravity that a specific legal basis is required.<sup>18</sup>

German law does not provide for an obligation to transfer information to OLAF; nevertheless, the principle of loyal cooperation calls upon national authorities to exercise their discretion accordingly (see *infra* 1.3.1.1. with regard to the Member States’ competition authorities). However, the general rules on international cooperation in administrative proceedings within the EU (§ 8a, § 8d Act on Administrative Proceedings, *Verwaltungsverfahrensgesetz – VwVfG*) do not apply to vertical cooperation with supranational institutions such as the Commission.<sup>19</sup> These rules might apply accordingly (see *infra* with regard to § 117 Fiscal Code, *Abgabenordnung – AO*), but, according to the prevailing opinion, the wording of the provisions does not cover cooperation with EU institutions so that a legal basis in EU law is necessary.<sup>20</sup> Since German law does not provide for any rules on cooperation with OLAF in the area of expenditure, the following analysis will focus on customs only.

Whether and to what extent the competent authority is obliged to transfer information to OLAF depends on the applicable law.<sup>21</sup> In the case of customs administration, the relevant rules are laid down in Council Regulation (EC) No. 515/97 of 13 March 1997 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.<sup>22</sup> Arts. 17 and 18 of this Regulation stipulate an obligation for the Member States to transmit information on customs irregularities to the EU Commission. Since OLAF was founded and has taken over the protection of the financial interests of the EU, these obligations apply to OLAF.<sup>23</sup> This means that most cases of legal assistance are directly covered by EU law.

If national law is relevant, the question of which provisions apply will arise. There are several possibilities in customs administration law. The first are the rules set out in the ZfdG. § 3 (6)

17 See BVerfGE 65, 1, 46.

18 See Böse, *supra* note 16, p. 300 ff.

19 H. Schmitz in: P. Stelkens et al. *Verwaltungsverfahrensgesetz Kommentar* (2014), § 8a margin no. 15.

20 D. Riedel in: J. Bader & M. Ronellenfitsch, *BeckOK Verwaltungsverfahrensgesetz* (2017), § 8a margin no. 16.1.

21 See, on the basis of legal and administrative assistance in customs law, B. Rätke, in F. Klein (ed.), *Abgabenordnung* (2016), § 117 nos. 12 ff.

22 OJ 1997 L 82/1, last amended by Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015 amending 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, OJ 2015 L 243/1.

23 Harder, *supra* note 5, ch. 22 no. 206; L. Kuhl & H. Spitzer, „Das Europäische Amt für Betrugsbekämpfung (OLAF)“, (2000) *Europarecht*, pp. 671 (681-682).

sent. 2 ZfdG grants the ZKA the right to establish an information system for the purpose of legal and administrative assistance if required by international treaties or other regulations. This means that it would be possible to grant OLAF direct electronic access to information if such an obligation is laid down in EU or national legislation. § 34 (2) ZfdG stresses that the ZKA can use automatic procedures to transfer personal data to an international database if required by international treaties that are binding on the Federal Republic of Germany. An example of such a database is the Customs Information System (CIS)<sup>24</sup>, which is managed by OLAF.

Apart from these automated information systems, the transfer of information to OLAF is covered by § 34 ZfdG. § 34 (1) ZfdG allows the transfer of information to supranational authorities that deal with the prevention of crime and criminal prosecutions. The wide scope of the legal basis (the prevention and prosecution of crime) corresponds to the double function of the ZKA performing tasks in administrative (customs) and criminal proceedings (supra 1.2.2.1. at note 5). Even though OLAF does not deal with criminal prosecutions, its task is to protect the EU's financial interests by preventing fraud. For this reason, an exchange of information with OLAF may rely on § 34 (1) ZfdG. Due to its twofold function, the ZKA may exchange information derived from administrative and criminal proceedings.

§ 34 (1) ZfdG only refers to “personal information”, which is information about the personal or material circumstances of an identified or identifiable individual (§ 1 Federal Data Protection Act, *Bundesdatenschutzgesetz – BDSG*). Nonetheless, the transfer of information that is not personal and is thus not protected by the BDSG should also be possible. This is because the transfer of such information does not violate privacy rights and thus does not necessarily require a legal basis. If the law allows for the transfer of more sensitive data, the transfer of less sensitive data should also be allowed (*a maiore ad minus* argument).

According to § 34 (1) ZfdG, the customs authorities can transfer information spontaneously under four circumstances: if the transfer is necessary in order to allow the customs authority to fulfil its tasks under the ZfdG (§ 34 (1) no. 1 ZfdG); if it is necessary for the prosecution of crimes or the enforcement of judgments, taking into account the rules on judicial cooperation in criminal matters (§ 34 (1) no. 2 ZfdG); if it is necessary to prevent a grave danger to society (§ 34 (1) no. 3 ZfdG); or if an especially important crime (*Straftat von erheblicher Bedeutung*)<sup>25</sup> is about to be committed (§ 34 (1) sent. 2 ZfdG). A request by the EU authority is not required.

Cooperation with OLAF could fall within the ambit of § 34 (1) no. 1 ZfdG because the supervision of EU financial interests is one of the tasks of the ZKA (§ 3 (1) ZfdG). However, the ZKA may only transfer information to OLAF “insofar as necessary” to perform its own tasks. Thus, it may not exchange information under this provision for the purpose of assisting OLAF. As OLAF has very limited powers of investigation and has to rely on the Member States anyway, it might be possible to effectively protect the EU's financial interests without involving OLAF. In this respect, it should be noted that § 34 (1) no. 1 ZfdG only refers to the tasks that have been attributed to the customs authorities under the ZfdG, not to obligations under EU law such as Art. 4 Regulation No. 2013/883/EU and EURATOM.

§ 34 (1) no. 2 ZfdG does not apply to OLAF because OLAF has neither the power to prosecute crimes nor to enforce criminal judgments. This leaves the possibility to involve OLAF in order to

24 Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes, OJ 2009 L 323/20. See, in more detail, N. Zurkinder/L. Gellert, in: U. Sieber et al. (eds.), *Europäisches Strafrecht* (2014), § 42 nos. 37 ff.

25 These are crimes that belong to at least a middle degree criminality and can disturb the feeling of safety in society, see BVerfGE 109, 279 (344).



prevent a grave danger to society. This requirement might apply in the case of OLAF. However, cases where involving OLAF might be necessary to prevent a dangerous situation are probably few in number. Accordingly, it can be concluded that § 34 ZfdG will not allow the transfer of data to OLAF in most instances.

Alternatively, the customs administration offices and the ZKA could transfer information to OLAF on the basis of § 11 Customs Administration Law (*Zollverwaltungsgesetz – ZollVG*). However, the provision in § 11 ZollVG is similar to § 34 ZfdG. Accordingly, it does not cover transmission to OLAF. Another possibility for allowing the ZKA to provide legal assistance to OLAF could be to directly apply the OLAF Regulation and combine it with § 3 (6) ZfdG, which gives the ZKA the competence to transfer this data. The problem with this solution is that Art. 8 of Regulation 2013/883/EU, EURATOM obliges the national competent authorities to transmit information to OLAF only “in so far as their national law allows”. Accordingly, a basis in national law is required.

Nonetheless, even if § 34 ZfdG and § 11 ZollVG are not applicable, the transfer of information to OLAF in the case of customs could be allowed by the more general provision in § 117 Fiscal Code (*Abgabenordnung – AO*<sup>26</sup>). Customs under the Union’s Customs Code are considered to be taxes for the purpose of the Fiscal Code (§ 3 (3) AO). Therefore, the rules in the AO also apply to customs. However, there are some problems attached to the application of § 117 AO. One such problem derives from Regulation No. 515/1997/EC. According to Art. 9 (1) of the Regulation, the requested authority shall respond to enquiries “as though acting on its own account or at the request of another authority in its own country.” This might signify that it is not the rule on international assistance (§ 117 AO) that should apply, but the one on national assistance (§ 111 AO).<sup>27</sup> The second problem relates to the text of § 117 AO. The German version (though not the official English translation) makes it clear that § 117 AO addresses international legal and administrative assistance *between states*.<sup>28</sup> This means that § 117 AO refers to horizontal cooperation, which would not cover cooperation with OLAF. As has been mentioned above with regard to the general rules in administrative law (§§ 8a ff. VwVfG), the application of § 117 AO would clearly go beyond the wording of this provision. These concerns notwithstanding, § 117 AO is relied upon as a legal basis for cooperation with EU authorities in literature and jurisprudence.<sup>29</sup> Notably, the supreme court in fiscal matters, the Federal Fiscal Court, has referred to § 117 AO when discussing the revenue authorities’ right to transmit information to the EU Commission.<sup>30</sup> The court, however, has not discussed whether the wording of the provision allows for its application to vertical cooperation.

According to § 117 (2) AO, the revenue authorities may provide international legal and administrative assistance on the basis of the nationally applicable legal instruments of the European Union. The OLAF Regulation is one of these instruments because it is directly applicable without

26 An English translation of the AO is available at [http://www.gesetze-im-internet.de/englisch\\_ao/englisch\\_ao.html#p0717](http://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html#p0717) (last accessed on 9 October 2017).

27 H. Söhn, in: W. Hübschmann et al. (eds), *Abgabenordnung/Finanzgerichtsordnung, 225th instalment* (November 2013), § 117 no. 410.

28 See the title of the provision: „§ 117 Zwischenstaatliche Rechts- und Amtshilfe in Steuersachen“.

29 Bundesfinanzhof (Federal Financial Court), judgment of 16 November 1999 - VII R 95, 96–98, BFHE 190, 522 (530); Söhn, supra note 21, § 117 no. 410.

30 Bundesfinanzhof, supra note 22, BFHE 190, 522 (530).

any implementation. The same is true for Art. 17 f. Regulation No. 1997/515/EC,<sup>31</sup> which deals with cooperation between the Commission and the customs authorities.<sup>32</sup> This means that § 117 (2) AO allows the relevant authorities to fulfil their obligations to provide information under the OLAF Regulation.

The requirements for transmitting information under § 117 (2) AO depend on the relevant legal instrument that the provision refers to. This means that the national authorities may transfer information on their own initiative or at the request of OLAF (see Art. 8 Reg. No. 2013/833/EU and EURATOM). In any case – and even if § 117 AO is not considered to be an appropriate legal basis for vertical cooperation – personal data may be transferred according to the Data Protection Acts (§ 4b BDSG, § 17 DSG NRW).

#### 4.1.2.2 Scope of information exchange

In the case of § 34 ZfdG and § 11 ZollIVG, the type of information to be transferred depends on the applicable case. Obviously, the information must be in conformity with the reason for transmitting it in the first place. In the case of § 117 (2) AO, the type of information depends on the relevant EU law. The national authorities may transmit any information that is required under the OLAF Regulation. The German provisions do not distinguish between the situation before an investigation is initiated by OLAF and subsequently. However, OLAF can only request specific information after an investigation has been opened.

#### 4.1.2.3 Limitations on the transfer of information

In the case of customs, it is important to know which provision applies. § 34 ZfdG only applies to customs investigation services (*Zollfahndung*), the ZKA in particular. In this regard, § 34 (4) ZfdG (and § 11 ZollIVG) contains specific limitations on transmitting personal data to EU authorities. The general provision on cooperation (§ 117 AO) has a broader scope and the limitations on exchanging information are not regulated in detail (see, however, for non-treaty-based cooperation with third states § 117 (3) AO). In any case, the limitations under § 34 (4) ZfdG (e.g. the obligation to ensure that the data is deleted when a certain period of time has expired) will apply if information is transmitted under § 34 (1) ZfdG. Nonetheless, the question arises whether § 34 (4) ZfdG also applies in cases of § 117 (2) AO because it is a special provision for customs law. This question does not seem to have been discussed. So far, it is assumed that § 117 AO completely applies even in cases of customs law.<sup>33</sup> Considering that § 117 (4) AO provides more limitations on legal and administrative assistance and thus counterbalances the low threshold contained in § 117 (2) AO, this view is convincing. Moreover, § 117 (5) AO explicitly refers to customs, which shows that the whole provision is deemed to apply in customs cases.

##### 4.1.2.3.1 Specialty and purpose limitation

According to § 117 (4) sent. 1 AO, the powers of the authorities and the rights and obligations of the participants and other persons are based on the provisions applying to taxes in cases of legal

31 Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1997 L 82/1.

32 As OLAF is part of the Commission, these rules are considered to cover the relationship between the national customs authorities and OLAF, see Harder, *supra* note 5, ch. 22 no. 206.

33 See, e.g., Harder, *supra* note fn. 5, ch. 22 no. 203.

and administrative assistance. The crucial provision in this context is § 30 AO. This provision obliges all public officials to observe tax secrecy. This means that they are not allowed to disclose information that has been received in an administrative investigation or an investigation into a tax crime or a commercial secret.<sup>34</sup> This rule also applies in the context of administrative or legal assistance.<sup>35</sup>

However, § 30 (4) AO recognises exceptions to the obligation to ensure tax secrecy. In the context of transmitting information to OLAF, the most relevant exceptions are those contained in § 30 (4) nos. 1 and 2 AO.<sup>36</sup> § 30 (4) no. 1 AO allows for the disclosure of information if this serves the implementation of an administrative procedure or criminal proceedings in tax matters. OLAF's proceedings are not criminal in nature, but qualify as administrative procedures. One could argue that transmitting information to OLAF serves administrative proceedings in tax matters, respectively customs matters (see supra 1.2.2.1. with regard to § 3 (3) AO), because it

34 See § 30 (1) AO: Public officials shall be in breach of tax secrecy if they

1. disclose or make use of, without authorisation, circumstances of a third person which have become known to them

a) in an administrative procedure, an auditing procedure or in judicial proceedings in tax matters,

b) in criminal proceedings for tax crimes or in administrative fine proceedings for tax-related administrative offences,

c) for other reasons from notification by a revenue authority or from the statutory submission of a tax assessment notice or a certification of findings made in the course of taxation,

or

2. disclose or make use of, without authorisation, a corporate or commercial secret which has become known to them in procedures/proceedings as designated under number 1 above,

or

3. electronically retrieve, without authorisation, data protected pursuant to number 1 or 2 above which have been stored in a file for procedures/proceedings as designated under number 1 above.

35 See S. Grotherr, 'Instrumente des Rechtsschutzes beim internationalen Informationsaustausch', (2015), *Internationale Steuer-Rundschau*, p. 193 (199).

36 See T. Franz, 'Zum Rechtsschutz beim Informationsaustausch auf Ersuchen und zur Prüfung der steuerlichen Erheblichkeit verlangter Informationen', (2017) *Internationales Steuerrecht* p. 273. § 30 (4) AO reads as follows:

The disclosure of information obtained pursuant to subsection (2) above shall be permissible, insofar as

1. it serves the implementation of procedures/proceedings within the meaning of subsection (2) number 1(a) and (b) above,

2. it is expressly permitted by law,

3. the persons concerned give their consent,

4. it serves the implementation of criminal proceedings for a crime other than a tax crime, and such information  
a) was obtained in the course of proceedings concerning tax crimes or tax-related administrative offences; however, this shall not apply in relation to facts which a taxpayer has disclosed while being unaware of the instigation of criminal proceedings or administrative fine proceedings or which have already become known in the course of taxation before the instigation of such proceedings, or

b) was obtained in the absence of any tax liability or by the waiver of a right to withhold information,

5. there is a compelling public interest in such disclosure; such a compelling public interest shall be deemed to exist in particular where

a) crimes and wilful serious offences against life and limb or against the State and its institutions are being or are to be prosecuted,

b) economic crimes are being or are to be prosecuted, and which in view of the method of their perpetration or the extent of the damage caused by them are likely to substantially disrupt the economic order or to substantially undermine general confidence in the integrity of business dealings or the orderly functioning of authorities and public institutions, or

c) disclosure is necessary to correct publicly disseminated incorrect facts which are likely to substantially undermine confidence in the administration; such a decision shall be taken by the highest revenue authority responsible in mutual agreement with Federal Ministry of Finance; the taxpayer is to be consulted before the correction of the facts.

enables OLAF to compile a more accurate report which can be used as a source of information in proceedings on the recovery of customs duties which have been evaded.

In any case, transmitting information to OLAF can be justified by § 30 (4) no. 2 AO, which allows information to be disclosed “if permitted by law”. If German law (see supra 1.2.2.1. with regard to § 34 ZfdG and § 117 AO) or EU law (No. 1997/515/EC) provides for a legal basis, the transfer of information is “permitted by law”.<sup>37</sup> Therefore, the tax secrecy clause does not hinder the transfer of information to OLAF if this is required or allowed by EU law.

#### 4.1.2.3.2 *Secrecy of investigations*

When a criminal investigation is ongoing at the national level, the relevant rules change. Administrative investigations into tax matters follow the rules laid down in the AO, while criminal investigations into tax offences follow the rules laid down in the Code of Criminal Procedure (*Strafprozessordnung – StPO*), see § 393 (1) AO. According to the prevailing opinion in the literature, the basis for legal assistance also changes.<sup>38</sup> § 117 AO only applies to assistance in administrative (tax) matters. Assistance in criminal matters (i.e. for the purpose of prosecuting crime) is covered by the Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen – IRG*). In cooperation with OLAF, however, the rules on cooperation in criminal matters do not apply because OLAF is considered to be merely an administrative body that does not conduct a criminal investigation. Thus, the rules on administrative cooperation (i.e. cooperation in tax and customs matters) will apply (§ 117 AO, § 34 ZfdG). Due to the double function of the customs authorities, the ZKA in particular, they may also transfer information originating from a criminal investigation.

In this regard, there are specific rules limiting the transfer of information in order to keep criminal investigations secret (§ 35 (3) no. 2 ZfdG, § 117a (6) no. 2 AO). These rules, however, regulate horizontal cooperation between the Member States and do not apply to cooperation with OLAF. The provisions on the transfer of information within the Union (§ 34a ZfdG and § 117a AO) refer to the public agencies of a Member State, which includes only those agencies that are explicitly listed with reference to Art. 2a of Framework Decision 2006/260/JHA<sup>39</sup> (see § 34a (5) ZfdG, § 117a (7) AO). This does not apply to OLAF, which is in any case not an agency of a Member State. Even though the provision on the secrecy of investigations does not apply, it must be noted that the customs authority may still refuse to transfer information to OLAF because although the legal basis for the exchange of information does impose an obligation, it leaves it to the discretion of the competent authority to decide whether or not to transfer information to OLAF. In addition, one might argue that the ground to refuse horizontal cooperation accordingly applies to vertical cooperation. On the other hand, the competent authority should reflect on whether the transfer of information bears the risk of jeopardizing the ongoing investigation as OLAF officials will ensure the confidentiality of this information.

37 See Bundesfinanzhof, supra note 22, BFHE 190, 522 (537); R. Rüsken, in: F. Klein (ed.), *Abgabenordnung* (2016), § 30 no. 145; Wolfgang, supra note 3, § 32 no. 38.

38 See, in detail, M. Hendricks, *Internationale Informationshilfe in Steuerverfahren* (2004), pp. 22 ff. See also S. Brinkschulte, *Bankgeheimnis und Steuerstrafrecht* (2013), pp. 174-175.; M. Jäger, in: F. Klein (ed.), *Abgabenordnung* (2016), § 385 no. 34; Zöllner, supra note 8, § 117 no. 5.

39 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ 2006 L, 386/89.

#### 4.1.2.3.3 *Banking secrecy*

Until June 2017, there was a specific provision on the protection of banking secrecy in § 30a AO (old version). The provision put emphasis on confidentiality between banks and their customers.<sup>40</sup> However, with effect from 25 June 2017, this provision has been repealed.<sup>41</sup> In its proposal for the new law, the Government argued that § 30a AO was an encumbrance for effective tax investigations.<sup>42</sup> Moreover, it was not clear whether the provision complied with constitutional law.<sup>43</sup> Anyway, this means that banking secrecy is no longer protected.

#### 4.1.2.3.4 *Professional secrecy*

The main rule for protecting the professional secrets of other administrative bodies is contained in § 30 AO. As has been explained above (1.2.2.3.1.), this provision does not forbid the transmitting of information to OLAF.

According to § 117 (4) sent. 1 AO, other provisions regulating the power of the authorities and the rights of the participants in tax law apply. This includes the rights to withhold information that are contained in the AO.<sup>44</sup> In § 105 (1) AO, it is explicitly stated that the duty of secrecy imposed on authorities and other public entities, including the Bundesbank, state banks and debt administrations, as well as the organs and officials thereof, shall not apply with respect to their duty to submit/present information and documents to the revenue authorities. There is only an exception for the confidentiality of postal services (§ 105 (2) AO). If, however, the professional secrecy of authorities is not protected in general tax proceedings, there is no reason to offer more protection when exchanging information. Therefore, there are no limits to the transfer of information that comes from the secrecy of administrative bodies.

The AO recognises another form of the protection of professional secrecy. According to § 102 AO, members of certain professions have the right to withhold information.<sup>45</sup> These are

40 The former § 30a AO read as follows:

(1) In determining the facts of a case (section 88) the revenue authorities shall take special account of the confidential relationship between credit institutions and their customers.

(2) The revenue authorities may not require credit institutions to submit non-recurrent or regular notifications with regard to accounts of specific types or specific amounts for general supervisory purposes.

(3) Deposit accounts or securities accounts in relation to which an identity check pursuant to section 154(2) has been carried out may not, on the occasion of the external audit of a credit institution, be identified or copied for the purpose of verifying the correct payment of taxes. No tax-audit tracer notes shall be prepared in respect of such accounts.

(4) The numbers of deposit and securities accounts which taxpayers hold at credit institutions shall not be required in tax return forms, unless tax-reducing expenses or benefits are being claimed or it is required for the settlement of payment transactions with the tax office.

(5) Requests for information addressed to credit institutions shall be governed by section 93. Where the identity of a taxpayer is known and proceedings for a tax crime or for a tax-related administrative offence have not been instigated against such a person, a credit institution will be requested, even in proceedings pursuant to the first sentence of section 208(1), to furnish information and documents only when a request for information addressed to the taxpayer does not or is not likely to produce any results.

41 Gesetz zur Bekämpfung der Steuerumgehung und zur Änderung weiterer steuerlicher Vorschriften (Law on the Fight against Tax Evasion and other changes of Tax Law), 23.6.2017, Bundesgesetzblatt (*Federal Law Gazette*) 2017, I, 1682.

42 Bundestag Drucksache (Official Parliamentary Documents), 18/11132, p. 23.

43 Bundestag Drucksache (Official Parliamentary Documents), 18/11132, p. 23. The question in constitutional law was whether it was unjust to grant a privilege to financial income by restricting administrative investigative measures against banks. See, e.g., J. Intemann, in: U. König (ed.), *Abgabenordnung* (2014), § 30a no. 3.

44 Rätke, *supra* note 20, § 117 no. 61; K. Wagner, in: A. von Wedelstädt (ed.), *Abgabenordnung und Finanzgerichtsordnung* (2011), § 117 no. 6.

45 For more details, see Böse & Schneider, *supra* note 1, p. 72.

clergymen, members of the Bundestag, of a Parliament of a *Land* or a second chamber, defence counsel, lawyers, patent agents, notaries, tax consultants, auditors, tax representatives, certified accountants, doctors, dentists, psychological psychotherapists, psychotherapists specialising in the treatment of children and juveniles, pharmacists, midwives and persons who are or were professionally involved in the preparation, production or dissemination of periodically printed matter or radio broadcasts (§ 102 (1) AO), all in relation to information they have received in their professional capacity. The right to withhold information also applies to documents (§ 104 AO). Usually, §§ 102 and 104 AO should have been observed by the revenue or customs authorities when gathering information. However, if they have failed to do so, §§ 102 and 104 AO bar the transmission of documents to OLAF that are protected by this form of confidentiality. In contrast, data that has been gathered in accordance with the law can be transferred to OLAF.

#### 4.1.2.3.5 *Business secrecy*

The rule on private professional secrets has already been explained above (1.2.2.3.4.). Apart from that, corporate and commercial secrets are explicitly protected by the tax secrecy rule in § 30 (2) no. 2 AO. However, as the disclosure of protected secrets to OLAF is permitted (supra 1.2.2.1.), there is no protection of business secrecy.

#### 4.1.2.3.6 *Further limitations*

The AO recognises other rights to withhold information from the tax authorities. § 101 AO enables relatives of the participant to refuse cooperation with the tax authorities. § 103 AO gives persons who are not participants in the tax proceedings the right to refuse cooperation when there is a risk of criminal prosecution (*nemo tenetur*).<sup>46</sup> These clauses similarly apply in administrative assistance proceedings.

According to § 117 (4) sent. 3, which refers to § 91 AO, the person concerned should be heard before the information is transmitted.<sup>47</sup> The individual in question will thereby be given the opportunity to challenge the transfer of information.<sup>48</sup> The use of the word “should” in § 91 (1) AO shows that consultation is generally not mandatory.<sup>49</sup> However, consultation is mandatory in cases of administrative assistance if the revenue authorities of the *Länder* administer the tax that forms part of the proceedings, unless other exceptions apply.<sup>50</sup> Why the law distinguishes between the authorities of the *Länder* and the federal authorities remains unclear.<sup>51</sup> Customs authorities

46 For details on the two provisions, see Böse & Schneider, supra note 1, pp. 72-73.

47 See, in detail, Grotherr, supra note 25, pp. 195 ff.

48 Rätke, supra note 20, § 117 no. 63.

49 See, also, Bundesfinanzhof (Federal Financial Court), judgment of 16 November 1999 - VII R 95, 96-98, BFHE 190, 522 (535 f.).

50 § 117 (4) AO reads:

When implementing legal and administrative assistance, the powers of the revenue authorities and the rights and obligations of the participants and other persons shall be based on the provisions applying to taxes as defined in section 1(1). Section 114 shall apply accordingly. Section 91 shall apply accordingly with regard to domestic participants where information and documents are transmitted; notwithstanding section 91(1), domestic participants shall invariably be consulted where legal and administrative assistance concerns taxes administered by *Länder* revenue authorities, unless VAT is concerned, information exchange is taking place on the basis of the EU Mutual Assistance Act, or exceptional circumstances exist within the meaning of section 91(2) or (3).

51 See, e.g., Rätke, supra note 20, § 117 no. 64.

are federal authorities, so that consulting the participant is not necessary.<sup>52</sup> Moreover, § 91 AO allows for numerous exceptions, which might especially apply in criminal proceedings.<sup>53</sup>

In any case, even if consultation was obligatory and did not occur, this does not necessarily render the information that was transmitted inadmissible. It has been argued that an illegal transmission has no effect on the use of the information abroad.<sup>54</sup> This question refers to the general question of under which circumstances illegally gathered information can be used in another jurisdiction.<sup>55</sup> In the case of OLAF, there is the additional problem that the final report prepared by OLAF does not necessarily disclose the origins of the information on which the report is based. Therefore, it might occur that the German customs authorities transmit information to OLAF in violation of, e.g., § 104 AO, and OLAF uses this information in a report which, in return, is used as evidence in administrative or even criminal tax proceedings. Obviously, such a form of “evidence laundering” would be unacceptable. Accordingly, information that has been illegally transmitted should not be used by OLAF at all.

#### 4.1.2.4 Conditions concerning the use of transmitted information

There is no explicit provision granting the right to impose conditions on the use of transmitted information. However, it follows from § 30 (4) AO that the use of information is generally limited to the exceptions to the tax secrecy clause listed there. Moreover, § 34 (4) sent. 2 ZfdG implies that the use of transmitted information is generally limited to a certain purpose. Therefore, it should be possible to impose conditions on the use of information, unless this is contrary to EU law.

#### 4.1.3 Transfer of information from judicial authorities to OLAF

The judicial authorities are the prosecution services (the public prosecutor’s office) and the courts. They are generally involved in criminal proceedings concerning offences against the financial interests of the EU. The same is true for the Customs Investigations Office when investigating criminal cases.

There is a provision on the cooperation of judicial authorities with OLAF in no. 151b of the Directive on Cooperation in Criminal Matters (*Richtlinie über den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RiVaSt*). This directive has been initiated by the Ministry of Justice and ranks lower than formal law. According to no. 151b sent. 1 RiVaSt, judicial authorities can render assistance to OLAF. However, the directive makes it clear that OLAF cannot oblige the German judicial authorities to transfer information that is part of criminal investigative proceedings.

Legal assistance in criminal matters is regulated by the IRG. However, the relevant provision for transmitting information, § 59 IRG, only allows for assistance at the request of “a competent authority of a foreign State”. This shows that the IRG applies to horizontal cooperation in criminal

52 Indeed, it has been suggested that the obligation to consult the participant has been restricted to *Länder* authorities in order to exclude the customs authorities, Rätke, supra note 20, § 117 no. 64. On the other hand, it has been suggested that the right to judicial review requires consultation before providing legal assistance, as this measure cannot be challenged, see Wolffgang, supra note 3, § 32 no. 65.

53 Harder, supra note 5, ch. 22 no. 204; J. Lenz, in: P. Wamers & B. Fehn (eds.), *Handbuch Zollfahndung* (2006), C no. 263.

54 Rätke, supra note 20, § 117 no. 65; Zöllner, supra note 8, § 117 no. 31.

55 See, in this context, R. Spatscheck/J. Alvermann, ‘Steuerfahndung ohne Grenzen? Auslandsermittlungen im Steuer- und Strafverfahren’ (2001) *Internationales Steuerrecht*, p. 33 (36).

matters, but not to vertical cooperation. Moreover, the IRG applies to support for foreign criminal proceedings (§ 59 (2) IRG). The same is true for prosecutions in general. For example, the Code of Criminal Procedure only allows for the transfer of data for the purpose of international cooperation in criminal matters (§ 488 (1) sent. 1 StPO). OLAF proceedings are not criminal in nature and thus do not fall within the scope of the IRG.

Therefore, it would be necessary to have redress to a provision on international cooperation in administrative matters that applies to judicial authorities (see also no. 151b RiVaSt: “Amtshilfe”). The general rules on the cooperation of judicial authorities can be found in §§ 12 ff. of the Introductory Law to the Courts Constitution Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz – EGGVG*). However, the scope of these rules is limited to the exchange of information between domestic authorities (§ 12 (1) 1 EGGVG; see also § 16 EGGVG). The only provision explicitly addressing cooperation with OLAF is no. 151b RiVaSt. Nevertheless, this provision is an internal guideline, but is not a statutory provision and thus cannot be considered to be a sufficient legal basis for the transfer of personal data, let alone information protected by business or professional secrecy. The interference with human rights resulting from international cooperation with OLAF requires a statutory Act adopted by Parliament. Accordingly, no. 151b RiVaSt can only be deemed to form the basis for judicial cooperation if it is combined with existing law, such as the OLAF Regulation. This result, however, is barred because the OLAF Regulation, in turn, refers to national law. As a last resort, § 4b BDSG might provide the necessary legal basis for transferring personal data to OLAF (supra 1.2.2.1.). Such an interpretation, however, would raise serious constitutional concerns because the data has been gathered within the framework of a criminal investigation and its transfer to OLAF would affect the principle of purpose limitation. Furthermore, the personal data of the suspect is particularly sensitive and requires a higher level of protection than data originating from administrative proceedings; this is also reflected in the detailed provision on the exchange of these data between domestic authorities (§ 14 EGGVG).<sup>56</sup> Therefore, one has to conclude that there is no legal basis for a direct transfer of information from judicial authorities to OLAF in German Law.<sup>57</sup>

If OLAF requires information on ongoing criminal investigations, it should contact other cooperation partners such as the AFCOS and ask them to provide the relevant information. There are ways to transfer information between national authorities that are not applicable to supranational authorities. This means that the AFCOS could probably access information needed by OLAF and transfer it if necessary. The same is true for other revenue authorities.

## 4.2 DG COMPETITION

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

The Federal Cartel Office (*Bundeskartellamt*, hereafter BKartA) is the competent competition authority for cooperation in proceedings of the Commission or the national competition authorities of other Member States (§ 50 (3) Act against Restraints of Competition, *Gesetz*

<sup>56</sup> See Böse, supra note 16, p. 374 ff.

<sup>57</sup> This does not apply to a potential basis in EU Law, e.g. Art. 2 (6) Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC(1999) 802), OJ L 136/20.



gegen Wettbewerbsbeschränkungen – GWB), and cooperation within the Network of European Competition Authorities (ECN) in particular (§ 50a GWB).

#### 4.2.1.1 Legal basis and scope of information transfer

§ 50a (1) GWB provides a legal basis for the exchange of information within the ECN and thereby implements the corresponding provision in Article 12 (1) of Regulation (EC) No. 1/2003 by designating the BKartA as the national competent authority within the ECN. According to these provisions, for the purpose of applying Articles 101 and 102 TFEU the BKartA is authorised to inform the Commission of any matter of fact or of law (§ 50a (1) no. 1 GWB). According to § 50b (1) GWB, this authorization accordingly applies to the exchange of information for other purposes (e.g. merger control under Regulation [EC] No. 139/2004) outside the ECN. Unlike in cooperation in tax and customs matters, these provisions do not provide for the undertaking concerned to be consulted as this would jeopardise the investigation.

The scope of § 50a (1) no. 1 GWB expressly covers documents as well as electronic data; the provision even applies to confidential information and operating and business secrets. § 50a(1) does not differentiate between a spontaneous exchange of information and the transfer of information upon request. Even though the context suggests a focus on information requests (§ 50a(1) no. 2: requests of the BKartA), the wording of § 50a(1) does not exclude a spontaneous exchange of information from its scope. This interpretation is supported by the obligation of the national competition authorities to inform the Commission of any case being investigated under Articles 101 and 102 TFEU (Art. 11(3) Regulation No. 1/2003).

The wording (“authorizes”) suggests that § 50a (1) does not impose an obligation, but that the BKartA has a margin of discretion as to whether or not to transfer information to the Commission.<sup>58</sup> However, according to the principle of loyal cooperation, the BKartA should generally provide the Commission with the requested information.<sup>59</sup> In particular, the BKartA is obliged to notify the Commission of any investigations under Articles 101 and 102 TFEU (Article 11(3) Regulation (EC) No. 1/2003).

§ 50a (1) applies to any information that could be relevant for the application of Articles 101 and 102 TFEU (exchange of information within the ECN) or the application of other provisions of EU competition law (e.g. merger control, see supra 1.3.1.1. with regard to § 50b (1) GWB). In particular, the Commission may request to have access to case files and evidence of infringements of EU competition law, but also to general information (e.g. the annual turnover of an undertaking) that is relevant for calculating a fine (Article 23 Regulation (EC) No. 1/2003).<sup>60</sup> As a matter of principle, it is up to the Commission to assess whether the requested information is necessary for its investigation.<sup>61</sup> However, the BKartA may refuse to transmit information that is requested for a purpose other than the enforcement of EU competition law (e.g. for the preparation of a

58 E. Rehbinder, in: U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50a margin no. 8, § 50b margin no. 6.

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

60 E. Rehbinder, in: U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50a margin no. 4.

61 E. Rehbinder, in: U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50a margin no. 9.

legislative proposal).<sup>62</sup> Furthermore, any information that is not required for the application of EU law must not be transmitted or the information must be deleted before providing the Commission with copies of the case file or other relevant documents.<sup>63</sup>

The provisions on the exchange of information (§§ 50a, 50b GWB) apply irrespective of the official opening of an investigation by the Commission. The opening of an investigation usually facilitates an assessment under the principle of purpose limitation (the application of Articles 101 and 102 TFEU), but is not a precondition for transferring information to the Commission.

#### 4.2.1.2 Limitations on the transfer of information

##### 4.2.1.2.1 *The specialty principle and purpose limitation*

The principle of purpose limitation is one of the most important safeguards for the protection of personal data. Within the framework of international cooperation in criminal matters, the principle of speciality (e.g. Articles 27 and 28 Framework Decision on the European Arrest Warrant) serves a similar function. These principles may limit both the transfer of information and the subsequent use of the information that has been transferred to the Commission.

In the latter case, the principle of purpose limitation is equivalent to the principle of speciality. Accordingly, the transfer of information is made subject to the condition that the authority receiving the information (i.e. the Commission) uses the information in evidence only for the purpose of applying provisions of competition law and in respect of the subject-matter of the investigation for which it was collected by the BKartA (§ 50b (2) sent. 1 No 1 GWB). If the information is exchanged within the ECN (i.e. for the purpose of applying Articles 101 and 102 TFEU), such a condition is not required because Article 12 (2) Regulation (EC) No. 1/2003 expressly obliges the Commission to comply with the principle of purpose limitation. Outside the ECN, the BKartA must ensure that the Commission will not use the information for other purposes; in case of doubt, the BKartA shall require an assurance that the receiving authority will abide by the principle of purpose limitation.<sup>64</sup>

On the other hand, the principle of purpose limitation may prohibit the transfer of information. The BKartA may refuse to provide the Commission with information that has been collected for a purpose other than the application of EU competition law (e.g. the application of national law).<sup>65</sup> This ground for refusal corresponds to the structure of the ECN that, unlike other areas of enforcement (OLAF, ECB, ESMA), allows for a more or less unrestricted exchange of information, but only for strictly limited purposes. The principle of purpose limitation, however, is not an absolute bar to the exchange of information, but is subject to exceptions provided by

62 E. Reh binder, in: U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50a margin no. 9; see also margin no. 8 for a flagrant violation of the exclusionary rules according to Article 12 Regulation (EC) No. 1/2003.

63 E. Reh binder, supra note 58 in: U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50a margin no. 7.

64 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 50b margin no. 9.

65 E. Reh binder, in: U. Immenga et al. (eds.), *Wettbewerbsrecht* (2014), Vol. II – GWB, § 50a margin no. 9.

the law.<sup>66</sup> Since the wording of § 50a GWB allows for the transfer of information that has been collected for a purpose other than the application of Articles 101 and 102 TFEU, the BKartA has to balance the conflicting interests of the Commission (and the principle of loyal cooperation), on the one hand, and the interests of the undertaking concerned, on the other, when taking its decision on whether or not to submit the information requested by the Commission.

#### 4.2.1.2.2 *Secrecy of investigations*

§§ 50a and 50b GWB do not limit the transfer of information to the Commission with regard to an ongoing national investigation. Such a limitation would run counter to the objectives of the ECN and the BKartA's obligation to notify the Commission of any investigation under Articles 101 and 102 TFEU (Article 11 (3) Regulation (EC) No. 1/2003). There are limitations on the transfer of information originating from leniency applications, but these limitations are intended to protect the undertaking concerned (see *infra* 1.3.1.2.5.).

#### 4.2.1.2.3 *Banking and professional secrecy*

There are no limitations on the transfer of information in order to protect the banking secrecy or the financial privacy of the undertaking concerned. In general, the exchange of information with the Commission is not limited by grounds of professional secrecy, either. As far as the BKartA may collect evidence and thereby interfere with professional secrets (e.g. legal professional privilege) in order to investigate a cartel case, it may transfer this evidence to the Commission for the very same purpose.

However, professional secrets may give rise to limitations where the evidence has been obtained illegally because the BKartA has violated the law on the protection of professional secrecy. The exchange of information under §§ 50a, 50b GWB only applies to information that has been collected in accordance with the law.<sup>67</sup> For the same reasons, the BKartA must not transfer information to the Commission that originates from another Member State if domestic rules on the protection of professional secrecy prohibit the BKartA from taking the corresponding investigative measure to collect that information (e.g. the seizure of documents protected by legal professional privilege).<sup>68</sup>

#### 4.2.1.2.4 *Business secrecy*

§ 50a(1) No. 1 GWB expressly allows for the transfer of information about any matter of fact or of law, including confidential information and in particular operating and business secrets. So, the exchange of information within the ECN is not limited by rules aiming to protect business secrecy. Nevertheless, the Commission shall keep this information confidential (Article 28(2) Regulation (EC) No. 1/2003).

Generally speaking, § 50a (1) No. 1 GWB accordingly applies to the exchange of information outside the ECN (§ 50b (1) GWB; see *supra* 1.3.1.1.). In this case, however, the transfer of

66 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 50a margin no. 34.

67 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 50a margin no. 42.

68 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 50a margin no. 42.

information is subject to the condition that the receiving authority (the Commission) will only transmit this information to third parties if the BKartA agrees to this transmission (§ 50b (2) sent. 1 no. 2 GWB). Furthermore, confidential information, including operating and business secrets, that has been disclosed in merger control proceedings may only be transmitted by the BKartA with the consent of the undertaking which has provided that information (§ 50b (2) sent. 2 GWB). Both requirements shall protect the confidentiality of business secrets: The BKartA shall ensure that the disclosure of confidential information is not disproportionate, and the consent of the undertaking is required because the undertaking shall have the right to decide upon whether or not to apply for a decision by the Commission in merger control proceedings and to disclose information to that end.<sup>69</sup>

#### 4.2.1.2.5 Confidentiality of leniency applications

The BKartA must not transmit information originating from leniency applications unless the undertaking which has submitted the application has given its consent to such transmission. This requirement, however, is not based upon domestic law, but upon the Commission Notice on cooperation within the Network of Competition Authorities of 2004 (para. 40; see also paras. 41-42 with regard to exceptions to the requirement of consent).

#### 4.2.1.3 Conditions concerning the use of transmitted information

Whereas the exchange of information within the ECN (§ 50a (1) GWB) cannot be made subject to conditions, the BKartA can impose conditions on the use of information transmitted outside the ECN (§ 50b (2) GWB). Such conditions shall ensure that the principle of purpose limitation (§ 50b(2)1 no. 1 GWB) and the confidentiality of business secrets (§ 50b (2) sent. 1 no. 2, § 50b (2) sent. 2 GWB) is maintained (see supra 1.3.1.2.1. and 1.3.1.2.4.).

### 4.2.2 Transfer of information from other administrative authorities to DG COMP

The BKartA is the national enforcement partner of the Commission in cartel cases (§ 50 (3) GWB; see supra 1.3.1). If the state competition authorities (*Landeskartellbehörden*) apply EU competition law (Articles 101 and 102 TFEU), they have to communicate with the Commission via the BKartA (§ 50 (2) sent. 1 GWB). The BKartA thereby serves as the national counterpart of the Commission and the central contact point in competition cases.<sup>70</sup> Accordingly, German law does not provide for the exchange of information between the Commission and other administrative authorities in competition cases.

### 4.2.3 Transfer of information from judicial authorities to DG COMP

EU competition law provides for an obligation for national courts to transmit any decision on the application of Articles 101 and 102 TFEU to the Commission (Article 15 (2) Regulation (EC) No. 1/2003). According to the implementing legislation, the German court shall, without undue delay after serving the decision on the parties, forward a duplicate of the decision to the Commission via the BKartA (§ 90a (1) sent. 1 GWB).

69 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 50b margin no. 13, 15.

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

Furthermore, the BKartA may request civil courts to provide copies of all briefs, records, orders and decisions in civil proceedings on the application of European and German competition law (§ 90 (1) sent. 2 GWB) and transmit them to the Commission (§ 90a (1) sent. 2 GWB). The BKartA is not obliged to transmit the requested information to the Commission (“may”), but enjoys a margin of discretion.<sup>71</sup> However, if the Commission intends to submit written observations in court proceedings, the court must, upon request, provide the Commission with all documents necessary for the assessment of the case (Article 15 (3) sent. 5 Regulation (EC) No. 1/2003, § 90a (2) sent. 2 GWB).

The rules on the exchange of information apply to court decisions (§ 90a (1) sent. 1 GWB) and documents in court proceedings such as briefs and records (§ 90a (1) sent. 2 GWB). Confidential information is not covered.<sup>72</sup> The aforementioned rules (§§ 90 and 90a GWB) apply irrespective of the opening of an investigation. Due to the limited scope of the provision (the transmission of court decisions and other official documents in court proceedings), there is no need for additional safeguards or limitations on the transfer of information.

In German law, there is no legal basis for the exchange of information between public prosecutors and the Commission (DG Competition). This is due to the fact that infringements of EU competition law are merely administrative offences that are fined by the BKartA. Even in cases where the relevant conduct is a criminal offence (bid rigging, § 298 Criminal Code), the prosecution of the corporation falls within the exclusive competence of the BKartA (§ 82 GWB) whereas the individual offender is prosecuted by the public prosecutor’s office. In such cases, the public prosecutor and the BKartA will act in close cooperation, and information can be transmitted via the ECN.

### 4.3 ECB

#### 4.3.1 Transfer of information from national counterparts to ECB

Banking supervision is a shared task of the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, hereafter BaFin) and the German Federal Bank (*Deutsche Bundesbank*, hereafter Bundesbank) (§ 6 (1) Banking Act, *Kreditwesengesetz – KWG*). Accordingly, cooperation with the ECB is the common task of BaFin and the Bundesbank: The BaFin is the national competent authority (Article 2 (2) SSM-Regulation No. 1024/2013) and – together with the Bundesbank – the competent authority within the SSM (Article 4 (1) Directive No. 2013/36/EU; see § 6 (1) sent. 2 and 3 KWG).<sup>73</sup> Both authorities inform each other of any information exchanged with the ECB (§ 7 (1a) sent. 2 KWG). However, the main responsibility lies with the BaFin (§ 7 (1a) sent. 4, (2) KWG). The Federal Financial Supervisory

71 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 90a margin no. 13.

72 B. Bergmann, in: W. Jaeger et al. (eds.), *Frankfurter Kommentar zum Kartellrecht* (82nd instalment, Nov. 2014), § 90a margin no. 13.

73 See BaFin’s Guideline on carrying out and ensuring the quality of the ongoing monitoring of credit and financial services institutions by the Deutsche Bundesbank of 19 December 2016 (preamble), available at [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Richtlinie/rl\\_130521\\_aufsichtsrichtlinie\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Richtlinie/rl_130521_aufsichtsrichtlinie_en.html) (11 October 2017); J.H. Lindemann, in: K.-H. Boos et al. (eds.), *KWG. CRR-VO* (2016), § 7 margin no. 38.

Authority 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*).

#### 4.3.1.1 Legal basis and scope of the transfer of information

The provisions on cooperation within the SSM refer to the exchange of information with the ECB (§ 7 (1a) sent. 2 and 3 KWG), but German law does not establish specific obligations to that end. Instead, it extends the cooperation model (banking supervision as a shared task of the BaFin and the Bundesbank) to vertical cooperation within the SSM, but mainly refers to the corresponding obligation under EU law (Article 6 (2) SSM Regulation No. 1024/2013).<sup>74</sup> As far as cooperation with the ECB is concerned, there is no need for further implementation on the national level.

The exchange of information with the ECB covers any type of information (statements, documents, data).<sup>75</sup> In particular, the Bundesbank shall transmit to the ECB the results of audits that it was commissioned by the ECB to carry out and incoming data sets, documents and information on the reporting and notification system and on data processing to the ECB.<sup>76</sup> The obligation for the BaFin and the Bundesbank to cooperate applies irrespective of whether or not the ECB has officially opened an investigation (Article 6 (2) SSM Regulation No. 1024/2013). Unlike in cooperation in tax and customs matters, these provisions do not provide for the financial institution concerned to be consulted.

#### 4.3.1.2 Limitations on the transfer of information

Due to the general obligation under EU law to transfer information to the ECB (see supra 1.4.), German law does not limit the transfer of information that has been collected for other purposes.

The exchange of information with the ECB is not limited by the secrecy of investigations. The general duty of confidentiality (§ 9 KWG) does not apply to the transfer of information to the ECB (§ 9 (1) sent. 4 No. 10 KWG).

Due to the subject matter of the exchange of information (banking supervision), the transfer of information to the ECB is not limited by rules protecting banking secrecy.<sup>77</sup> Nor is the exchange of information with the ECB limited by the duty of confidentiality (§ 9 KWG). Information that has been legally obtained can be shared with the SSM. Finally, there are no special provisions aiming at the protection of business secrets, and German law does not provide for conditions on the use of information transmitted to the ECB.

#### 4.3.2 Transfer of information from other administrative and judicial authorities to ECB

German law does not provide for an obligation for other administrative authorities or judicial authorities to transfer information to the ECB. The exchange of information between the ECB

<sup>74</sup> J.H. Lindemann, in: K.-H. Boos et al. (eds.), *KWG. CRR-VO* (2016), § 7 margin no. 40.

<sup>75</sup> See § 7(1a)3 („Beobachtungen, Feststellungen, Daten oder sonstige Informationen“).

<sup>76</sup> See the BaFin’s Guideline on (supra note 73).

<sup>77</sup> See for the cooperation between the BaFin and the Bundesbank: J. Habetha, in: A. Schwennicke et al. (eds.), *KWG Kreditwesengesetz* 2013) § 7 margin no. 32, with further references.

and national criminal investigation authorities is subject to the ECB Decision (EU) 2016/1162.<sup>78</sup> This decision, however, does not regulate the transfer of information to the ECB, but the transfer of confidential information to national criminal investigation authorities, i.e. the ECB is not acting as the requesting authority, but as the requested authority (Article 2).

## 4.4 ESMA

### 4.4.1 Transfer of information from national counterparts to ESMA

In Germany, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*, see supra 1.4.) is the competent authority for the supervision of credit rating agencies (§ 29 (1) Securities Trading Act, *Wertpapierhandelsgesetz – WpHG*<sup>79</sup>; Reg No. 1060/2009) and of OTC derivatives, central counterparties, trade repositories and credit rating agencies (§ 30 (1) WpHG; Reg No. 648/2012). Accordingly, ESMA's national enforcement partner is the BaFin (§ 18 (1) sent. 1 WpHG).

#### 4.4.1.1 Legal basis and scope of the transfer of information

According to § 29 (3) and § 30 (1) sent. 3 WpHG, the exchange of information with ESMA in the areas governed by Regulation Nos 1069/2009 (CRAR) and 648/2012 (EMIR) is subject to the general rules on international cooperation (§ 18 WpHG). In addition, there is a special provision on the BaFin's cooperation with ESMA (§ 19 WpHG; see also § 7b (1) sent. 3 KWG).

Upon request, the BaFin must provide ESMA with any information that ESMA needs to perform its tasks (§ 19 (1) WpHG, referring to Articles 35 and 36 Regulation No. 1095/2010). Furthermore, the BaFin shall spontaneously (i.e. without request) inform ESMA of any indicated potential infringements of EU financial markets law (§ 18 (8) sent. 1 WpHG). In addition, the BaFin shall provide general information on any sanctions and administrative measures imposed within the framework of its supervisory functions (§ 19 (2) and (3) WpHG, § 18 (4) sent. 4 WpHG).

The BaFin must provide information on cases and potential cases, but also general information on economic actors and its enforcement activities.<sup>80</sup> The BaFin is obliged to transfer information upon request, irrespective of whether or not ESMA has officially opened an investigation, if the requested information is necessary for ESMA to perform its tasks.<sup>81</sup>

#### 4.4.1.2 Limitations on the transfer of information

Since EU law establishes a general obligation to transfer information to ESMA (see supra 1.5.1.1.), German law does not limit the transfer of information that has been collected for other purposes. If the BaFin, at the request of ESMA, has carried out investigative measures, it shall indicate, when transmitting the collected information to ESMA, that the information may only be used for the purpose for which it has been transmitted (§ 18 (2) sent. 2 WpHG). This provision, however,

78 Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations, OJ L 192/73.

79 In the following, the WpHG is quoted in its new version that will enter into force by 3 January 2018.

80 See also D. Döhmel, in: H.D. Assmann & U.H. Schneider (eds.), *Wertpapierhandelsgesetz* (2012), § 7a margin no. 15.

81 D. Döhmel, in: H.D. Assmann & U.H. Schneider (eds.), *Wertpapierhandelsgesetz* (2012), § 7a margin no. 15, 16.

mainly refers to the horizontal cooperation between the competent authorities of the Member States (Art. 79 ff. Directive 2014/65/EU (MiFID II)).<sup>82</sup> Since ESMA is bound by the principle of purpose limitation (see recital 78 of Regulation No. 648/2012 and recital 33 of Regulation No. 1060/2009), it seems doubtful whether a reference to the principle of speciality is necessary with regard to information that is transmitted to ESMA.

The transfer of information is not limited by the secrecy of investigations. The general duty of confidentiality does not apply to the transfer of information to ESMA (§§ 29 (3) and 30 (1) sent. 3 and § 21 (1) sent. 3 No. 5 WpHG). There is, however, a provision on parallel domestic proceedings and their impact on international cooperation whereby the BaFin may refuse the transmission of information if judicial proceedings have already been initiated in respect of the same facts against the persons in question or if a final judgement has been delivered (§§ 29 (3), 30 (1) sent. 3 and § 18 (6) sent. 1 WpHG). Since this exception implements Article 83 of Directive 2014/65/EU (MiFID II),<sup>83</sup> it applies to horizontal cooperation between the competent authorities of the Member States (Art. 81 MiFID II), but is not relevant for the transfer of information to ESMA.

There are no special provisions aiming at the protection of banking secrecy or the professional secrecy of administrative bodies (see also for the duty of confidentiality supra 1.2.2.3.3. and 1.2.2.3.4.). If the requested information is available, it must be transmitted to ESMA. The BaFin, however, is not obliged to provide information that is protected by professional secretaries (e.g. legal professional privilege) and, thus, is not available to the BaFin.<sup>84</sup> Finally, there is no special protection for business secrets.

#### **4.4.2 Transfer of information from other administrative and judicial authorities to ECB**

Due to the BaFin's coordinating function as the national counterpart of ESMA, there are no other administrative authorities that communicate directly with ESMA. Nor is there any specific obligation for judicial authorities to transfer information to ESMA.

### **4.5 CONCLUSION**

The comparative overview of the rules on the vertical exchange of information in the four enforcement areas has revealed significant differences. Whereas the BKartA, the Bundesbank and the BaFin may rely on a domestic legal framework that has been built upon the relevant EU legislation, a legal framework for the transfer of information to OLAF is almost non-existent (see, however, § 34 ZfdG). Instead, the exchange of information must be based upon general provisions in data protection acts (BDSG, DSG NRW) or an analogous application of the rules on horizontal cooperation (§ 117 AO). This lacuna corresponds to the relatively weak position of the national counterpart (BMF) that does not have investigative powers<sup>85</sup>; in contrast, the ZKA has such powers and is expressly authorised to transfer information to supranational bodies (such

82 See in this regard Bundestags-Drucksache 18/10936, p. 229.

83 See in this regard Bundestags-Drucksache 18/10936, p. 229.

84 D. Döhmel, in: H.D. Assmann&U.H. Schneider (eds.), *Wertpapierhandelsgesetz* (2012), § 7a margin no. 16.

85 See also Böse & Schneider, supra note 1, p. 85 f.



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as OLAF). Furthermore, the areas significantly differ from each other with regard to the purpose of the transfer of information: In the ECN, the exchange of information is strictly limited to the enforcement of Arts 101 and 102 TFEU and measures against undertakings (i.e. corporations). As a consequence, there is less need for maintaining traditional limitations on the exchange of information. By contrast, the information transmitted to OLAF may be used in various contexts, be it administrative proceedings (the recovery of customs duties) or a criminal investigation; in the latter case, this will seriously affect the fundamental rights of natural persons and, thus, must be accompanied by appropriate safeguards. This is all the more reason to establish a clear legal framework for cooperation with OLAF on the national level.



## 5. HUNGARY

*A. Csúri*

### 5.1 OLAF

#### 5.1.1 Transfer of information from national counterparts (AFCOS) to OLAF

##### 5.1.1.0 OLAF national enforcement partner (AFCOS)

The Hungarian national enforcement partner of OLAF is the OLAF Coordination Office (*OLAF Koordinációs Iroda*, hereinafter HU AFCOS). The HU AFCOS is a unit within the National Tax and Customs Administration (*Nemzeti Adó- és Vámhivatal*, NTCA), which itself is part of the Ministry for National Economy (*Nemzetgazdasági Minisztérium*).

Act XXIX of 2004, which contains rules related to Hungary's accession to the EU<sup>1</sup>, forms the main legal basis for the HU AFCOS and its operations. Chapter 12 with the title "Cooperation between the Hungarian authorities and OLAF" applies to all persons and organizations linked to the Union budget<sup>2</sup> with a special focus on the HU AFCOS.

Accordingly, the HU AFCOS has the following characteristic features.

- It is part of the NTCA, but functions independently. Employees at the HU AFCOS cannot be involved in the execution of any other NCTA tasks (Art. 124.).
- In case OLAF's request concerns NTCA activities, the HU AFCOS shall act under the supervision of a person designated by the Minister responsible for taxation. (Art. 124. (4))
- The HU AFCOS has no authority or independent legal personality and no monitoring competences (Art. 124.).

According to its website, in order to protect the EU's financial interests the HU AFCOS is in direct contact with OLAF, with the Member States' anti-fraud services and with the competent national authorities and institutions. For the competent national authorities with reporting obligations towards the HU AFCOS see I.2.

##### 5.1.1.1 Obligations as regards the information transfer

In 5.1.1.2. the national report details the content of the reports that the HU AFCOS receives from the competent national authorities, which the HU AFCOS must forward to OLAF.

According to Act XXIX of 2004 the HU AFCOS:

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1 2004. évi XXIX törvény az európai uniós csatlakozással összefüggő egyes törvénymódosításokról, törvényi rendelkezések hatályon kívül helyezéséről, valamint egyes törvényi rendelkezések megállapításáról.

2 Art. 123 (2), Act XXIX of 2004.

- a) may gather *information in general about tenders* regarding EU funding, contracts with beneficiaries and the use of the funds (Art. 125. (e))
- b) *manages personal data and criminal personal data* in the framework of a specific OLAF investigation, limited to reporting purposes in the specific case (Art. 125. (f))
- c) *presents annual reports* to the Minister responsible for taxation about irregularities against the financial interests of the Union (Art. 125. § (j))

As regards the transfer of information the HU AFCOS:

- a) *complies statistics* – excluding personal data – about irregularities against the financial interests of the EU (Art. 125. § (i))
- b) *forwards reports to OLAF* concerning irregularities detected in the use of the EU budget (Art. 125. (c)). See in detail 5.1.1.2.
- c) forwards OLAF requests to the competent national authorities (Art. 125. (g))

The HU AFCOS is required to provide OLAF with information, both on request and through reporting obligations.

It is not expressly formulated, but the wording of Act XXIX of 2004 suggests that in individual cases the HU AFCOS acts upon an OLAF request, with Articles 125 and 126 clearly linking the information flow to existing OLAF investigations. (The interviewees also confirmed that this is the general practice.) On the other hand, Government Decree 272 of 2014 on the use of grants from EU funds for the period 2014-2020<sup>3</sup> and Government Decree 360/2004 on the development of financial management, accounting and control systems related to the receipt of grants from the operational programmes of the National Development Plan, the EQUAL Community Initiative Programme and the Cohesion Fund projects<sup>4</sup> require the HU AFCOS to forward reports on irregularities to OLAF. (See I.2.)

#### 5.1.1.2 Type of information

Act XXIX of 2004 determines what information/data the HU AFCOS (and consequently OLAF) might have access to.

These are:

- Information about tenders regarding EU funding, contracts with beneficiaries and the use of the funds (Art. 125. (e))
- Personal data and criminal personal data in the framework of a specific OLAF investigation, limited to reporting purposes in the specific case (Art. 125. (f))

The authorities managing EU funds have reporting obligations about irregularities on a regular basis towards the HU AFCOS and shall also provide the HU AFCOS with information in specific OLAF investigations.

The reports shall include the measures taken in connection with the irregularities and the state of possible ongoing administrative or judicial proceedings. The HU AFCOS shall forward these

3 272/2014. (XI. 5.) Korm. rendelet. a 2014-2020 programozási időszakban az egyes európai uniós alapokból származó támogatások felhasználásának rendjéről.

4 360/2004. (XII. 26.) Korm. Rendelet a Nemzeti Fejlesztési Terv operatív programjai, az EQUAL Közösségi Kezdeményezés program és a Kohéziós Alap projektek támogatásainak fogadásához kapcsolódó pénzügyi lebonyolítási, számviteli és ellenőrzési rendszerek kialakításáról.

reports to OLAF within two months of their receipt and within fourteen days in the case of newly identified irregularities (See I.2.).

Article 127 of Act XXIX of 2004 further elaborates on what (*personal*) data the HU AFCOS might have access to for its reporting purposes about the persons and organizations concerned. These are the full name, residence, profession and position of a natural person and the name/company name (full and short name), type of organization, address, seat, company register number, founding document and the name of the representative of legal entities.

In line with the webpage of the Hungarian National Authority for Data Protection and Freedom of Information (*Nemeti Adatvédelmi és Információszabadság Hatóság*) *criminal personal data* covers information related to criminal offences or criminal proceedings in connection with a specific offender and his/her criminal record, which was gathered by the competent authorities prior or during the criminal proceedings.<sup>5</sup>

Article 128 (1) of Act XXIX of 2004 provides for a *catalogue of offences*, in the case of which the HU AFCOS may process criminal personal data and may report the initiation, suspension or termination of criminal proceedings to OLAF.

### 5.1.1.3 Consequence of the official opening of an OLAF investigation

The wording of Articles 125 and 126 of Act XXIX of 2004 link the information flow towards OLAF to ongoing inquiries. The interviewees have also confirmed that the HU AFCOS activities in concrete cases require the initiation of an OLAF investigation.

Nevertheless, there is also a general reporting obligation towards OLAF as, according to Government Decree 272/2014, the HU AFCOS shall forward reports of the competent Hungarian authorities on irregularities to OLAF within two months of their receipt and within fourteen days in the case of newly identified irregularities.

### 5.1.1.4 Limitations on the transfer of information

#### *Speciality principle*

Act XXIX of 2004 sets limits on the access to and the use of information by the HU AFCOS. The HU AFCOS may not transmit any personal or criminal personal data to bodies other than OLAF, it may not use it for any other purposes and it may not link it to any other data. Additionally, personal and criminal personal data must be deleted once the OLAF audit is completed. (Art. 126 (2) and (3)). These restrictions apply between the competent Hungarian authorities and HU AFCOS and do not affect the information flow from the HU AFCOS to OLAF.

#### *Secrecy of investigations*

According to the broad wording of Article 71/B (2) Hungarian Code of Criminal Procedure<sup>6</sup> OLAF has the right to receive *any* information that has become part of the criminal files, irrespective of whether the information is considered to be confidential (professional, business, banking secrecy, etc.) under other statutes. See below.

5 Nemeti Adatvédelmi és Információszabadság Hatóság. <https://www.naih.hu/adatvedelmi-szotar.html>

6 1998. évi XIX. Törvény a büntetőeljárásról.

*Banking secrecy*

The definition of banking secrets is provided in Act CCXXXVII of 2013<sup>7</sup>. Article 161 (2) a) explicitly allows the transfer of information, including banking secrets to OLAF. (See also Section III. 1.4.)

*Professional secrecy*

The definition of tax secrets is provided in Act XCII of 2003<sup>8</sup>. Article 54 (7) explicitly allows the transfer of information, including tax secrets on the basis of an OLAF request.

*Business secrecy*

The definition of business secrets is provided in Act CXXXVIII of 2007 on Credit Institutions and Financial Enterprises.<sup>9</sup> Article 117 (3) c) explicitly allows the transfer of information, including business secrets to OLAF.

**5.1.1.5 Conditions on the use of transmitted information**

According to the interviewees, as a main rule, the HU AFCOS does not impose conditions on the use of transmitted information. However, the managing authorities might impose conditions when transferring information to the HU AFCOS. In such cases the HU AFCOS will indicate these conditions to OLAF.

**5.1.2 Transfer of information from other administrative authorities to OLAF****5.1.2.0 Administrative authorities transmitting information to OLAF***Customs:*

As elaborated in Section 1.0, the HU AFCOS is the central channel of information for OLAF. It is a unit within the National Tax and Customs Administration (*Nemzeti Adó- és Vámhivatal*, NCTA), which is itself part of the Ministry for National Economy (*Nemzetgazdasági Minisztérium*).

The NCTA carries out its tasks through its central organs (the Central Management; *Központi Irányítás* and the Criminal Directorate-General; *Bűnügyi Főigazgatóság*) and through regional bodies. The NCTA transfers information to the HU AFCOS concerning irregularities. The following legislation forms the legal basis for the NCTA and its operations: Act CXXII of 2010 on the National Taxation and Customs Administration<sup>10</sup>; Government Decree 485 of 2015 on the Jurisdiction and Responsibility of the Bodies of the National Tax and Customs Administration<sup>11</sup> and, most recently, Act CLII of 2017 on the Implementation of EU Customs Law, which entered into force on 1 January 2018.<sup>12</sup>

7 2013. évi CCXXXVII. Törvény a hitelintézetekről és a pénzügyi vállalkozásokról.

8 2003. évi CXII. Törvény az adózás rendjéről.

9 2013. évi CCXXXVII. Törvény a hitelintézetekről és a pénzügyi vállalkozásokról.

10 2010. évi CXXII. Törvény a Nemzeti Adó- és Vámhivatalról.

11 485/2015. (XII. 29.) Kormány Rendelet a Nemzeti Adó- és Vámhivatal szerveinek hatásköréről és illetékességéről.

12 2017. évi CLII. Törvény az uniós vámjog végrehajtásáról.

*Structural Funds:*

The administrative authorities managing structural funds are located both at the central and the local levels. The legal basis defining the respective authorities is widespread. At the central level the competent authorities are the respective Ministries.<sup>13</sup>

**5.1.2.1 Obligations as regards the information transfer***Customs:*

According to Act CXXII of 2010 on the National Taxation and Customs Administration, the NCTA:

- a) determines, collects, registers, executes, reimburses, assigns and monitors compulsory payments under the Law on the Implementation of EU Customs Law and
- b) compiles and summarizes data concerning tax, customs and cash flow as well as the results of controls and provides related information to governmental bodies involved in the development of economic policy.
- c) is competent for the purpose of international cooperation as defined in EU and national law, including mutual administrative assistance between authorities.
- d) co-operates with the European Anti-Fraud Office and coordinates its investigations in specific cases.<sup>14</sup>

*Structural Funds:*

Government Decree 272 of 2014 on the use of grants from EU funds for the period 2014-2020 and Government Decree 360/2004 on the development of financial management, accounting and control systems related to the receipt of grants from the operational programmes of the National Development Plan, the EQUAL Community Initiative Programme and the Cohesion Fund projects<sup>15</sup> lay down the common rules for investigating suspected irregularities and the respective reporting obligations for all competent authorities managing structural funds. The rules contain reporting obligations within the management authority and towards the HU AFCOS both in individual cases (the detection of new irregularities) as well as in a regular manner.

The common mechanism and the most important rules can be summarized as follows.

- For the purpose of registering and reporting irregularities, the competent authorities shall designate an organizational unit or person (hereinafter Auditor).<sup>16</sup>
- Among its tasks the Auditor
  - (a) registers irregularities,
  - (b) compiles quarterly reports on irregularities,
  - (c) uploads information on irregularities to the Uniform Monitoring and Information System (*Egységes Monitoring és Információs Rendszer, EMIR*<sup>17</sup>).

13 The following table indicates the competent Ministries with reporting obligations as regards structural funds. [https://www.palyazat.gov.hu/iranyito\\_hatosagok\\_kozremukodo\\_szervezetek](https://www.palyazat.gov.hu/iranyito_hatosagok_kozremukodo_szervezetek).

14 Art. 13 (3), Act CXXII of 2010.

15 360/2004. (XII. 26.) Korm. Rendelet a Nemzeti Fejlesztési Terv operatív programjai, az EQUAL Közösségi Kezdeményezés program és a Kohéziós Alap projektek támogatásainak fogadásához kapcsolódó pénzügyi lebonyolítási, számviteli és ellenőrzési rendszerek kialakításáról.

16 Government Decree 360 of 2004, Art. 43/A. (1) and Government Decree 272 of 2014, Art. 160 (1).

17 The EMIR webpage is only accessible from a Hungarian IP address. <https://www.palyazat.gov.hu/egysges-monitoring-s-informcis-rendszer-emir-szolgtatsainak-elsre>

- (d) co-operates with the HU AFCOS.<sup>18</sup>
- The results of an investigation, even if no irregularity has been detected, must be recorded in written form (hereinafter, the report).<sup>19</sup>
  - The report shall include:
    - (a) the title of the project concerned and information about the beneficiary,
    - (b) the amount per financing source,
    - (c) the way and the time of being made aware of the suspected irregularity,
    - (d) a brief summary of the suspicion,
    - (e) the names of the persons involved in the investigation,
    - (f) a list of the documents, circumstances and facts examined,
    - (g) a description of the names of the persons interviewed, the minutes of the hearing and on-the-spot examinations, signed by the persons interviewed and/or present at the time,
    - (h) in the event of a disagreement with the content of the minutes, the relevant clause,
    - (i) the conclusions reached during the investigation and a copy of the supporting documents certified by the investigator.<sup>20</sup>
  - If an irregularity has been detected the report shall further contain
    - (a) a precise reference to the infringed provisions and whether the irregularity has a detrimental effect on the general budget of the EU,
    - (b) a reference to a systematic irregularity, if any
    - (c) proposed subsequent measures.<sup>21</sup>

Additionally, Government Decree 272 of 2014 further requires an indication as to whether the irregularity establishes reporting obligations towards the European Commission, whether administrative or criminal sanctions have been imposed and whether charges have been initiated in the case of suspected fraud.<sup>22</sup>
  - Within six weeks of each quarter, the managing authority shall send a report to the paying authority on the initiation of irregularity procedures, the measures taken and their results, as specified by the European Commission.<sup>23</sup>
  - The managing authority shall attach an annex to the fourth quarterly irregularity reports on the sum withdrawn, as well as the sums recovered or recovered on a given date in the year of initiating the recovery procedures and informing the paying authority about the way in which the amounts recovered are to be reused.<sup>24</sup>
  - The managing authority shall send a report within five working days following the decision on the irregularity, and the measures taken and their results, as determined by the European Commission, in the event that the irregularity refers to a new type of illegal conduct or has an impact outside the territory of Hungary.<sup>25</sup> The paying authority forwards the report to the HU AFCOS. The HU AFCOS then forwards the report to OLAF and, if necessary, to the other Member States involved.<sup>26</sup>

18 Government Decree 360 of 2004, Art. 43/A. (2) and Government Decree 272 of 2014, Art. 158.

19 Government Decree 360 of 2004 Art. 44 (1) and Government Decree 272 of 2014 Art. 163 (1).

20 Government Decree 360 of 2004, Art. 44 (2) and Government Decree 272 of 2014, Art. 163 (2).

21 Government Decree 360 of 2004, Ar. 44 (3) and Government Decree 272 of 2014, Art. 163 (3).

22 Government Decree 272 of 2014, Art. 163 (3) c)-e).

23 Government Decree 360 of 2004, Art.48 (1).

24 Government Decree 360 of 2004, Art. 48 (2).

25 Government Decree 360 of 2004, Art. 48 (3).

26 Government Decree 360 of 2004, Art. 49 (3).



- Within seven weeks of every quarter, on the basis of the quarterly reports submitted by the managing authority, the paying authority shall send a consolidated report to the HU AFCOS about the irregularities or misuses of funds and the progress of the administrative or judicial proceedings. The HU AFCOS then forwards the report to OLAF.<sup>27</sup>
- On the basis of the quarterly reports of the managing authorities, the paying authority attaches to its annual report to the HU AFCOS an annex on the sum withdrawn, collected and recovered. The HU AFCOS then forwards the report to OLAF.<sup>28</sup>

The above reporting obligations only apply to irregularities which may be detrimental to the general budget of the Union.<sup>29</sup>

Government Decree 272 of 2014 contains further provisions concerning OLAF. These are listed under a separate title. The managing authorities shall report newly identified irregularities within 14 days to the HU AFCOS. In any case the competent authorities shall comply and send a report on the irregularities to the HU AFCOS within 6 weeks of each quarter. The report shall include the measures taken in connection with the irregularities and the progress of any possible ongoing administrative or judicial proceedings. The HU AFCOS shall forward these reports to OLAF within two months of their receipt and within fourteen days in the case of newly identified irregularities.<sup>30</sup>

As regards the means by which to register or transfer the above information, Hungarian law contains the following information:

- The irregularity officer shall record the results of the irregularity procedure within three days of the decision-making process in the monitoring and information system (EMIR).<sup>31</sup>
- The managing authority shall publish on the website of the minister responsible for the use of EU funds the decisions establishing the irregularity with the exception of personal data. Within 10 days of a decision becoming final, the name of the beneficiary, the title of the project, the consequences of the irregularity and the amount affected by the irregularity shall also be published.<sup>32</sup>
- Finally, the reports from the managing authorities to HU AFCOS as well as from the HU AFCOS to OLAF shall be sent electronically.<sup>33</sup>

### 5.1.2.2 Type of information

*Customs:*

Article 28 Act CLII of 2017 on the Implementation of EU Customs Law determines what information the NCTA may request. This constitutes the pool of data that the NCTA might transfer to the HU AFCOS (and the HU AFCOS to OLAF).

27 Government Decree 360 of 2004, Art.49 (1).

28 Government Decree 360 of 2004, Art. 49 (2).

29 Government Decree 360 of 2004, Art. 50.

30 Government Decree 272 of 2014, Art. 174 (2).

31 Government Decree 272 of 2014, Art. 165 (1).

32 Government Decree 272 of 2014, Art. 165 (3).

33 Government Decree 272 of 2014, Art. 174 (4).

Accordingly, the NCTA may request data for specific purposes from the following registers:

- a) In order to identify persons: from the personal data and address register of citizens, by means of a passport number from the passport register, from the court registry and from the register of private entrepreneurs;
- b) In order to identify goods and motor vehicles: from the vehicle register;
- c) In order to verify the conditions laid down in Article 39 (a) of the Union Customs Code in relation to a serious criminal offence in connection with economic activities referred to in Article 82 (2): the date, the offence, the punishment and the penalties from the criminal record register, information from the police biometric data system and from the court registers of the Member States of the Union about judgments against Hungarian citizens;
- d) In the context of the verification of the conditions set out in Article 39 (a) of the Union Customs Code for the prosecution of the applicant as a result of a suspicion of having committed a serious criminal offence under Article 82 (2) the NCTA may request information about the designation of the competent authority in the case, the competent Member State, the starting date of proceedings from the register of persons subjected to a criminal procedure, from the register of criminal records, from the court registers of EU Member States, including judgments against Hungarian citizens, and from the criminal and police biometric data system;
- e) At the request of the customs authorities, credit institutions shall provide information which is necessary for determining the authenticity of a customs valuation, the monitoring of a customs debt and the payment of other charges.

Data stored in the electronic system of the NCTA and any modification thereof shall be kept for 10 years from the date of its generation or modification (Article 33).

#### *Structural Funds*

Investigations carried out by the managing authorities may establish whether or not irregularities exist. Under Hungarian law, the managing authority is obliged to record the proceedings with reports to be made and forwarded in both cases to the HU AFCOS. The content of these reports (and the types of information) was outlined in 2.1. above.

#### **5.1.2.3 Consequence of the official opening of an OLAF investigation**

Investigations are carried out regardless of ongoing OLAF investigations and under Hungarian law the results of the investigations need to be reported to the HU AFCOS on a regular basis (See. 2.1.).

#### **5.1.2.4 Limitations on the transfer of information**

See above, 5.1.1.4.

#### *Other legal limits*

##### *Customs:*

Irrespective of its form, Act CLII of 2017 on the Implementation of EU Customs Law classifies as a customs secret all information received by the NCTA while carrying out its tasks (Article 27 (1)).

Act CLII of 2017 provides for various exceptions in the case of which the NCTA might transfer information – including customs secrets – to the competent authorities. For instance to the Minister of Justice, so that he/she is able to fulfil his/her reporting obligations towards the EU. This occurs either *ex officio* or within 30 days upon request (Article 29 (1) j). The same provision also provides for the possibility of customs secrets being transferred to the competent bodies of the Union and to the competent national authorities in accordance with the customs legislation (Article 29 (3)).

### **5.1.3 Transfer of information from judicial authorities (other than AFCOS, if of a judicial nature) to OLAF**

This section focuses mainly on the direct transfer of information between the Hungarian prosecution services and OLAF.<sup>34</sup>

#### **5.1.3.1 Obligations as regards the information transfer**

In general, OLAF may contact the HU AFCOS or the liaison officer of the Prosecutor General's Office to discover whether criminal proceedings were initiated in a specific case and which prosecution unit is competent. However, according to the interviewees, in practice, OLAF usually contacts the competent prosecution service directly, which then directly transfers the information to OLAF, while at the same time also informing the Prosecutor General's Office about the transfer of information.

According to the interviewees, besides case-by-case requests, the liaison officer of the Prosecutor General's Office meets OLAF investigators once or twice a year in order to exchange information on individual cases, on ongoing OLAF investigations that would possibly result in judicial recommendations and on the progress of criminal proceedings initiated upon OLAF's recommendations.

The key provision on the exchange of information between judicial authorities and OLAF (or other EU bodies) is laid down in the Hungarian Code of Criminal Procedure (1998. évi XIX. Törvény a büntetőeljárásról, hereinafter, Be.).<sup>35</sup> Accordingly, the exchange of information is based on a request and is limited to the specific purposes of such requests.

Article 71/B (2) Be.

*Upon the request of a body established by international or Union law the court, the prosecutor, the investigating authority or the national member of Eurojust shall provide the respective body with information, access to files and with authentic copies of criminal records to the extent necessary for the performance of its tasks.*

34 In addition to OLAF, the Prosecutor General's Office is in negotiations with the European Investment Bank (EIB) on possible future reporting (though not in specific cases). In the near future a Memorandum of Understanding will be signed with the EIB, even though the prosecution service may already exchange information with the EIB merely on the basis of Art. 71/B (2) of the Hungarian Code of Criminal Procedure.

35 1998. évi XIX. Törvény a büntetőeljárásról.

According to the interviewees, in practice it is assumed without further examination that the requested information is necessary for OLAF in order to perform its tasks.

Although, as a main rule, the exchange of information takes place at the initiative of one of the parties, a *spontaneous transfer of information* might also take place while carrying out their tasks. Article 63/A. Be. allows the courts, the prosecution service and the investigative authorities to inform other competent authorities about facts that would support their proceedings. In practice this provision is used to inform other competent *national* authorities, but the wording of the law as it stands would not exclude this provision being applicable to European bodies as well.

#### **5.1.3.2 Type of information**

In line with Article 71/B (2) Be. *all information* gathered in criminal proceedings, including personal data, may be transferred to OLAF.

#### **5.1.3.3 Consequence of the official opening of an OLAF investigation**

In line with Article 71/B (2) Be. it makes no difference at what point OLAF requests information. If the information is necessary to carry out OLAF's tasks, that information must be provided.

#### **5.1.3.4 Limitations on the transfer of information**

According to the broad wording of Article 71/B (2) Be. OLAF has the right to receive *any* information that has become part of the criminal files, irrespective of whether the information is considered to be confidential (professional, business, banking secrecy, etc.) under other statutes.

#### **5.1.3.5 Conditions on the use of transmitted information**

There is no applicable legal provision under Hungarian law. Nevertheless, according to the interviewees, if the competent judicial authority imposes conditions on the use of certain information, OLAF will take this into account.

## **5.2 DG COMPETITION**

### **5.2.1 Transfer of information from national counterparts (NCAs) to DG COMP**

#### **5.2.1.0 DG COMP national enforcement partner (NCA)**

The national counterpart of DG COMP in Hungary is the Hungarian Competition Authority (*Gazdasági Versenyhivatal*, hereinafter HCA), an independent authority having jurisdiction to apply Articles 101 and 102 TFEU. The HCA started operating on 1 January 1991 and became a member of the European Competition Network with Hungary's accession to the EU in 2004. The current Competition Act is Act LVII of 1996 on the prohibition of unfair and restrictive market practices,<sup>36</sup> and its latest amendment entered into force on 1 January 2018.

The HCA is an administrative authority which is independent from the government and reports only to Parliament. It is an independent budgetary institution with a separate chapter in the central budget. The HCA has no regional offices. Its central investigative units collect information in competition cases, while the International Unit deals with questions related to EU law and EU and other international relations. The HCA co-operates with the European Commission and with the

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<sup>36</sup> 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról.

competition authorities of the States Parties to the Agreement on the European Economic Area, including the EFTA Surveillance Authority.<sup>37</sup> In addition, the HCA may conclude co-operation agreements with other foreign competition authorities.<sup>38</sup> Among its main tasks, the HCA oversees the implementation of and compliance with national and Union competition rules, influences relevant government decisions and contributes in general to the development of a competition culture in Hungary.

#### **5.2.1.1 Obligations as regards the information transfer**

Council Regulations 1/2003 and 139/2004 determine what kind of information the national competition authorities must or might share with the European Commission. From the very nature of Regulation 139/2004 it follows that the transfer of information usually occurs at the request of the European Commission.

In addition, under Hungarian law, before opening the special proceedings under Article 74 Competition Act – in which the Competition Council holds a preliminary hearing before a decision is taken – the HCA shall forward its preliminary position to the European Commission and, where appropriate, to the competition authority of the Member State concerned<sup>39</sup>.

If the HCA is requested to provide information pursuant to Article 6 of Regulation 2006/2004, Hungarian law requires that the final decision must expressly confirm that the information has been sent to the Commission.<sup>40</sup>

#### **5.2.1.2 Type of information**

There are no specific rules under Hungarian law.

The interviewees confirmed that case-specific information is usually transferred to DG COMP. Although Regulation 1/2003 also enables the European Commission to request any other information, according to the interviewees the HCA has not experienced this.

#### **5.2.1.3 Consequence of the official opening of a DG COMP investigation**

DG COMP has the authority to request information before and following the opening of an official investigation and has the power to issue information injunctions before a formal investigation. Regulation 1/2003 distinguishes between information which may be requested (and transferred) before the opening of a DG COMP investigation and information that may be requested thereafter (informal contact, a request for information based on Article 12 or a request for information based on Article 18 Regulation (EC) No. 1/2003). Hungarian law does not provide for any further specific rules in this regard.

#### **5.2.1.4 Limitations on the transfer of information**

There are no specific rules, but according to the interviewees DG COMP allows Member States to request business secrets to be removed from decisions or information to be disclosed by DG COMP to third parties (e.g. complainants).

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37 Art. 33 (2a), Act LVII of 1996.

38 Art. 33 (2b), Act LVII of 1996.

39 Art. 80/B in conjunction with Art. 74, Act LVII of 1996.

40 80/H Act LVII of 1996.

### 5.2.1.5 Conditions on the use of transmitted information

Yes, on its public disclosure or disclosure to third parties, in accordance with the rules on professional secrecy (in accordance with Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions). According to the interviewees, if the HCA marks information as being confidential, DG COMP will deal with it accordingly.

## 5.2.2 Transfer of information from other administrative authorities to DG COMP

### 5.2.2.0 Administrative authorities transmitting information to DG COMP

According to the 1996 Competition Act the HCA has sole jurisdiction to apply Articles 101 and 102 TFEU.<sup>41</sup> No other administrative authority transmits information to DG COMP.

However, in matters involving state aid the corresponding partner of DG COMP is the State Aid Monitoring Office (*Támogatásokat Vizsgáló Iroda*) with its status, competence and activities being defined by Government Decree 37/2011.<sup>42</sup>

The Office is one of the departments of the Prime Minister's Office and as a result is part of the central administration. It is an administrative authority, but its primary role is that of consultation (it is necessary to consult the Office if a Hungarian aid grantor wishes to implement a State aid measure) and communication with DG COMP in State aid matters. The State Aid Monitoring Office is the *exclusive* channel of communication in State aid matters between Hungary and DG COMP.

### 5.2.2.1 Obligations as regards the information transfer

In State aid matters, it depends on the subject-matter. Notifications (including pre-notifications) and information submissions under the block exemption regulation are generally done through the formalized online interface SANI2.<sup>43</sup> In this system, there are standard web-based forms that an aid grantor completes with the assistance of the State Aid Monitoring Office. Following pre-notifications via SANI2 or via informal contacts<sup>44</sup>, e-mail is used for correspondence; following notifications, formal letters by the Commission and replies are generally sent by PKI (public key infrastructure) secured e-mail.

### 5.2.2.2 Type of information

By virtue of Council Regulation 2015/1589 and in accordance with Article 4(3) TEU, Member States are obliged to cooperate with the Commission and to provide all information that is necessary to carry out its duties under Article 108 TFEU. Consequently, DG COMP may require a broad range of information in State aid cases. According to the interviewees the State Aid Monitoring Office provides all possible information as any refusal to disclose information may run the risk that the Commission will make a decision based on limited information. Concerning the related procedure, Hungarian law complies with Regulation 2015/1589, in particular Articles 2, 4-9, 12, 15, 21, 25 and 30.

41 Art. 45, 1996 Competition Act

42 37/2011.(III.22.) Korm. Rendelet az európai uniós versenyjogi értelemben vett állami támogatásokkal kapcsolatos eljárásról és a regionális támogatási térképről.

43 Art.18/B, Government Decree 37/2011.

44 Informal contacts: The Commission might first send an informal inquiry to the Hungarian authorities if there are questions to be clarified based on, for instance, press reports. After it has received answers to its inquiry the Commission might decide to continue with a formal procedure (e.g. launching an investigation).

### **5.2.2.3 Limitations on the transfer of information**

There are no specific rules.

### **5.2.2.4 Conditions on the use of transmitted information**

Yes, on its public disclosure or disclosure to third parties, in accordance with the rules on professional secrecy (in accordance with Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions).

## **5.2.3 Transfer of information from judicial authorities to DG COMP**

### **5.2.3.1 Obligations as regards the information transfer**

Under Article 29 Regulation 139/2004, DG COMP may contact the courts in order to make observations in specific cases. For this purpose, DG COMP may *request* information from the court directly, and is bound by professional secrecy as referred to above. However, to the knowledge of the interviewees this option has not yet been exercised in Hungary.

Until as recently as 31 December 2017, Article 91/H Competition Act required the courts to share information with the HCA, sending, without undue delay, rulings concerning competition law to the Minister of Justice, who had to forward the information to the HCA<sup>45</sup>. Thus, in an indirect way, this information originating from the judicial authorities was also available for DG COMP. This provision was repealed as of 1 January 2018.

### **5.2.3.2 Type of information**

There are no specific provisions under Hungarian law.

### **5.2.3.3 Consequence of the official opening of a DG COMP investigation**

There are no specific provisions under Hungarian law.

### **5.2.3.4 Limitations on the transfer of information**

There are no specific provisions under Hungarian law.

## **5.3 ECB**

### **5.3.1 Transfer of information from national counterparts to ECB**

#### **5.3.1.0 ECB national enforcement partner**

The national counterpart of the ECB in Hungary is the Hungarian National Bank (*Magyar Nemzeti Bank*, hereinafter 'HNB'). Hungary has the status of a Member State with a derogation, i.e. it is one of the EU Member States that have not yet adopted the single currency.

The following legislation forms the legal basis for the HNB and its operations: Act CXXXIX of 2013 on the Hungarian National Bank and the consolidated version of the Fundamental Law of Hungary.<sup>46</sup> It is to be noted that the legislation and institutional framework regarding the HNB have been changed on several occasions over the course of the last few years, with more

<sup>45</sup> Former Art. 91/H (4) Competition Act. (Repealed as of 1 January 2018).

<sup>46</sup> Magyarország Alaptörvénye, Magyar Közlöny 2013/163. (X.3.).

than ten amendments between 2014 and 2016 alone.<sup>47</sup> The HNB is a member of the European System of Central Banks and the European System of Financial Supervision.<sup>48</sup> The HNB and its members are independent in carrying out their tasks and neither seek nor take instructions from the Hungarian government, from the institutions, bodies and offices of the European Union (with the exception of the ECB and other instances described in Article (3) HNB Act), or from the governments of Member States or any other organization or political party.<sup>49</sup> The HNB is a legal person functioning in the form of a company limited by shares. The seat of the HNB is in Budapest.<sup>50</sup>

### 5.3.1.1 Obligations as regards the information transfer

The HNB Act regulates certain aspects of the relationship between the HNB and certain European Union institutions, also addressing the transfer of information. According to Article 140 (1), besides other Union institutions, the HNB shall cooperate with the European Commission and the European Supervisory Authorities. While doing so, the HNB shall meet notification and data/information-supply requirements to allow these authorities to discharge their functions (Article 140 (2)).

In order to understand the lack of available information about the mechanisms for the transfer of information from the HNB to the ECB it is important to refer to the 2016 convergence report of the ECB.<sup>51</sup> In this report the ECB stated that there is a lack of compliance as regards the legal integration of Hungary into the Euro system. Various provisions in both the Fundamental Law of Hungary and in the HNB Act, especially those establishing the powers of the HNB in the field of monetary policy and instruments for the implementation thereof, do not recognize the ECB's powers in these fields, in particular concerning the collection of statistics, financial reporting and international cooperation. For instance, although Article 4(7) HNB Act generally refers to the obligation to provide statistical information to the ECB, the specific provisions that detail the powers of the HNB as regards the collection of statistics do not reflect/recognize the powers of the ECB in this field. Additionally, the law fails to recognize the ECB's powers in official foreign reserve management and in issuing operations or the HNB's obligation to comply with the Euro system's regime for financial reporting.

Next, we will summarize the information to which the HNB has access. As stated above, despite general indications in the HNB Act, the exact legal basis for the transfer (and its practical implementation) to the ECB remains rather unclear.

The following rules apply to the transfer of information between the HNB and the ECB.

According to Article 4 (6) HNB Act, the HNB shall collect and publish statistical information that is required for carrying out its tasks and fulfilling the statistical reporting obligations towards the ECB as defined in Article 5 of the Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank annexed to the Treaty on the Functioning of the European Union ('ESCB Statute'). As stated above, the relevant provisions on the gathering and transfer of statistical information do not recognize the ECB's powers in this field.

47 2013. évi CXXXIX. Törvény a Magyar Nemzeti Bankról.

48 Art. 1 (1) HCB Act.

49 Art. 1 (2) HCB Act.

50 Art. 5 (1) HCB Act.

51 See ECB report: <https://www.ecb.europa.eu/pub/pdf/conrep/cr201606.en.pdf>



The HNB may release data to foreign financial supervisory and resolution authorities and the organizations defined in Article 140(1) subsection a) for specific purposes (Article 57 (1)). Nevertheless, Article 140 (1) does not mention the ECB for these purposes.

- The HNB operates a central bank information system, in which organizations and natural persons defined in secondary legislation (Decree of the Governor of the HNB) shall provide information to the central bank information system (Article 30 (1)). The HNB shall operate a statistical system as part of the central bank information system, for the purposes of which it shall be entitled to receive data that do not qualify as personal data from bodies of the official statistical service, in a manner which is suitable for individual identification. When handling statistical data within the central bank information system, the HNB shall take all necessary regulatory, technical and organisational measures to ensure the physical and practical security of individual statistical data (Article 30 (2)).
- The governor of the HNB may stipulate in a decree the information that shall be provided to the central bank information system (together with the method and deadline for its submission) in order to facilitate the research, analysis and decision-making tasks of the HNB, in such a manner that the organizations falling within the scope of the Act on credit institutions and financial enterprises, the Act on capital markets ('Tpt.') and the Act on investment firms and commodity dealers and on the regulations governing their activities ('Bszt.'), as well as the state tax authority, the pension insurance administration body, the health insurance body, the Central Statistical Office, the Court of Registry, and, in respect of family support and disability benefits, social, child welfare, child protection and public education benefits and allowances financed from the central budget, the treasury shall irreversibly modify, for the purposes of data provision to the central bank information system, the personal data, tax secrets, banking secrets, payment secrets, securities secrets, insurance secrets, fund secrets and individual statistical data managed by them in such a way that prevents the information being associated with the subjects of the data, in order to provide the MNB with information on organizations deprived of their confidential nature, or on natural persons deprived of their personal nature. The governor of the MNB shall designate the organizations which have to provide information in a decree (Article 30 (5) HNB Act).
- The HNB is entitled to request the above information from several different organisations with the anonymous linking code established on the basis of the same encoding method, and to interconnect such information. Such an interconnection may not extend to a database managed by the HNB (Article 30 (7) HNB Act).

#### **5.3.1.2 Consequence of the official opening of a ECB investigation**

There are no specific rules.

#### **5.3.1.3 Limitations on the transfer of information**

##### *Speciality principle*

Individual statistical data provided accordingly may be used solely for statistical purposes, and the central bank information system shall deal with such data separately from other data. (Article 30 (2) HNB Act).

*Banking secrecy*

The HNB may hand over confidential information specified in Article 150(1) to the authority performing public supervisory auditing duties and acting within the scope of its functions. The persons exercising public supervisory powers are bound by a confidentiality obligation with regard to this confidential information (Article 57 (7) HNB Act).

*Professional secrecy*

The employees of the MNB and the members of the supervisory board shall not disclose any personal data, classified data, banking secrets, securities secrets, payment secrets, fund secrets, insurance secrets, occupational retirement secrets and business secrets which have come to their knowledge in performing their duties and they must comply with the legal regulations governing the management of such data. This obligation shall continue after the termination of their employment relationship or mandate (Article 150 (1) HNB Act). Additionally, the employees of the MNB shall not disclose, as professional secrets, all data, facts or circumstances of which they gain knowledge in the course of carrying out their public authority activities and which the MNB is not required by law to render accessible to other authorities or to the public. Employees of the MNB shall not disclose or use professional secrets without proper authorisation (Article 150 (2) HNB Act).

**5.3.1.4 Can the national competent authority impose conditions on the use of transmitted information, and if so, why?**

There are no specific rules.

**5.3.2 Transfer of information from other administrative authorities to ECB**

No other national authority may share information with the ECB, mainly because the MNB is responsible for overseeing the entire financial sector in Hungary and therefore – unlike other EU Member States – there are no shared competencies or different national authorities assigned to a particular subject.

**5.3.3 Transfer of information from judicial authorities to ECB**

No other national authority may share information with the ECB, mainly because the MNB is responsible for overseeing the entire financial sector in Hungary and therefore – unlike other EU Member States – there are no shared competencies or different national authorities assigned to a particular subject.

**5.4 ESMA****5.4.1 Transfer of information from national counterparts to ESMA****5.4.1.0 ESMA national enforcement partner**

The national enforcement partner of ESMA in Hungary is the Hungarian National Bank. No other national authority may share information with ESMA, mainly because the MNB is responsible for overseeing the entire financial sector in Hungary and therefore there are no shared competencies or different national authorities assigned to a particular subject.

#### 5.4.1.1 Obligations as regards the information transfer

The directly applicable Regulation No. 1095/2010<sup>52</sup> forms the legal basis for the information exchange between the HNB and the ESMA. Additionally, the HNB Act also includes provisions regarding the information exchange with ESMA. Furthermore, the transfer of information may take place within the framework of the ESMA Multilateral Memorandum of Understanding (MMOU) which was signed by the HNB.

According to the HNB Act:

- with a view to its membership of the European System of Financial Supervision, the MNB shall perform the tasks imposed upon it with regard to the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority and the European Systemic Risk Board (Article 1 (3) HNB Act).
- the MNB shall perform the tasks arising from the implementation of Commission Delegated Regulation 2015/514/EU of 18 December 2014 on the information to be provided by competent authorities to the European Securities and Markets Authority pursuant to Article 67(3) of Directive 2011/61/EU of the European Parliament and of the Council (Article 40 (17) HNB Act).
- The MNB has to cooperate with the European Supervisory Authorities, in particular the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (Article 140 (1) HNB Act).

#### 5.4.1.2 Type of information

The legal basis for the transfer of information is the directly applicable Regulation No. 1095/2010. The starting point is Article 35 of the Regulation, which governs the requests for information that ESMA can make and the requirements for meeting such requests. The interviewees stated that in practice ESMA requests and the HNB provides extensive information, for example, to provide information to the ESMA central database or to provide the information required for various surveys/studies related to ESMA's broadly defined tasks (e.g. supervisory convergence).

Under Hungarian law Article 140 (4) HNB Act requires the HNB to notify ESMA:

- aa) concerning any market abuse and administrative measures and sanctions imposed for any infringement of the statutory provisions applicable to investment firms and commodity dealers, following publication, as well as annually in aggregate form,
- ab) concerning the approval of the prospectus and any supplement thereto simultaneously with the notification of the issuer, the offer or the person asking for admission to trading on a regulated market, and shall at the same time provide a copy of the prospectus and any supplement thereto,
- ac) concerning the granting and withdrawal of authorisation to engage in investment service activities, for the establishment of an exchange, for exchange market operations, and for the pursuit of investment fund management activities,
- ad) of the regulated markets established in Hungary, including a list of such regulated markets and any changes therein,

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52 Az Európai Parlament és a Tanács 1095/2010/EU Rendelete (2010. november 24.) az európai felügyeleti hatóság (Európai Értékpapír-piaci Hatóság) létrehozásáról, a 716/2009/EK határozat módosításáról és a 2009/77/EK bizottsági határozat hatályon kívül helyezéséről

- ae) of the extrajudicial complaint and redress mechanisms which are available to the persons and entities covered by the acts referred to in Article 39,
- af) concerning bonds, mortgage bonds, and the particulars of the issuers of such, which satisfy the conditions set out in Article 52(4) of Directive 2009/65/EC, including a list of the relevant categories with a notice specifying the status of the attached guarantees offered, and
- ag) of the information available relating to third countries under Article 62(3) of the Pmt., in order to protect the integrity of the internal market and to seek funding from alternative financing sources.

#### **5.4.1.3 Consequence of the official opening of an ESMA investigation**

There are no specific rules under national law.

#### **5.4.1.4 Limitations on the transfer of information**

There are no specific rules under national law.

#### **5.4.2 Transfer of information from other administrative authorities to ESMA**

No national authority other than the HNB may share information with ESMA, mainly because the HNB is responsible for overseeing the entire financial sector in Hungary and therefore – unlike other EU Member States – there are no shared competencies or different national authorities assigned to a particular subject.

#### **5.4.3 Transfer of information from judicial authorities to ESMA**

See above.

## 6. ITALY

*S. Allegrezza*

### 6.1 OLAF

#### 6.1.1 Transfer of information from national counterparts (AFCOS) to OLAF

##### 6.1.1.0 OLAF national enforcement partner (AFCOS)

Italy's AFCOS-designated authority is the Italian Financial Police (*Guardia di Finanza*), a division which specialises in combating EU fraud at the Department of European Policies. It represents the "intermediary" of the National Committee for Combating Community Fraud (COLAF), operating at the Department for European Policies at the Presidency of the Council of Ministers.<sup>1</sup>

The COLAF was established by Article 76 of Law n. 142/1992 and was 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 is a Committee regulated as a public law agency but it has no direct operational authority.

It has the following tasks:

- Providing advice and coordination at the national level against fraud and irregularities in the fields of taxation, the Common Agricultural Policy and structural funds;
- monitoring the flow of information on unlawfully obtained European funds and on their recovery in the case of misuse under Regulations (CE) 1828/06 and (CE) 1848/06 and further modifications;
- reporting to the European Commission according to Article No. 325 of the Treaty on the Functioning of the European Union (TFEU).

The Committee is chaired by the political authority responsible for European Affairs (*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, which are appointed by the Chair;

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<sup>1</sup> See S. Allegrezza, Italy, in: M. Luchtman & J. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (2017), p. 129.

- The Members appointed by the national Conference of Regions, Cities and Local Authorities. The Committee's action is supported by a technical secretariat composed of officers from the Financial Police Anti-fraud Unit, operating at the Department for European Policies<sup>2</sup>.

A special Unit of the Italian Financial Police (*Guardia di Finanza – GdF*) operates – according to Law No. 234 of December 24th 2012, Article No 54 – at the Department for European Policies to counter fraud against the European Union's budget. The GdF division represents the technical support for the COLAF.

The Division is responsible for:

- the closing of dossiers opened with the European Commission – OLAF, relating to cases of fraud/irregularities reported by Italy, through a continuous and constant exchange of information with the competent Management Authorities;
- coordinating the activities of the Italian Administrations with those of the European Institutions, particularly through constant participation in the meetings of the Anti-fraud Group of the EU Council (AFG), the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF) and the European Anti-fraud Communicators Network (OAFCN);
- updating the publication of all the lists of beneficiaries of European funding on the website of the Presidency of the Council ([www.politicheeuropee.it](http://www.politicheeuropee.it)) in the spirit of the European Transparency Initiative;
  - monitoring the flow of information (through the IT system's denominated "Irregularities Management System") on misused European funds and their recovery under Regulations (EC) 1681/94 of July 11th 1994 and 1828/06 of December 8th 2006, and further modifications;
  - operating as the national contact and coordination point for the "Questionnaires" on the anti-fraud activities of the European Commission, in compliance with Article No. 325 of the Treaty on the Functioning of the European Union (TFEU)<sup>3</sup>.
- offering to cooperate with other Member States wishing to study the effective anti-fraud organization and the management models of Italy in-depth<sup>4</sup>.

As for its legal status, the specialized division is part of the Guardia di Finanza (GdF) (English: Financial Police). The GdF is an Italian public law enforcement agency (*rectius*, a military police force) under the authority of the Minister of Economy and Finance.

#### 6.1.1.1 Obligations as regards the information transfer

On 5 June 2012, a new Technical Memorandum of Understanding was signed governing cooperation between the Guardia di Finanza and the European Anti-Fraud Office (OLAF), replacing the previous memorandum of understanding signed in 1996 with the Unit on the Coordination of Fraud Prevention (UCLAF) which was no longer in line with the EU and Italian legislative and organisational frameworks. The M.O.U. is not a public body.

In brief, the agreement:

- a. provides that cooperation between the Guardia di Finanza and OLAF should target:

<sup>2</sup> See the information provided at <http://www.politicheeuropee.it/struttura/16528/colaf>

<sup>3</sup> See the information provided at <http://www.politicheeuropee.it/struttura/15381/nucleo-lotta-alle-frodi>.

<sup>4</sup> AA.VV., *Il contrasto alle frodi finanziarie all'Unione europea. Strategie e strumenti di controllo*, Gengemi ed., 2012, p. 26.

- preventing fraud, corruption and any other unlawful activity which falls within the the two entities' field of responsibility;
  - preventing and combating serious irregular behaviour by persons who work in any capacity within the EU institutions and bodies.
- b. covers the following:
- the exchange of information, including strategic information;
  - procedures for operational or technical assistance;
  - conditions under which it is possible to take Community action;
- c. ensures possible future training initiatives and staff exchanges.

In accordance with the mission statement of the Guardia di Finanza, as laid down in Legislative Decree No. 68/2000, and its pre-eminent role in preventing and combating fraud against the EU budget, assigned to the Force by the Decree of the Ministry of the Interior of 20 April 2006 in relation to the "Reallocation of police forces' areas of competence", the Memorandum of Understanding strengthens and improves the current system of cooperation with the Commission in combating any unlawful activity which is harmful to the financial interests of the Union.

Besides consolidating the international dimension of the role attributed to the Force by Article 4(1) of Legislative Decree No. 68/2000, the updated Memorandum of Understanding between the Guardia di Finanza and OLAF highlights the benefit of a common point of reference for Member States in the fight against fraud, given the transnational nature of the organisations commonly involved in fraud. It is thanks to OLAF that they can streamline their actions and have access to specialist knowledge in highly technical operational areas. The initiative has therefore been carried out as part of a wider strategic approach to offences which are harmful to the financial interests of the European Union<sup>5</sup>.

As for the international legal framework, until the approval of the very recent PIF Directive<sup>6</sup>, the PIF Convention provided for the possibility for the authorities involved in protecting the EU's financial interests to exchange information. According to Article 7, "the competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering. The Commission and the competent national authorities shall take account, in each specific case, of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed"<sup>7</sup>.

There is no specific legal provision in national law concerning the transfer of information to OLAF. The lack of a specific legal basis does not mean that information is not transmitted but

<sup>5</sup> This information has been provided by the Commission staff working paper on the Implementation of Article 325 by the Member States in 2012 accompanying the document entitled « Report from the Commission to the European Parliament and the Council on Protection for the European Union's financial interests - Fight against fraud - Annual Report 2012.

<sup>6</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

<sup>7</sup> Art. 7 of the Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests - Joint Declaration on Article 13 (2) - Commission Declaration on Article 7, Official Journal C 221 , 19/07/1997, (PIF Convention).

only that this data flow is not formalized. No further information is available because the above-mentioned M.O.U. is not accessible to the public. According to informal information obtained by telephone interviews, the exchange of information covers all sorts of data related to a potential criminal activity affecting the EU's interests. Confidentiality should be respected by both sides. There is a specific Hercule-funded project on the development of "Technical Support for National Authorities' Use of Special Investigative Tools and Methods in the Fight against Fraud and Corruption and Technical Support to Strengthen Inspections of Containers and Trucks at the EU's External Borders, Including the fight against Cigarette Smuggling and Counterfeiting"<sup>8</sup>.

#### 6.1.1.2 Type of information

The COLAF can only transmit so-called "cold data", i.e. data that are not related to ongoing criminal investigations. In particular, they deal with structural funds (for which there is currently no mutual assistance in administrative matters), agricultural funds and customs (for which better administrative mutual assistance tools are available).

The COLAF has no direct investigative authority nor a direct power to transmit information regarding ongoing criminal proceedings. When it comes to potential fraud, the COLAF or any other administrative authority dealing with EU funds will transmit the information to a law enforcement agency with a specific and full set of criminal investigation powers, such as the operational divisions of GdF or the customs police. This is part of the duty to report suspected criminal activity to criminal law enforcement authorities provided by Art. 331 of the Italian Code of Criminal Procedure.

We should highlight that Italy allows the administrative enforcement authorities to use criminal investigative powers and forces in order to protect the EU's financial interests<sup>9</sup>.

The exchange of information with OLAF will then follow the rules for criminal investigations (see question n. 3.4). In this case, GdF and the customs police as criminal enforcement agencies have access to the whole body of information, including any administrative document potentially related to criminal activity. They have access to all data, not only to criminal information.

This transfer of information cannot be centralised because it depends on the territorial competence of the different authorities composing the criminal justice system.

When it comes to information concerning an organized crime investigation, the authority in charge is the Direzione Investigativa Antimafia (*DNA – the National Anti-Mafia Prosecution*

8 (Hephaestus "High-Tech Empowering of (Ph)orensic Advanced Expertise Systems and Tools for the (European) Union's Sake" - Grant Agreement OLAF/2013/D5/065. On the developments, see the National Anti-fraud Database, Computer Tool for preventing Fraud Against the Union's Financial Interest with the Collaboration of the Law Enforcement Staff and the National and Regional Authorities, Rome, 2016.

9 See Art. 4, § 2, d.lgs. 19 March 2001, n. 68 ("Adeguamento dei compiti del Corpo della Guardia di finanza, a norma dell'articolo 4 della legge 31 marzo 2000, n. 78"), according to which the GDF can use the powers provided by Arts 52, § 2, d.p.r. 633/1972 and 33, § 1, d.p.r. 600/1972. See S. Allegrezza, *supra* note... p. 139 f. and G. Lasagni, 'Cooperazione amministrativa e circolazione probatoria nelle frodi doganali e fiscali. Il ruolo dell'Ufficio europeo per la lotta antifrode (OLAF) alla luce della direttiva OEI e del progetto EPPO', *Diritto penale contemporaneo*, (2015), p. 4.



*Service*) with whom OLAF has signed a co-operation protocol on 17 February 2000<sup>10</sup>. According to the press release on this agreement (not disclosed to the public), the DNA and OLAF will mutually communicate information and data for the purposes of prevention, investigation and detection and the follow-up action required to combat illegal activities as well as for the purposes of identifying and recovering profits resulting from these activities.

### **6.1.1.3 Consequence of the official opening of an OLAF investigation**

There are no specific rules under national law.

### **6.1.1.4 Limitations on the transfer of information**

The above-mentioned limitations do not come into play as regards the transfer of information between OLAF and COLAF, given the mere liaising role of the latter and the nature of the “cold data” which are transmitted.

Specific rules on secrecy only apply when private parties want to have access to information which is retained by the Public Administration<sup>11</sup>.

As stated above, the M.O.U. is not available to the public but international obligations do apply, in particular the second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities’ financial interests according to which the Member States and the Commission, when transferring information between the competent authorities, “shall take account, in each specific case, of the requirements of investigation secrecy and data protection”<sup>12</sup>.

When it comes to information related to a criminal investigation, rules on secrecy as provided by the Code of Criminal Procedure will apply.

The secrecy of investigations that prohibits any disclosure of investigative data to any agency or person not directly in charge of the investigation occupies a central role<sup>13</sup>. This secrecy does not allow for investigative findings to be made public until they are disclosed to the defendant. This confidentiality should also apply even between different public enforcement agencies not directly involved in the investigation unless the information is relevant for criminal enquiries. In this case the police or the prosecutor can always request information and the different enforcement agencies have an obligation to report activities when they realize that a crime has been committed, but once the *notitia criminis* has reached the criminal enforcement agencies the latter have no duty to disclose any investigative result at least until the end of the investigation.

This might be (and it has been) the case for OLAF, whose reports have been included in criminal trials concerning, in particular, Euro fraud, TVA carousel frauds and organised crime related to

10 Cooperation Protocol between the Italian National Anti-Mafia Directorate (DNA) and the European Anti-Fraud Office (OLAF)

11 Art. 24 of Law n. 241 of 1990.

12 Art. 7 of the PIF Convention, according to which the Commission may transfer personal data obtained from a Member State in the performance of its functions under Article 7 to any other Member State and/or to any third country provided that the Member State which supplied the information has agreed to such a transfer (Art. 10).

13 See Art. 329 of the Code of Criminal Procedure.

smuggling activities<sup>14</sup>. In such cases there has been an intense exchange of information between criminal prosecutors and OLAF agents but this flow of information is not specifically regulated by Italian law.

Several rules allow one or more witnesses to withhold information which they possess. They are thus a privilege for witnesses before the authorities.

Such rules represent a limitation on the fact-finding exercise of the courts and they are envisaged to protect legally relevant constitutional interests. Needless to say, they are only legitimate to the extent that they pursue the protection of a legally constitutional interest.

There are three legitimate reasons for withholding information on the basis of the protection of secrecy: the protection of professional secrecy (Article 200 CCP), which also includes the protection of journalists' sources (Article 200 section 3 CCP), the protection of administrative secrecy (Article 201 CCP) and the protection of State secrets (Articles 202 and 204 CCP). The last-mentioned category is not directly relevant for the purpose of this study.

The protection of professional secrecy is only accorded to certain categories of professionals explicitly identified by the law. The law offers this privilege to members of the clergy in order to protect citizens' freedom and liberty of religion; to legal counsel and notaries in order to protect citizens' right to defence; and to doctors and medical staff in order to protect the free access to health experts and facilities. Alongside these three categories, Article 200 mentions a fourth residual category: other professions which are given this privilege by other statutes.

The protection of administrative secrecy can be traced back to the old French idea that the administration needs to be shielded from undue impediments and control. Over time the logic surrounding the work of the public administration has changed and the rule which currently applies is that of transparency. The work of all public servants must be transparent and visible to citizens. This change in logic has called into question the legitimate existence of such a privilege, which appears to many to have now become archaic. The only accepted forms of administrative secrecy are very specific and confined situations, such as the right of judges to ensure that their deliberations are confidential or the right of certain public authorities (e.g. central banks) to withhold information on their activities<sup>15</sup>.

In both cases judges can overcome a situation where a witness refuses to provide information when they believe that the alleged privilege is unfounded.

A special rule applies to journalists. They can only withhold information concerning the identity of their sources and a judge can compel them to reveal their sources when he/she believes that certain information is essential in proving an alleged crime and that the reliability of information can only be checked by identifying the journalist's source.

As for banking secrecy, this is no longer protected by Italian law, in particular when it comes to criminal investigations. Bank employees do not enjoy professional secrecy (among the professions listed there are no banking officials – with the exception of Banca d'Italia's civil servants (see *infra* sub. III)). Anti-Mafia legislation specifically provides for the authority of law enforcement agencies and prosecutors to request information on the bank accounts of potential suspects of Mafia-related crimes.

14 See Lasagni, *supra* n. 9.

15 On the different forms of secrecy in criminal proceedings in the Italian system, see M. Panzavolta, 'sub artt. 200, 201 and 202', Conso – Grevi – Illuminati, *Commentario breve al codice di procedura penale*, Kluwer-Cedam, Padova, 2015, 796, f.

There is no specific legal provision allowing for a transfer to OLAF but, as we have previously stated, this does not mean that the transmission of information is prohibited but rather that the procedure is completely informal.

#### **6.1.1.5 Conditions on the use of transmitted information**

There are no specific rules under national law.

### **6.1.2 Transfer of information from other administrative authorities to OLAF**

#### **6.1.2.0 Administrative authorities transmitting information to OLAF**

The legal basis of administrative cooperation in the field of customs and structural funds is represented by Council Regulation (EC) No. 515/97 of 13 March 1997 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.

– As for structural funds, the competent authority for sending information to the IMS (*the Irregularity Management System*) on behalf of different managing authorities is COLAF. The administration of structural funds is mostly conferred upon the different regions. A list of managing authorities according to the different fields can be found at: [http://ec.europa.eu/regional\\_policy/it/atlas/managing-authorities//?search=1&keywords=&periodId=3&countryCode=IT](http://ec.europa.eu/regional_policy/it/atlas/managing-authorities//?search=1&keywords=&periodId=3&countryCode=IT). It is important to emphasize that the exchange of data remains exclusively in the hands of COLAF and the above-mentioned authorities only deal with the management of specific EU policies. They provide information on the programme, manage the selection process and monitor the execution of the different programmes.

As for the current picture, Italy has 57 operational programmes (OP) : 11 national OP (NOP) managed by central governmental authorities (Ministries), 39 regional OP (ROP) managed by the Regions and 2 autonomous provinces and, finally, 7 OP involving European Territorial Cooperation (ETC).

For example, the managing authority for the National Operational Programme on Legality is the Italian Ministry of Home Affairs; the Ministry for Infrastructure and Transport's General Division for territorial development is competent for the management of the National Operational Programme on Infrastructures and Networks.

– As for customs, the Customs Agency is a non-economic public body established by Legislative Decree n° 300 dated 30th July 1999<sup>16</sup>. It is competent to transfer information to the CIS customs information system<sup>17</sup>.

According to Article 343 of the Customs Law, the Financial Administration is in charge of exchanging information with foreign counterparts in order to combat breaches of customs law subject to the condition of reciprocity. Olaf is not explicitly mentioned among the authorities that

<sup>16</sup> See G. Lasagni, *supra* nt. 9, p. 4.

<sup>17</sup> See the List of customs authorities designated by Member States for the purposes of receiving applications for, or issuing binding tariff information, adopted in accordance with Art. 6(5) of Commission Regulation (EEC) No. 2454/93(1), as last amended by Regulation (EC) No. 214/2007(2).

might send or receive information from the Italian Financial Administration but that only means that the transfer of information is informal.

In general, when it comes to anti-corruption, in 2016 OLAF signed a cooperation agreement with the Italian national Anti-Corruption Authority (ANAC).

Article 3 provides that ‘The Partners will provide each other, on their own initiative or upon request, with information which might be relevant for the other partner in view of their common interest, as spelled out in the Preamble of the Arrangement, including allegations of fraud, corruption or any other illegal activities potentially affecting the financial interests of the European Union. Based on this information, the Partners may identify further collaboration opportunities.

3.2. When cooperating on a specific case, the Partners will exchange relevant information, in line with their respective missions and applicable confidentiality requirements. The information exchange should include relevant elements for identifying:

- the persons, companies or entities suspected of being involved and
- the nature of fraud, corruption or other illegal activities.

3.3. The Partners will exchange information via the contact persons referred to under Article 10. In case of an information request, the requested partner will provide an initial reply to the request as soon as possible and no later than 30 days from the receipt of the request.’

According to this last provision, an exchange of information does not usually need any formal request.

#### **6.1.2.1 Obligations as regards the information transfer**

There are no specific rules under national law. Italian legislation refers to guidelines provided by the European Commission and the directly applicable legal provisions of Union law. In particular, administrative enforcement follows the rules laid down in Council Regulation (EC) No. 515/97 of 13 March 1997 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. It provides for specific rules on the exchange of information between the Commission and the Member States and among the Member States themselves. The Regulation introduces an obligation for the Member States to transmit information and irregularities to the EU Commission<sup>18</sup>.

With a specific reference to criminal investigations involving OLAF, several members of the police and prosecution authorities have highlighted the need for greater specialization in cybercrimes and a stronger network involving European agencies (in particular OLAF and Eurojust) to strengthen the exchange of information.<sup>19</sup>

<sup>18</sup> Arts 17 and 18 of Council Regulation (EC) No. 515/97 of 13 March 1997.

<sup>19</sup> M. Carducci, *La cooperazione giudiziaria e di polizia nelle indagini sul cybercrime: l'esperienza del pool reati informatici presso la Procura della Repubblica di Milano*, in: *Information Technologies in the criminal investigation: a European perspective*, a cura di Francesco Cajani – Gerardo Costabile, Experta, Forlì, 2011, p. 23.

### **6.1.2.2 Type of information**

There are no specific legal provisions under national law (as for anti-corruption, see question 2.0).

### **6.1.2.3 Consequences of the official opening of an OLAF investigation**

There are no specific legal provisions under national law.

### **6.1.2.4 Limitations on the transfer of information**

#### *Speciality principle*

There are no specific legal provisions under national law.

#### *Secrecy of investigations*

When a case involves a criminal offence, a criminal investigation is opened at the national level and, as a consequence, the applicable set of rules changes and all the relevant criminal procedural rules apply, including those related to the secrecy of investigations (see under 1.4).

Accordingly, the rules on judicial cooperation in criminal matters will apply (MLA conventions, letters rogatory, spontaneous transmission and, in the future, the EIO). When it comes to OLAF, it seems that the transfer of information follows the rules laid down in the MOU that has not been made public. but it cannot be considered to be a specific legal framework.

#### *Banking secrecy*

Banking secrecy is no longer protected by Italian law, in particular when it comes to criminal investigations. Bank employees do not enjoy professional secrecy (among the professions listed there are no banking officials – with the exception of Banca d'Italia's civil servants (see infra sub III)). Anti-Mafia legislation specifically provides for the authority of law enforcement agencies and prosecutors to request information on the bank accounts of potential suspects of Mafia-related crimes.

There is no specific legal provision allowing for a transfer to OLAF but, as we have previously stated, this does not mean that the transmission of information is prohibited but rather that the procedure is completely informal.

#### *Professional secrecy*

As a general rule, all State administration employees are civil servants bound by professional secrecy, which prohibits them from communicating confidential information, gathered in the exercise of their function, to third parties, unless this is authorized by law. However, this provision does not apply to the transfer of information between different law enforcement agencies. This means that the duty of confidentiality only represents a limitation on disclosure to the public at large or to private agencies, but it does not prohibit an exchange of information between different administrative enforcement agencies. When it comes to information related to a criminal investigation, rules on secrecy as provided by the Code of Criminal Procedure will apply.

#### *Business secrecy*

There are no specific legal provisions under national law.

#### **6.1.2.5 Conditions on the use of transmitted information**

There are no specific legal provisions under national law.

### **6.1.3 Transfer of information from judicial authorities (other than AFCOS, if of a judicial nature) to OLAF**

#### **6.1.3.1 Obligations as regards the information transfer**

COLAF, the national AFCOS, has no – or very limited - access to operational information related to ongoing investigations that are being conducted by the competent law enforcement authorities. As a consequence, all the relevant flows of information concerning fraud are transmitted by investigative authorities (GdF, the police and the judicial authorities).

As we have already clarified, in 2012 OLAF renewed its memorandum of understanding with the Italian GDF (not made public).

In 2000 OLAF signed a cooperation protocol between the Italian National Anti-Mafia Directorate (DNA) and the European Anti-Fraud Office (OLAF).

This document has also not been made available.

On 23 June 2006, OLAF signed a cooperation protocol with the Prosecutor General of the Italian Court of Auditors in Brussels at the end of the 4th Conference of Anti-Fraud Prosecutors General. This protocol was confirmed and renewed in 2013 with a new Administrative Cooperation Agreement (ACA), according to the new Regulation No. 883/2013. The above agreements provide for ongoing collaboration and investigative reporting between the prosecutors of the Italian Court of Auditors and OLAF. Of particular interest in the new agreement is, inter alia, OLAF's foreseen assistance also in the enforcement of convictions that are related to direct funds (and which, in respect of the administration that suffered the loss in revenue, fall within the jurisdiction of the European Commission's Legal Service).

It has not been made publicly available.

#### **6.1.3.2 Type of information**

There are no specific legal provisions.

#### **6.1.3.3 Consequence of the official opening of an OLAF investigation**

There are no specific legal provisions.

#### **6.1.3.4 Limitations on the transfer of information**

##### *Speciality principle*

There are no specific legal provisions.

##### *Secrecy of investigations*

Article 329 of the Italian Code of Criminal Procedure lays down the principle of the secrecy of every investigative activity carried out by the prosecutor or by the police until the end of

the investigation but this does not apply to OLAF because, as we have said, the secrecy of investigations does not apply to those agencies that are required to provide information to the police and/or prosecutors.

#### *Banking secrecy*

Banking secrecy is no longer protected by Italian law, in particular when it comes to criminal investigations. Bank employees do not enjoy professional secrecy (among the professions listed there are no banking officials – with the exception of Banca d'Italia's civil servants (see *infra*). Anti-Mafia legislation specifically provides for the authority of law enforcement agencies and prosecutors to request information on the bank accounts of potential suspects of Mafia-related crimes.

There is no specific legal provision allowing for a transfer to OLAF but, as we have previously stated, this does not mean that the transmission of information is prohibited but rather that the procedure is completely informal.

#### *Professional secrecy*

Professional secrecy is protected by Article 200 of the Italian Code of Criminal Procedure. It covers only specific professions (doctors, lawyers, members of the clergy, private investigators, certain experts and notaries).

#### *Business secrecy*

There are no specific legal provisions. Specific rules on secrecy only apply when private parties want to have access to information retained by the Public Administration (Article 24 of Law n. 241 of 1990).

When it comes to information related to a criminal investigation, rules on secrecy as provided by the Code of Criminal Procedure will apply.

### **6.1.3.5 Conditions on the use of transmitted information**

There are no specific legal provisions.

## **6.2 DG COMPETITION**

### **6.2.1 Transfer of information from national counterparts (NCAs) to DG COMP**

#### **6.2.1.0 DG COMP national enforcement partner (NCA)**

The counterpart of DG COMP is the Italian Competition Authority (*ICA - Autorità Garante della Concorrenza e del Mercato - AGCM*). The Italian Competition Authority is an independent collegial administrative agency established by Law no. 287/90. The procedural rules and the investigative powers of the Authority are laid down in Law no. 287/90 and Decree No. 217/98. According to Article 10(4) of Law no. 287/90, the Authority “may correspond with any government department and with any other statutory bodies or agencies under public law, and may request information and co-operation in the performance of its duties. Being the national Competition Authority, it is responsible for relations with the institutions of the European Community provided by the relevant provisions of Community law”.

### **6.2.1.1 Obligations as regards the information transfer**

No specific rules are provided at the national level. Law no. 278/90 simply states that when the Competition Authority considers that a case does not fall within the scope of that Act, it shall inform the Commission of the European Communities and shall forward any relevant information which it has at its disposal<sup>20</sup>.

### **6.2.1.2 Type of information**

The obligation includes any relevant information which it has at its disposal.

### **6.2.1.3 Consequence of the official opening of an DG COMP investigation**

No specific rules are provided under national law.

### **6.2.1.4 Limitations on the transfer of information**

#### *Speciality principle*

According to Article 12 of Presidential Decree no. 217/98, '1. All the information acquired in the process of enforcing the Act and this Regulation shall only be used for the purposes for which it has been requested.'

#### *Secrecy of investigations*

Information collected in the course of an investigation is covered by professional secrecy (see below question 1.3 d).

#### *Banking secrecy*

No specific rules are provided under national law.

#### *Professional secrecy*

Confidentiality is strongly protected in competition cases. Any information or data regarding undertakings being investigated by the Authority is completely confidential and may not be divulged even to other government departments<sup>21</sup>. In the exercise of their functions, officials of the Authority shall be considered 'public officials'. As a consequence, they are sworn to secrecy<sup>22</sup>. According to Article 12 of Presidential Decree no. 217/98, '1. All the information acquired in the process of enforcing the Act and this Regulation shall only be used for the purposes for which it has been requested and, pursuant to Section 14(3) of the Act, it is to be treated as confidential and may not be divulged even to government departments and authorities, 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 Community<sup>23</sup>, pursuant to Sections 1(2), and 10(4) of Law no. 287/90'.

20 Art. 1(2) of Law no. 287/90.

21 Art. 14(3) of Law no. 287/90.

22 Art. 14(4) of Law no. 287/90.

23 See Arts 1 and 10(4) of Law no. 287/90



*Business secrecy*

Italian law protects the business secrecy of companies within the procedure regulated by Presidential Decree 217/98 when other parties are involved, but this does not apply to the transfer of information to DG COMP.

Whenever investigated 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 to have access to the file is permitted for other parties, wholly or partly, to the extent that is strictly necessary to enable them to make representations in respect thereof. Access to documents containing commercial secrets is not allowed. 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.

Any parties wishing to safeguard the confidentiality or secrecy of any information supplied shall submit a specific request to this end to the offices of the ICA, containing details of the documents or parts thereof which they consider should be kept confidential, specifying the reasons for the request<sup>24</sup>.

*Other legal limits*

The general secrecy of ongoing criminal investigations as laid down in Article 329 of the Italian Code of Criminal Procedure shall apply.

**6.2.1.5 Conditions on the use of transmitted information**

According to Article 12 of Presidential Decree no. 217/98, ‘All the information acquired in the process of enforcing the Act and this Regulation shall only be used for the purposes for which it has been requested. It is plausible to apply the same limits to the information transferred to DG COMP.’

**6.2.2 Transfer of information from other administrative authorities to DG COMP**

This is not provided for in the national legal framework. It might be necessary for the Commission to contact other authorities such as the Authority for Telecommunications or the agencies in charge of controlling and authorising pharmaceuticals. In any case, this might be defined as being an obligation.

**6.2.3 Transfer of information from judicial authorities to DG COMP**

As for judicial authorities in administrative law, DG COMP might enjoy the same procedural role as the ICA but no obligation to transfer information is provided by law.

As Italian law does not consider competition breaches to be criminal offences, there is no exchange of information with criminal judicial authorities. When the information related to a competition case is relevant in order to ascertain a criminal offence, it is treated as any other information coming from the administrative enforcement authorities.

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<sup>24</sup> See Art. 13 of Presidential Decree no. 217/98.

## 6.3 ECB

### 6.3.1 Transfer of information from national counterparts to ECB

#### 6.3.1.0 Who is the ECB national enforcement partner and what is its legal status?

The ECB's Italian counterpart is the Bank of Italy, a public law institution that is in charge of the supervision of the banking and financial system (together with the *Commissione nazionale per la borsa e il mercato – CONSOB*).

The Bank of Italy's banking and financial supervisory powers have their legal basis in the Consolidated Law on Banking (*Testo unico bancario – TUB*, Legislative Decree 385/1993) and in internal circulars.

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 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 the designated National Competent Authority (NCA) under the Single Supervisory Mechanism (SSM) and the National Resolution Authority (NRA) under the Single Resolution Mechanism (SRM).

Personnel of the Bank of Italy participate in the JSTs established by the ECB when requested.

#### 6.3.1.1 Obligations as regards the information transfer

Article 6 of the Consolidated Law on Banking provides for the duty of Italian credit institutions to comply with obligations stemming from European rules, vis-à-vis the ECB in particular.

In the light of this general power of the ECB to obtain relevant information directly from the credit institutions, Article 6 *bis* (2)(b) of the Consolidated Law on Banking provides for a duty for Banca d'Italia to transfer all the information and data in its possession that are relevant within the SSM framework. Banca d'Italia shall also inform the ECB of all information gathered according to its independent supervisory powers and of any ongoing administrative proceedings<sup>25</sup>, in line with the provisions of the SSMR and the SSMFR. If the ECB opens a proceeding and asks for the cooperation of Banca d'Italia, the latter will promptly inform the ECB about the results<sup>26</sup>.

There are no specific provisions on digital automatized systems.

#### 6.3.1.2 Type of information

Any information that is relevant for banking supervision can be transferred between the ECB and Banca d'Italia. This might refer to the prudential requirements of the credit institution or to corporate governance's 'fit and proper' requirements. With regard to this aim, one should note that other branches of the State administration or other public entities should transfer information and cooperate with Banca d'Italia according to their specific legal framework. For example, CONSOB and Banca d'Italia exchange information when the credit institution in question deals with investments on the stock market.

<sup>25</sup> Art. 6 *bis* (2)(d) of the Consolidated Law on Banking.

<sup>26</sup> Art. 6 *bis* (2)(e) of the Consolidated Law on Banking.

### 6.3.1.3 Consequence of the official opening of an ECB investigation

This is no different to the opening of an official investigation.

### 6.3.1.4 Limitations on the transfer of information

Information that is in the Bank of Italy's possession and which has been acquired in the course of its supervisory, regulatory and inspectoral activities cannot be divulged owing to the limits imposed by the obligation of professional secrecy pursuant to Article 7 of the Consolidated Law on Banking, according to which 'all the information and figures possessed by the Bank of Italy by virtue of its supervisory activity shall be covered by professional secrecy, also with respect to governmental authorities'. According to Art. 7(2) TUB, "employees of the Bank of Italy, in the performance of supervisory functions, are public officials and are obliged to report exclusively to the Directory all irregularities detected, even when they take on the appearance of crimes. The SSM provisions on the communication of information to the ECB are applicable. According to Art. 7(8) TUB, the Bank of Italy may exchange information with administrative or judicial authorities within the scope of liquidation or insolvency proceedings, in Italy or abroad, regarding banks, foreign branches of Italian banks, Italian branches of EC and non-EC banks, and persons included within the scope of consolidated supervision.

Similar confidentiality constraints are moreover imposed by European legislation (EU Council Regulation No. 1024/2013). A violation of professional secrecy by a staff member of the Bank of Italy can also lead to criminal proceedings. The professional secrecy obligation does not apply in a number of clearly circumscribed cases (for example, vis-à-vis the judiciary and Consob).

All information or data gathered by Banca d'Italia because of its mandate and scope is covered by professional secrecy (defined as "*segreto d'ufficio*" according to Italian law)<sup>27</sup>. But, as stated by scholars, "Once entered into the SSM through the NCAs – the point of entry of all supervisory information from credit institutions - information is available to all the SSM components consistently with the allocation of responsibilities therein, professional secrecy being applicable only outside the System"<sup>28</sup>.

In particular, just as for the banking secrecy of credit institutions, under Article 10(1) of the SSM Regulation the ECB may require legal and natural persons mentioned therein "to provide all information that is necessary in order to carry out the tasks conferred on it" by the regulation. Paragraph 2 adds that "the persons referred to in paragraph 1 shall supply the information requested" and clarifies that even "professional secrecy provisions do not exempt those persons from the duty to supply that information" and that "supplying that information shall not be deemed to be in breach of professional secrecy". These general rules apply to Italy. As a consequence, when it comes to the exchange of information between Banca d'Italia and the ECB, the ordinary professional secrecy privilege does not apply. The latter provides that "employees of Banca d'Italia are civil servants and when they are acting as supervisory authorities they have the duty to report every irregularity to only the management board of Banca d'Italia' (even when it concerns criminal misconduct)<sup>29</sup>. But this provision, as we have said, does not apply to the transfer of information to the ECB within the framework of the SSM.

27 Art. 7(1) of the Consolidated Law on Banking.

28 R. D'Ambrosio, *The ECB and NCAs accountability*, p. 65.

29 Art. 7(2) of the Consolidated Law on Banking.

The Consolidated Financial Law (see the definition in the ESMA part) provides for a list of cases in which professional secrecy does not apply, but “for any other purpose the provisions governing professional secrecy in respect of information and data in the possession of the Bank of Italy shall be unaffected”<sup>30</sup>.

As for secrecy in the case of a criminal investigation, please refer to section 1.4.

### **6.3.2 Transfer of information from other administrative authorities to ECB**

#### **6.3.2.0 Administrative authorities transmitting information to ECB**

In particular Consob according to Article 2(2-bis) Legislative Decree n. 58 of 1998 (see *infra* VI, 1). “The authorities indicated in subsection 1 shall exercise, each to the extent applicable, the intervention powers attributed to them by Parts I and II of this Legislative Decree also to ensure compliance with EU Regulation no. 575/2013, the relevant technical regulatory and implementing rules issued by the European Commission pursuant to Articles 10 and 15 of EU Regulation no. 1093/2010, or in the event of non-compliance with the directly applicable ESMA and EBA acts adopted under these regulations”.

#### **6.3.2.1 Obligations as regards the information transfer**

The same rules apply as those governing the transfer of information to ESMA when the data are related to investment banking activities carried out by credit institutions . See *infra*, sub. IV.

#### **6.3.2.2 Type of information**

The same rules apply as those governing the transfer of information to ESMA when the data are related to investment banking activities carried out by credit institutions . See *infra*, sub. IV.

#### **6.3.2.3 Consequence of the official opening of an ECB investigation**

There are no specific legal provisions.

#### **6.3.2.4 Limitations on the transfer of information**

The same rules apply as those governing the transfer of information to ESMA when the data are related to investment banking activities carried out by credit institutions . See *infra*, sub. IV.

#### **6.3.2.5 Conditions on the use of transmitted information**

There are no specific legal provisions.

### **6.3.3 Transfer of information from judicial authorities to ECB**

#### **6.3.3.1 Obligations as regards the information transfer**

There are no specific provisions in national law.

#### **6.3.3.2 Type of information**

There is no obligation to transfer information for criminal judicial authorities when a criminal investigation is ongoing until the end of the investigations (see subsection 1.4).

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<sup>30</sup> Art. 4(8) of the Consolidated Law on Finance.

### **6.3.3.3 Consequence of the official opening of an ECB investigation**

There are no specific provisions in national law. The ordinary rules governing criminal procedure will apply.

### **6.3.3.4 Limitations on the transfer of information**

There are no specific provisions in national law.

## **6.4 ESMA**

### **6.4.1 Transfer of information from national counterparts to ESMA**

#### **6.4.1.0 ESMA national enforcement partner**

ESMA's national counterpart is CONSOB - The Commissione Nazionale per le Società e la Borsa (CONSOB). It is the public authority which is 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). As for its legal status, CONSOB is a public agency governed by public law.

According to Article 3 (2-ter) of the Consolidated Financial Law “Consob shall be the point of contact for the receipt of requests for information from competent authorities of EU member states regarding investment services and activities performed by authorised persons and regulated markets”.

#### **6.4.1.1 Obligations as regards the information transfer**

The Consolidated Financial Law provides a set of detailed obligations that require the CONSOB to transfer information to ESMA for the fulfilment of its tasks. According to Article 2(3) “In cases of crisis or tension on financial markets, the Bank of Italy and Consob consider the effects of their action on the stability of the financial system of the other Member States, also using the appropriate exchange of information with the European Securities and Markets Authority, the Joint Committee, the European Systemic Risk Board and the supervisory authorities of other Member States”. These obligations reflect CONSOB's mandate as the main Italian financial regulator. Most of the information gathered by the financial regulator is digital and is collected by atomised systems. In this field, one might say that “digital” is the ordinary nature of relevant data. Consob has adopted specific guidelines for communications between the supervised financial entities, in particular intermediaries, and Consob: they are first checked by the Fund Manager and the Investment fund data in order to verify their syntactic and semantic correctness, and then they are sent to ESMA. XML files and the SFTP Protocol are used<sup>31</sup>.

As a regulator, CONSOB transmits both “spontaneously” and on request, but in both cases the applicable rules are the same.

#### **6.4.1.2 Type of information**

According to the EU, CONSOB should transfer all the information that is required according to EU law, i.e. that is needed in order to enable ESMA to carry out its tasks. As stated by Art. 35 of Regulation No. 1095/2010, ‘at the request of the Authority, the competent authorities of

31 Guidelines for reporting, available at <http://www.consob.it/documents/46180/46181/AIFMD+Reporting+Istruzioni.pdf/de48f0fb-046b-4fcd-8dd8-28af93c553dc>.

the Member States shall provide the Authority with all the necessary information to carry out the duties assigned to it by this Regulation, provided that they have legal access to the relevant information, and that the request for information is necessary in relation to the nature of the duty in question<sup>7</sup>.

The Bank of Italy and CONSOB may use ESMA to solve disputes with supervisory authorities from the other Member States in cross-border situations<sup>32</sup>.

When CONSOB and/or the Bank of Italy receive information from the corresponding financial supervisory authorities of other Member States, this information may not be transmitted to third parties or other Italian authorities, including the Minister of the Economy and Finance, without the consent of the authority that has supplied it<sup>33</sup>.

#### **6.4.1.3 Consequence of the official opening of an ESMA investigation**

There are no specific rules under national law.

#### **6.4.1.4 Limitations on the transfer of information**

In general, “all the information and data possessed by Consob by virtue of its supervisory activity shall be covered by professional secrecy, also with respect to governmental authorities, except for the Minister of Economy and Finance. Cases in which the law provides for investigations of violations subject to criminal sanctions shall be unaffected<sup>34</sup>. Professional secrecy binds all the employees of Consob as well as consultants and experts engaged by Consob<sup>35</sup>. The Consolidated Law on Finance also points out that “in the performance of their supervisory functions employees of Consob shall be 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”<sup>36</sup>. This rule represents a derogation from the duty to report established by Article 331 of the Italian Code of Criminal Procedure according to which any civil servant has the duty to report every suspected criminal activity to the police or other criminal agency.

As for professional secrecy, it does not apply between the Bank of Italy, Consob, the Commissione di vigilanza sui fondi pensioni and IVASS (see Article 4(1) of the Consolidated Financial Law: “The Bank of Italy, Consob, the Commissione di vigilanza sui fondi pensioni and IVASS shall cooperate by exchanging information and otherwise for the purpose of facilitating their respective functions. The said authorities may not invoke professional secrecy in their mutual relations”). As a consequence, no professional privilege applies with regard to ESMA. In fact, “The Bank of Italy and Consob collaborate, also through the exchange of information, with the authorities and committees comprising the ESFS, in order to facilitate their respective duties. In the cases and ways established by European legislation, they fulfil the disclosure obligations with regard to the said parties and other authorities and institutions indicated by the provisions of the European Union”<sup>37</sup>.

32 See Art.4(3) of the Consolidated Financial Law.

33 See Art. 4(4) of the Consolidated Financial Law.

34 See Art. 4(10) of the Consolidated Law on Finance.

35 See Art. 4(12) of the Consolidated Law on Finance.

36 See Art. 4(11) of the Consolidated Law on Finance.

37 See Art. 4(2) of the Consolidated Law on Finance.

According to Article 4(5) of the Consolidated Financial Law, an exchange of information with the authorities of non-EU countries shall be subject to the existence of provisions concerning professional secrecy.

A specific provision concerning the transfer of information on criminal sanctions is the following: ‘For cooperation, by the exchange of information, which the competent authorities of European Union Member States and with ESMA, Consob and the Bank of Italy establish with the Ministry of Justice, also on the basis of a memorandum of understanding, the procedures for obtaining information on the criminal sanctions applied by the Judicial Authority, for the offences contemplated under Article 2638 of the Civil Code and Articles 166, 167, 168, 169, 170-bis and 173-bis, for successive communication to ESMA, pursuant to Article 195-ter, paragraph 1-bis<sup>38</sup>. For this aim, and without prejudice to the prohibition on information covered by investigative secrecy pursuant to Article 329 of the Code of Criminal Procedure, Consob and the Bank of Italy may request information from the relevant judicial authority with regard to the investigations and criminal proceedings for the offences contemplated by paragraph 13-bis 104<sup>39</sup>.

These provisions partially mitigate the general rule under Art. 329 Code of Criminal Procedure, which has been mentioned several times in this report, according to which information related to ongoing criminal investigations cannot be divulged until the end of those investigations in order to protect the secrecy of criminal investigations. When it comes to financial supervision, this provision might be overruled by the abovementioned rules allowing financial regulators to have access to criminal information. In any event it seems that any transfer of information between criminal judicial authorities and ESMA should be “mediated” by Consob or the Bank of Italy.

#### **6.4.1.5 Conditions on the use of transmitted information**

There are no specific rules under national law.

### **6.4.2 Transfer of information from other administrative authorities to ESMA**

#### **6.4.2.0 Administrative authorities transmitting information to ESMA**

The Bank of Italy.

#### **6.4.2.1 Obligations as regards the information transfer**

There are no specific provisions in national law.

#### **6.4.2.2 Consequence of the official opening of an ESMA investigation**

There are no specific legal provisions.

#### **6.4.2.3 Conditions on the use of transmitted information**

See section III on Banca d’Italia.

38 See Art. 4(13 bis) of the Consolidated Law on Finance, added by Art. 1 of Italian Legislative Decree no. 71 of 18.4.2016.

39 See Art. 4(13 ter) of the Consolidated Law on Finance, added by Art. 1 of Italian Legislative Decree no. 71 of 18.4.2016.

### **6.4.3 Transfer of information from judicial authorities to ESMA**

There are no obligations or specific rules under national law, with an exception being made for the criminal investigative authorities when it comes to ongoing criminal investigations (see *supra*, III, and IV). As stressed in the Vertical Report, it is unlikely that information held by national judicial authorities will be transferred to ESMA.



## 7. LUXEMBOURG

*V. Covolo*

### 7.1. OLAF

#### 7.1.1 Transfer of information from national counterparts (AFCOS) to OLAF

##### 7.1.1.0 OLAF national enforcement partner (AFCOS)

Luxembourg has designated the Directorate of International Financial Relations, Development Aid and Compliance (*Affaires multilatérales, développement et compliance*), within the Ministry of Finance, as the national anti-fraud coordination service (AFCOS).<sup>1</sup> Accordingly, the Luxembourg AFCOS constitutes an administrative unit without an independent legal status.

##### 7.1.1.1 Obligations as regards the information transfer

Luxembourg law does not lay down specific rules governing the exchange of information between OLAF and the national AFCOS. It should be underlined, however, that the Luxembourg AFCOS simply constitutes a national contact point vested with the task of facilitating cooperation and the exchange of information between OLAF and the competent administrative and judicial authorities within the country. Consequently, the Luxembourg AFCOS does not have access to information related to ongoing – especially criminal – investigations carried out by the other competent national authorities. With regard to this legal framework, the AFCOS is simply entitled to provide OLAF with “non-operational” information (e.g. the contact details of the competent body) that is necessary for ensuring coordination between the investigative units.

##### 7.1.1.2 Type of information

There are no specific rules under national law.

##### 7.1.1.3 Consequence of the official opening of an OLAF investigation

Here are no specific rules under national law.

##### 7.1.1.4 Limitations on the transfer of information

The above-mentioned limitations do not come into play as regards the transfer of information between OLAF and the Luxembourg AFCOS. The latter plays a liaising role in so far as it facilitate cooperation and contacts between OLAF and the national competent authorities, which provide information to the former. Therefore, the national AFCOS has no – or very limited – access to

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<sup>1</sup> Council of Ministers 14/11/2014.

operational information relating to ongoing investigations that are conducted by the competent administrative and law enforcement authorities.

#### 7.1.1.5 Conditions on the use of transmitted information

There are no specific rules under national law.

### 7.1.2 Transfer of information from other administrative authorities to OLAF

#### 7.1.2.0 Administrative authorities transmitting information to OLAF

- *Customs*

In customs matters, the national competent authority is the Luxembourg Customs Administration (*L'Administration des douanes et accises*). According to national law, the latter has direct access to the Customs Information System (CIS) and is entitled to use the data stored in the said database.<sup>2</sup> The Luxembourg Customs Administration is further responsible for the collection and processing of information within the CIS.

- *Structural funds*

The national authorities which are competent for administering structural funds in Luxembourg and are therefore likely to report irregularities are administrative services within different ministries in their sectorial field of competence. For instance, the national FEDER Managing authority is the Directorate for Regional Policy (*Direction de la Politique régionale*) within the Ministry of Economics. Agricultural funds such as FEAGA and FEADER fall within the competence of the Control Unit (*Unité de contrôle*) within the Ministry of Agriculture.

#### 7.1.2.1 Obligations as regards the information transfer

- *General remarks*

It should be stressed that Luxembourg law does not provide for specific rules governing the duty for the administrative authorities to report irregularities and, broadly speaking, to transfer information to OLAF. Thus, the legal basis for the exchange of information between Luxembourg's competent authorities and the European Anti-Fraud Office lies in the directly applicable legal provisions of Union law.<sup>3</sup> Yet, the relevant EU legal instruments governing the exchange of information refers back to national law.<sup>4</sup> Thus, the lack of specific implementing provisions in the domestic legal

2 Art. 3 Law of 20 December 2002 ratifying the Convention on the use of information technology for customs purposes (*Loi du 20 décembre 2002 portant approbation du Protocole, établi sur la base de l'article K.3 du Traité sur l'Union européenne, concernant l'interprétation, à titre préjudiciel, par la Cour de Justice des Communautés européennes de la Convention sur l'emploi de l'informatique dans le domaine des douanes, signé à Bruxelles, le 29 novembre 1996*), Mém. A 160

3 Commission Staff Working Document, Implementation of Article 325 TFEU by the Member States in 2014, SWD(2015) 154 final, at 62.

4 See for instance Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council 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, 18.9.2013, p. 1; in the field of structural funds Commission Delegated Regulation (EU) 2015/1970 of 8 July 2015 supplementing Regulation (EU) No. 1303/2013 of the European Parliament and of the Council with specific provisions on the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European

order results in legal loopholes that can hinder the transfer of information. This holds particularly true with regard to general provisions imposing confidentiality duties on the national competent authorities. In particular, the violation of professional secrets constitutes a criminal offence under Luxembourg law, unless a statutory provision authorises the communication of confidential information.<sup>5</sup> However, Luxembourg law does not have such legal provisions with regard to OLAF as it does for other Union institutions and agencies (such as, for instance, DG Com and the ECB).<sup>6</sup> The national statutes governing the protection of personal data seem to confirm, however, that the transfer of information to OLAF would require the introduction of specific legal provisions. Indeed, according to Article 4 of the 2002 Act on the protection of personal data, the competent authorities must process, use and transfer such data for purposes predefined by statutory provisions. This further highlights the legal limbo surrounding the exchange of information between the Luxembourg competent authorities and OLAF.

- *Customs*

The 2002 law designating the Luxembourg Customs Administration as the national authority having access to the CIS does not provide any rules governing the transfer of information, but simply refers to the provisions under Union law that govern the collection, processing and storage of information in the database. In a report published in 2016 the national Data Protection Supervisor regretted the lack of a national legal framework.<sup>7</sup>

- *Structural funds*

There are no specific legal provisions under national law. As mentioned above, Luxembourg's competent authorities apply rules provided under EU regulations.

### 7.1.2.2 Type of information

As mentioned above (see question 2.1), Luxembourg law does not lay down specific provisions clarifying the legal conditions upon which information can be transferred, nor the type of information to be exchanged. As regards the latter aspects, some EU legal instruments specify the type of data to be provided, such as, for instance, Regulation 2015/1970 on customs and agricultural matters. Although Luxembourg's competent authorities apply those directly applicable EU rules, legal loopholes persist where the relevant Union provisions refer back to national law.

### 7.1.2.3 Consequence of the official opening of an OLAF investigation

Luxembourg law does not provide specific rules that limit the transfer of information depending on whether OLAF has opened an investigation.

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Maritime and Fisheries Fund, OJ L 293, 10.11.2015, p. 1; in customs matters see Council Regulation (EC) No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1.

5 Art. 458 Luxembourg Criminal Code (*Code pénal*).

6 Cf. Sections II, III and IV, *infra*.

7 National Commission for Data Protection, Report on the execution of the supervisory authority's tasks during 2014 and 2015, at 5 – 6, available at [https://cnpd.public.lu/fr/publications/rapports/groupe\\_article17/rapport\\_1415.pdf](https://cnpd.public.lu/fr/publications/rapports/groupe_article17/rapport_1415.pdf)

#### 7.1.2.4 Limitations on the transfer of information

##### *Speciality principle*

According to Article 4 of the 2002 law on the protection of personal data, the competent authorities must process such data in compliance with the predefined purposes for which they were collected.<sup>8</sup> In other words, Luxembourg law prohibits the subsequent use of personal data for a purpose that is different from the one that justifies the collection of the information. Likewise, the transfer of information should be authorized by law for predefined purposes, including where national authorities exchange data in accordance with international cooperation instruments in administrative and criminal matters.<sup>9</sup> Therefore, the speciality principle does not prevent the transfer of information gathered in the course of investigations to other European authorities entrusted with the power to prevent, investigate and sanction EU fraud provided that the information transfer is required or authorized by Union law.

##### *Secrecy of investigations*

There are no specific legal provisions under national law.

##### *Banking secrecy*

There are no specific legal provisions under national law.

##### *Professional secrecy*

As a general rule, Luxembourg's civil servants are bound by professional secrecy, which prohibits them from communicating confidential information, gathered in the exercise of their function, to third parties, unless this is authorized by law.<sup>10</sup> The relevant legal provisions define the scope of information covered by secrecy in a broad and unclear way. According to domestic law, professional secrecy prevents, for instance, customs officials from disclosing 'anything' that comes to their knowledge in the performance or due to the performance of their duties to third parties.<sup>11</sup> According to the law, the duty of secrecy does not however prevent customs officers in the performance of their function from providing administrative and judicial authorities with information in compliance with the applicable Union law.<sup>12</sup>

The wording of the national provision referred to gives rise to a twofold remark. On the one hand, the duty of confidentiality incumbent upon customs authorities aims, first of all, to prevent private persons, who are third parties in the proceedings, from accessing information gathered by the administrative authorities. Professional secrecy shall not jeopardize, as a matter of principle, the exchange of information which is necessary to ensure coordination and cooperation between European and national competent authorities. On the other hand, however, Luxembourg law does not lay down a clear legal framework governing the transfer of data but, on the contrary, refers back to the application of Union law. The cross-reference between the national and European

8 Art. 4 (1) a) Law of 2 August 2002 of the protection of personal data (*Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*), Mem. A 91.

9 Art. 17 (1) c) Law of 2 August 2002 of the protection of personal data.

10 Art. 11 Modified law of 1979 regulating the status of the State's civil servants (*Loi du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat*), consolidated version available at [http://data.legilux.public.lu/file/eli-etat-leg-code-fonction\\_public-20170906-fr-pdf.pdf](http://data.legilux.public.lu/file/eli-etat-leg-code-fonction_public-20170906-fr-pdf.pdf)

11 Art. 320 (1) General Law on customs and duties (*Loi générale sur les douanes et accises*) [http://data.legilux.public.lu/file/eli-etat-leg-recueil-douanes\\_accises-20171023-fr-pdf.pdf](http://data.legilux.public.lu/file/eli-etat-leg-recueil-douanes_accises-20171023-fr-pdf.pdf)

12 Art 320 (2) General Law on customs and duties.

legal order may potentially lead, once again, to a legal vacuum that seems to characterize the transfer of information with OLAF.

#### *Business secrecy*

There are no specific legal provisions under national law.

#### *Other legal limits*

It should be stressed that in Luxembourg any duly constituted authority, public official or civil servant, and any employee or agent responsible for a public service mission, who, in the performance of his or her duties, becomes aware of facts that may constitute a crime or offence, is required to notify the Public Prosecutor without delay and to send to the Public Prosecutor all the necessary information, notwithstanding any rule of confidentiality or professional secrecy that may be applicable to them.<sup>13</sup> If, as a consequence to this reporting duty, the Public Prosecutor opens an investigation, the transferred information will then be covered by the secrecy of criminal investigations (see question 3.4 b).

#### **7.1.2.5 Conditions on the use of transmitted information**

There are no specific legal provisions.

#### **7.1.3 Transfer of information from judicial authorities (other than AFCOS, if of a judicial nature) to OLAF**

##### **7.1.3.1 Obligations as regards the information transfer**

Luxembourg law does not impose nor does it provide specific rules governing the obligation for the national judicial authorities to inform OLAF. In other words, the duty to report to or inform the Office stems from directly applicable rules under sectoral Regulations and Regulation 883/2013. With regard to the latter, no specific implementing measures have been adopted in Luxembourg, even where Union law refers to domestic law. The only exception to this can be found in the legal provisions that implemented the 2002 Council Decision setting up Eurojust. Accordingly, for the purposes of receiving and transmitting information between Eurojust and OLAF, the Luxembourg national member of Eurojust is regarded as the competent authority for the purposes of Regulations concerning the investigations conducted by OLAF.<sup>14</sup>

##### **7.1.3.2 Type of information**

There are no specific legal provisions under Luxembourg law.

##### **7.1.3.3 Consequence of the official opening of an OLAF investigation**

Luxembourg law does not provide for specific rules that limit the transfer of information depending on whether OLAF has opened an investigation.

<sup>13</sup> Art. 9 Modified Law of 16 April 1979 laying down the general terms and conditions of employment for civil servants and Article 23(2) Luxembourg Code of Criminal Procedure (*Code de procédure pénale*). Hereinafter CCP.

<sup>14</sup> Art. 75-7 Law of 11 April 2005 implementing the Council Decision setting up Eurojust (*Loi du 11 avril 2005 portant 1. transposition de la décision du Conseil du 28 février 2002 instituant Eurojust afin de renforcer la lutte contre les formes graves de criminalité, 2. Modification de la loi modifiée du 7 mars 1980 sur l'organisation judiciaire et du Code d'instruction criminelle*), Mem. A 42

### 7.1.3.4 Limitations on the transfer of information

#### *Speciality principle*

According to Article 4 of the 2002 law on the protection of personal data, the competent authorities must process such data in compliance with the predefined purposes for which they were collected.<sup>15</sup> In other words, Luxembourg law prohibits the subsequent use of personal data for a purpose that is different from the one that justifies the collection of the information. Likewise, the transfer of information should be authorized by law for predefined purposes, including where national authorities exchange data in accordance with international cooperation instruments in administrative and criminal matters.<sup>16</sup> Therefore, the speciality principle does not prevent the transfer of information gathered in the course of investigations to other European authorities entrusted with the power to prevent, investigate and sanction EU fraud provided that the transfer of information is required or authorized by Union law.

#### *Secrecy of investigations*

Article 8 Luxembourg Code of Criminal Procedure (CCP) lays down the principle of the secrecy of investigations conducted by the police at the behest of both the Public Prosecutor or the Investigating Judge.<sup>17</sup> The said principle prohibits national law enforcement and judicial authorities from disclosing information related to ongoing investigations to persons who are not parties to the criminal proceedings.<sup>18</sup> According to the case law, a violation of the confidentiality of criminal investigations arises where the investigating judge gives persons other than the defendant or the victim access to the entire case file<sup>19</sup> or communicates documents gathered through house searches to third parties without prejudice to the needs of the investigation.<sup>20</sup> Indeed, the secrecy of investigations shall not prevail over effectively conducting criminal proceedings. For instance, no legal provision can prevent the investigating judge from disclosing to the public any information which has been gathered through means of surveillance in order to identify the author of a criminal offence.<sup>21</sup> Likewise, the Public Prosecutor may disclose to the public any information which is related to the progress of a criminal procedure, without prejudice, however, to the right of defence, the protection of personal data, the presumption of innocence, the right to privacy and the dignity of the persons concerned as well as properly conducting the investigation.<sup>22</sup>

Thus defined, the secrecy of criminal investigations constitutes an obstacle to the transfer of information to OLAF. Insofar as the Anti-Fraud Office has no specific legal status in national criminal proceedings, it does not have access to the materials in the case file. Moreover, the second paragraph of Article 8 CCP provides that an officer or magistrate who breaches the secrecy of investigations is criminally liable for a violation of professional secrecy according to Article 458 Luxembourg Criminal Code, unless national law provides for derogations, notably, from the international obligations in the field of international cooperation.<sup>23</sup> Accordingly, the

15 Art. 4 (1) a) Law of 2 August 2002 of the protection of personal data.

16 Art. 17 (1) c) Law of 2 August 2002 of the protection of personal data.

17 Art. 8 (1) Luxembourg CCP

18 CSJ, Ch.c.C. 9 décembre 2016, n° 1045/16

19 CSJ, Ch.c.C. 9 décembre 2016, n° 1045/16

20 CSJ, Ch.c.C. 11 novembre 2016, n° 905/1

21 CSJ Ch.c.C. 24 avril 2012, n° 254/12

22 Art. 8 (3) Luxembourg CCP

23 Art. 8 (2) Luxembourg CCP

lack of specific legal provisions under Luxembourg law that explicitly lift the duty of secrecy vis-à-vis OLAF prevents the exchange of information and documents recorded in the criminal case file. Likewise, the application of Union law does not establish unconditional reporting duties that prevail over national law. Indeed, Article 8 of Regulation 883/2013 requires the national authorities to transfer information to OLAF ‘in so far as national law allows’. Again the cross-reference between Union and Luxembourg law leads to a legal limbo that is an obstacle to information exchange.

Having regard to the general rules governing access to the case file under Luxembourg law, one could imagine that the European Commission would become a civil party (*partie civile*) to the criminal proceedings in order to recover EU funds, which have been embezzled by the accused. In this situation, the Commission would benefit from the right to have access to certain information and, to some extent, to the case file subject to the conditions laid down in Luxembourg’s CCP. The communication of information related to the criminal proceedings shall not, however, undermine the rights of the defendant. In this regard and considering the similarities between their inquisitorial criminal justice systems, the Luxembourg Court might adopt the same approach as the French Court of Cassation in 2010.<sup>24</sup> After having been heard as a witness by the Court of Appeal, an OLAF official requested and obtained a copy of the record of the hearing. Such documents were not communicated to the defendant. According to the Court of Cassation, this situation amounted to a violation of the right to a fair trial guaranteed by Article 6 ECHR. The judgement stressed that the disclosure of the record of the hearing to OLAF suggested that the European Officials, who recommended the case for criminal prosecution, had close ties with the national court which convicted the accused. Thus, the judicial scrutiny carried out by domestic courts may encompass the observance by OLAF of fundamental rights applicable to national criminal proceedings.

#### *Banking secrecy*

In the course of a criminal investigation, judicial and law enforcement authorities may collect confidential information that is covered by banking secrecy.<sup>25</sup> Once collected, such information is recorded in the criminal case file and is thus covered by the secrecy of criminal investigations. At this stage of the proceedings, it is consequently the secrecy of investigations – and not banking secrecy – that prevents the transfer of information between the national judicial authorities and OLAF (see question 3.4b).

#### *Professional secrecy*

See above.

#### *Business secrecy*

As for banking secrecy, judicial and law enforcement authorities may collect confidential information that is covered by business secrecy.<sup>26</sup> Once collected, such information is recorded in the criminal case file and is thus covered by the secrecy of criminal investigations. At this stage of the proceedings, it is consequently the secrecy of investigations – and not the business secrecy

24 Cass. crim. (France), 27 January 2010, App. No 09-81693.

25 Art. 41 (1) Law of 5 April 1993 on the financial sector, Mem. A27, as modified by the Law of 12 January 2001.

26 Business secrecy is notably protected under Articles 309 and 458 Luxembourg Criminal Code.

– that prevents the transfer of information between the national judicial authorities and OLAF (see question 3.4b).

#### **7.1.3.5 Conditions on the use of transmitted information**

There are no specific legal provisions under Luxembourg law.

## **7.2 DG COMPETITION**

### **7.2.1 Transfer of information from national counterparts (NCAs) to DG COMP**

#### **7.2.1.0 DG COMP's national enforcement partner (NCA)**

The national counterpart of DG COMP in Luxembourg is the Competition Council (*Conseil de la concurrence*), which constitutes an independent administrative authority having jurisdiction to apply Articles 101 and 102 TFEU.<sup>27</sup>

#### **7.2.1.1 Obligations as regards the information transfer**

According to the 2011 Competition Act, the Luxembourg Competition Council is the competent authority to collect notifications and to meet the commitments referred to in Regulation 1/2003 and Regulation 139/2004.<sup>28</sup> As a consequence, the Competition Council is bound by the obligations related to the transfer of information as laid down in the above-mentioned regulation. In addition, Luxembourg law states that the Competition Council may transmit information or documents in its possession as well as information and documents it has gathered to the European Commission or to the competition authorities of the other Member States when they so request, provided that two conditions are met:

First, the condition of reciprocity implies that Luxembourg's authorities are not obliged to provide information that the requesting authority could not itself obtain in the normal course of administration. In other words, a lack of reciprocity arises where the requesting authority is not able to obtain and provide the requested information under similar circumstances. The underlying rationale aims to prevent the requesting authority from taking advantage of the cooperation with the Luxembourg authorities in order to circumvent restrictions imposed upon them by the law or where their administrative practice would result in a lack of a reciprocal exchange of information. Second, the competition authority of the other Member State concerned must be subject to the obligation of professional secrecy with the same guarantees as those offered by the Grand Duchy of Luxembourg.<sup>29</sup>

It should be noted, however, that the twofold condition of reciprocity and confidentiality solely refers to the transfer of information between the Luxembourg Competition Council and its national counterparts in other countries. Luxembourg law does not expressly lay down the same requirements as regards the transfer of information to the DG COMP.

#### **7.2.1.2 Type of information**

Article 31(1) of the 2011 Competition Act refers broadly to information and documents in possession of the Luxembourg Competition Council.

<sup>27</sup> Art. 6 Competition Act of 23 October 2011 (*Loi du 23 octobre 2011 relative à la concurrence*), Mem A 218.

<sup>28</sup> Art. 32(1) Competition Act.

<sup>29</sup> Art. 31 (1) Competition Act.



### 7.2.1.3 Consequence of the official opening of a DG COMP investigation

No specific rules are provided under national law.

### 7.2.1.4 Limitations on the transfer of information

#### *Speciality principle*

The 2011 Competition Act allows the Luxembourg Competition Council to use the information collected only for the purpose for which it was acquired,<sup>30</sup> including the detection, investigation and sanctioning of infringements to competition law. Accordingly, the speciality principle does not prevent or limit the exchange of information with national competition authorities nor the DG COMP.

#### *Secrecy of investigations*

Luxembourg law does not lay down specific rules related to the secrecy of investigations carried out by the Competition Council. Nonetheless, information collected in the course of an investigation is covered by professional secrecy (see below question 13 d).

#### *Banking secrecy*

There are no specific rules. However, if information protected by banking secrecy is gathered during an investigation, such information is covered by professional secrecy (see below question 1.3.4).

#### *Professional secrecy*

Pursuant to Article 27 of the 2011 Competition Act, members, officers, investigators as well as appointed experts of the Luxembourg Competition Council are bound by the duty of professional secrecy. Professional secrecy encompasses the secrecy of deliberations as well as the information acquired while carrying out their duties.<sup>31</sup> However, Luxembourg law explicitly provides that such professional secrecy shall not prevent the Council from transmitting information or documents in its possession to the European Commission.<sup>32</sup>

#### *Business secrecy*

According to Luxembourg law, the parties to the proceedings may address a written request to the Competition Council with the aim of retaining the confidentiality of business secrets provided by the undertaking or seized during the investigation. The Competition Council will assess the reasons for non-disclosure put forward by the undertaking and may, as a result, remove from the file or redact part of the confidential documents.<sup>33</sup> This procedure aims to prevent third parties, in particular competitors, from having access to information covered by business secrecy. Yet, it is worth noting that Luxembourg law explicitly states that professional secrecy shall not prevent the Competition Council from providing information to DG COMP. However, the relevant statutes do not lay down any corresponding provisions which explicitly state that business secrecy shall not be an obstacle to the exchange of information.

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30 Art. 27(1) Competition Act.

31 Art. 27(2) Competition Act.

32 Art. 31 (2) Competition Act.

33 Art. 26 Competition Act.

*Other legal limits*

Luxembourg law lays down additional limitations on the transfer of information to the competition authorities of other Member States where the execution of requests for information affects the sovereignty, security, fundamental economic interests or the public order of Luxembourg, or where a criminal procedure is already underway in the Grand Duchy of Luxembourg based on the same facts and against the same persons, or where a final judgment has already been delivered in relation to such persons for the same actions.<sup>34</sup> It should however be noted that the wording of the provision in question does not explicitly refer to the European Commission and, therefore, does not apply to the exchange of information between the Luxembourg Competition Council and the DG COMP. An exception to this might be a situation where Luxembourg prosecution authorities have opened a criminal investigation following the information reported to them by the Luxembourg Competition Council.<sup>35</sup> The information may then be covered by the secrecy of criminal investigations.

**7.2.1.5 Conditions on the use of transmitted information**

There are no specific rules under national law.

**7.2.2 Transfer of information from other administrative authorities to DG COMP**

Not provided for in the national legal framework.

**7.2.3 Transfer of information from judicial authorities to DG COMP****7.2.3.1 Obligations as regards the information transfer**

Luxembourg law does not provide for specific obligations that require judicial authorities to communicate information to the National Competition Council or DG COMP. By contrast, some statutory provisions regulate the transfer of information from the competition authority to the national judicial authorities. In particular, the Luxembourg Competition Council may submit written observations before the civil and administrative courts and, with the permission of the competent court, oral observations. The Council may also produce minutes and investigation reports.<sup>36</sup> In addition, Luxembourg law requires ex-ante judicial authorization for searches of the business premises of the undertaking and the seizure of documents. To this end, the Luxembourg Competition Council shall provide the President of the competent District Court or the substitute magistrate with evidence which points to the existence of prohibited activities or a market failure and which testifies to the seriousness of the practice or the suspected failure as well as information which shows a possible involvement in such events by the undertaking or association of undertakings concerned.<sup>37</sup>

**7.2.3.2 Type of information**

There are no specific rules.

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34 Art. 31(3) Competition Act.

35 Indeed, according to Article 27(1) Competition Act, members and officials of the Competition Council have the duty to report to the Public Prosecutors facts that may constitute a criminal offence, notwithstanding any rule on confidentiality or professional secrecy.

36 Art. 33 Competition Act.

37 Art. 16(3) Competition Act.

### 7.2.3.3 Consequence of the official opening of a DG COMP investigation

No specific rules are provided under national law.

### 7.2.3.4 Limitations on the transfer of information

The answers provided under Section I (OLAF), question 3.4, equally apply to competition matters.

### 7.2.3.5 Conditions on the use of transmitted information

There are no specific rules under national law.

## 7.3 ECB

### 7.3.1 Transfer of information from national counterparts to ECB

#### 7.3.1.0 ECB national enforcement partner

In Luxembourg, the *Commission de surveillance du secteur financier* ('CSSF') qualifies as the national competent authority within the legal framework of the SSM.<sup>38</sup> The CSSF is a public institution with legal personality that supervises the professionals and products of the financial sector of the Grand Duchy of Luxembourg.

#### 7.3.1.1 Obligations as regards the information transfer

Article 51-19 (1) paragraph 3 of the Modified Financial Sector Act explicitly allows for the CSSF to exchange information on regulated entities within a financial conglomerate<sup>39</sup> with the ECB as may be required for the performance of their respective supervisory tasks.<sup>40</sup> The first paragraph of the provision specifies that the CSSF shall communicate to the other competent authorities responsible for the supervision of the above mentioned entities, on request, all relevant information and shall communicate, on its own initiative, all essential information.<sup>41</sup> Such rules governing the transfer of information consequently apply vis-à-vis the ECB where it exercises its supervisory powers. In addition, according to Article 12-9 of the CSSF Organic Law, the Resolution Board of the CSSF, which has competence in the case of the failure of credit institutions and certain investment firms, may exchange information and cooperate with the ECB.

#### 7.3.1.2 Type of information

The above-mentioned provisions refer to any information on regulated entities within a financial conglomerate, which is essential or relevant for the exercise of the other authorities' supervisory tasks under the sectoral rules and supplementary supervision.<sup>42</sup> Article 51-19 (1) para. 3 of the Financial Sector Act provides a detailed list of information to be transferred that encompasses:

38 Art. 2 Law of 23 December 1998 establishing the CSSF (*Loi du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier*), Mem A 112, hereinafter CSSF Organic Act.

39 Pursuant to Art. 59-1 of the Financial Sector Act, a financial conglomerate shall mean a "group or sub-group in which a regulated entity is at the head of the group or sub-group or in which at least one of the subsidiaries of this group or sub-group is a regulated entity". To qualify as a financial conglomerate, the group must fulfil further conditions laid down by the law that implies entities undertaking activities in the banking and financial sector.

40 Art. 51-19 (1) para. 3 Modified Financial Sector Act (*Loi du 5 avril 1993 relative au secteur financier*), Mem A27, a consolidated version is available at [http://www.cssf.lu/fileadmin/files/Lois\\_reglements/Legislation/Lois/L\\_050493\\_ifs\\_upd230716.pdf](http://www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_050493_ifs_upd230716.pdf)

41 Art. 51-19 (1) para. 1 Financial Sector Act.

42 Art. 51-19 (1) para. 1 Financial Sector Act.

- a) the identification of the group's legal structure, governance system and organizational structure, including all regulated entities, non-regulated subsidiaries and significant branches belonging to the financial conglomerate, holders of qualifying holdings at the level of the ultimate parent undertaking, as well as the competent authorities of the regulated entities in that group;
- b) the financial conglomerate's strategic policies;
- c) the financial situation of the financial conglomerate, in particular concerning capital, intra-group transactions, risk concentration and profitability;
- d) the financial conglomerate's major shareholders and management;
- e) the organisation, risk management and internal control systems at the financial conglomerate level;
- f) procedures for the collection of information from the entities in a financial conglomerate, and the verification of that information;
- g) adverse developments in regulated entities or in other entities of the financial conglomerate which could seriously affect the regulated entities;
- h) major penalties and exceptional measures taken by the competent authorities in accordance with sectoral rules or this Chapter.

### **7.3.1.3 Consequence of the official opening of an ECB investigation**

There are no specific rules under national law.

### **7.3.1.4 Limitations on the transfer of information**

#### *Speciality principle*

According to Luxembourg law, the CSSF can exchange information to the extent that such information is needed for the performance of the ECB's supervisory tasks (see question 1.1).

#### *Secrecy of investigations*

There are no specific rules preventing the exchange of information where the CSSF is carrying out an investigation.

#### *Banking secrecy*

There are no specific rules under national law. Nonetheless, banking secrecy shall not prevent the exchange of information which is held by the CSSF, if that information is needed for the performance of the ECB's supervisory tasks.

#### *Professional secrecy*

Pursuant to Luxembourg law, professional secrecy applies to all members and officers of the CSSF 'without prejudice to the provisions of the laws and regulations governing supervision'.<sup>43</sup> Thus, it does not constitute an obstacle to the exchange of information with the ECB within the SSM.

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<sup>43</sup> Art. 16 CSSF Organic Act.

*Business secrecy*

There are no specific rules under national law. Nonetheless, business secrecy does not prevent the exchange of information which is held by the CSSF, if that information is needed for the performance of the ECB's supervisory tasks.

*Other legal limits*

It should be noted that Luxembourg law lays down specific requirements for the transfer of information in all cases where a specific law governing the supervision does not expressly authorise the CSSF to disclose certain facts to other competent authorities.<sup>44</sup> In this case, Luxembourg law still allows the CSSF to transfer confidential information in the interest of investor and depositor protection as well as financial stability. Additional conditions must be fulfilled. In particular, according to the speciality principle, the authority which receives the information from the CSSF may only use it for the purpose for which it was communicated to it and shall be able to ensure that it will not be used for any other purpose. In addition, the information communicated by the CSSF shall be covered by the professional secrecy of the competent authority receiving it and the professional secrecy of that competent authority shall provide guarantees which are at least equivalent to the professional secrecy that the CSSF is subject to.

**7.3.1.5 Conditions on the use of transmitted information**

There are no specific rules under national law.

**7.3.2 Transfer of information from other administrative authorities to ECB**

The Central Bank of Luxembourg is a national authority which is responsible for markets in financial instruments and therefore it might transfer information to the ECB. However, there are no legal provisions under Luxembourg law which impose any duty to provide information or which govern the transfer of information between the national and European central banks within the framework of the SSM. Neither has the Luxembourg Central Bank entered into memoranda of understanding with the ECB. By contrast, the Luxembourg Central Bank can communicate information to the CSSF,<sup>45</sup> which in turn may transfer that information to the ECB.

**7.3.3 Transfer of information from judicial authorities to the ECB**

Luxembourg law does not impose any obligation on the national judicial authorities vis-à-vis the ECB as regards the transfer of information. On the contrary, the secrecy of criminal investigations (see Section I, question 3.4.2) constitutes an obstacle to the exchange of information related to ongoing criminal proceedings.

44 Art. 16 para. 4 CSSF Organic Act

45 Art. 33 (2) Organic Law of the Central Bank of Luxembourg (*Loi du 23 décembre 1998 relative au statut monétaire et à la Banque centrale du Luxembourg*), Mem A112, a consolidated version is available at [http://www.bcl.lu/en/Legal-Framework/documents\\_national/loi\\_organique/loi\\_list/organic\\_law\\_1-April-2015.pdf](http://www.bcl.lu/en/Legal-Framework/documents_national/loi_organique/loi_list/organic_law_1-April-2015.pdf)

## 7.4 ESMA

### 7.4.1 Transfer of information from national counterparts to ESMA

#### 7.4.1.0 ESMA national enforcement partner

The CSSF<sup>46</sup> (see Section 7.3).

#### 7.4.1.1 Obligations as regards the information transfer

The Financial Sector Act provides a set of detailed obligations that require the CSSF to transfer information to ESMA. First, Luxembourg law generally allows the CSSF to exchange information with ESMA, which is required for carrying out the latter's mission.<sup>47</sup> Second, Luxembourg law further imposes notification duties on the CSSF when it cooperates with the competent authorities of other Member States. In the field of prudential supervision, the CSSF shall notify ESMA, as specifically as possible, in the following cases:

- where the CSSF has good reasons to suspect *that acts* carried out in another Member State by entities not subject to its supervision *would have been such as to be contrary to the provisions of the Luxembourg Financial Sector Act*, if carried out in Luxembourg by that credit institution or investment firm;<sup>48</sup>
- where the CSSF receives comparable information from an authority of another Member State, it shall notify the outcome of the action and, to the extent possible, of significant interim developments following appropriate *measures taken against credit institution and investment firms*;<sup>49</sup>
- where the CSSF *refuses to act on a request for cooperation* addressed by the competent authority of another Member State in carrying out an investigation, on-the-spot verification or supervisory activity, it shall inform ESMA providing as detailed information as possible to the extent that such information is related to investment firms;<sup>50</sup>
- where the CSSF *refuses to execute a request for information* addressed by the competent authority of another Member State responsible for prudential supervision of credit institutions, investment firms and markets in financial instruments, it shall inform ESMA providing as detailed information as possible to the extent that such information is related to investment firms.<sup>51</sup>

Third, the CSSF has the duty to inform ESMA about precautionary measures and sanctions taken against credit institutions that are under the supervision of another home Member State in three specific cases:

46 Art. 2-1 (1) CSSF Organic Act.

47 Art. 44-2 (2) Financial Sector Act.

48 Art. 44-1 (3) Financial Sector Act.

49 Art. 44-1 (3) Financial Sector Act.

50 Art. 44-1 (5) Financial Sector Act. According to this provision, the CSSF may refuse to act on a request for cooperation where one of the following conditions is met: the investigation, on-the-spot verification or supervisory activity might adversely affect the sovereignty, security or public policy of the State of Luxembourg, or judicial proceedings have already been initiated in respect of the same actions and against the same persons before the Luxembourg courts, or a final judgment has already been delivered in relation to such persons for the same actions in Luxembourg.

51 Art. 44-2 (1) Financial Sector Act.

- *Non-compliance with Union law.* The obligation to report arises in two situations. As regards credit institutions having a branch or providing services within Luxembourg territory, the CSSF shall inform the competent authority of the home Member State if the credit institution breaches or there is a material risk that it will not comply with Regulation (EU) 575/2013. If, despite the action taken by the competent authority of the home country, such a measure proves to be inadequate or the credit institution or investment firm concerned persists in acting in a manner that is clearly prejudicial to the orderly functioning of markets, the CSSF has the power to take all the appropriate measures needed in order to protect investors and the proper functioning of the markets in Luxembourg. The CSSF shall then inform ESMA of such measures without delay or may refer the matter to ESMA in order to enable the latter to take the appropriate action in accordance with Union law.<sup>52</sup>
- *Non-compliance with Luxembourg law.* Luxembourg law lays down a similar duty to report where the credit institution or investment firm of another Member State having a branch in Luxembourg persists in not complying with the national Financial Sector Act despite warnings addressed to it by the CSSF. In this case, the latter shall inform ESMA of precautionary and sanctioning measures taken against the offending credit institution or investment firm in order to protect investors and the proper functioning of the market. The CSSF may also refer the matter to ESMA in order to enable the latter to take the appropriate action in accordance with Union law.<sup>53</sup>
- *Precautionary measures in urgent cases.* Lastly, the CSSF shall inform ESMA, without delay, of the adoption of any precautionary measures taken in urgent cases against a credit institution that provides investment services or carries out investment activities in order to protect against financial instability that would seriously threaten the collective interests of depositors, investors or other persons to whom services are provided.<sup>54</sup>

Finally, the CSSF shall notify the authorizations as well as the withdrawals of authorisation for investment firms to ESMA.<sup>55</sup>

#### **7.4.1.2 Type of information**

Luxembourg law does not provide a detailed list of information that must be transferred. The general obligation to inform ESMA that is provided under Article 44-2 (2) of the Financial Sector Act broadly refers to any information needed in order to enable ESMA to carry out its tasks. Thus, the type and the amount of information communicated by the CSSF may vary depending on the role that ESMA plays in the specific situations enumerated under question 1.1.

#### **7.4.1.3 Consequence of the official opening of an ESMA investigation**

There are no specific rules under national law.

#### **7.4.1.4 Limitations on the transfer of information**

The answers provided under Section 7.3 apply *mutatis mutandis* to the exchange of information between the CSSF and ESMA.

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52 Art. 46 (1) Financial Sector Act.

53 Art. 46 (2) Financial Sector Act.

54 Art. 46 (4) Financial Sector Act.

55 Art. 52 (1) Financial Sector Act.

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**7.4.1.5 Conditions on the use of transmitted information**

There are no specific rules under national law.

**7.4.2 Transfer of information from other administrative authorities to ESMA**

Luxembourg law does not lay down specific rules allowing or governing the exchange of information between administrative authorities other than the CSSF and ESMA. If information held by national administrative bodies is to be transferred to ESMA, it is likely that the CSSF will intervene as an intermediary in order to transfer this information.

**7.4.3 Transfer of information from judicial authorities to ESMA**

There are no obligations or specific rules under national law. As stressed in the Vertical Report, it is unlikely that information held by national judicial authorities will be transferred to ESMA. In addition, the secrecy of criminal investigations (see Section I, question 3.4.2) constitutes an obstacle to the exchange of information related to ongoing criminal proceedings.



## 8. THE NETHERLANDS

*K. Bovend'Eerd*

### 8.1 OLAF

#### 8.1.1 Transfer of information from the AFCOS to OLAF

##### 8.1.1.1 OLAF Dutch enforcement partner (AFCOS)

Regulation 883/2013 lays down that Member States are to designate an AFCOS to facilitate effective cooperation and to facilitate the exchange of information, including information of an operational nature, with OLAF. This AFCOS *may be* – although not necessarily so – the competent authority for the purposes of Regulation 883/2013.<sup>1</sup>

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*)<sup>2</sup> designates the Minister of Finance as the *competent authority* for the purposes of Regulation 883/2013.<sup>3</sup> The act stipulates that the Minister of Finance serves as a contact point for OLAF. The Minister of Finance, in light of the purpose and objective of the OLAF investigation envisaged, determines in turn who is the appropriate Minister to offer assistance.<sup>4</sup>

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

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

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

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

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

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

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

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

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

#### 8.1.1.2 Obligations as regards the information transfer

Obligations concerning the transfer of information stem from directly applicable Union law, particularly Articles 17 and 18 of Regulation 515/97.<sup>10</sup> Also the means by which information is to be transferred (on request,<sup>11</sup> spontaneously,<sup>12</sup> or automatized)<sup>13</sup> are laid down in Union law.

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

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

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

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

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

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

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

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

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

### 8.1.1.3 Type of information

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

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

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

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

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

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

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

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

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

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

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

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

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

26 Interview with AFCOS (31 October 2017).

27 Interview with AFCOS (31 October 2017).

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

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

#### **8.1.1.4 Consequence of the official opening of an OLAF investigation**

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

#### **8.1.1.5 Limitations on the transfer of information**

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

##### *Speciality principle*

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

##### *Secrecy of investigations*

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

##### *Banking secrecy*

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

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

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

31 Interview with AFCOS (31 October 2017).

32 Interview with AFCOS (31 October 2017).

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

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

35 Ibid.

*Professional secrecy*

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

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

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

*Business secrecy*

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

*Other legal limits*

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

**8.1.1.6 Conditions on the use of transmitted information**

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

**8.1.2 Transfer of information from other administrative authorities to OLAF**

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

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

37 Ibid., Art. 12(1).

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

39 See Wiarda supra note 18, p. 110.

40 Customs Manual, ch. 5.00.00 para. 13.2.2.

### 8.1.2.1 Administrative authorities transmitting information to OLAF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 Ibid.

57 Ibid.

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

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

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

#### **8.1.2.2 Obligations as regards the information transfer**

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

For obligations concerning the transfer of information recourse must be had to Union law. Article 122(2) of Regulation 1303/2013 states that Member States must notify the Commission (OLAF) of any irregularities that exceed EUR 10 000 in contributions from the structural funds and keep it informed of significant progress in related administrative and legal proceedings.<sup>61</sup> Detailed rules on the type of information are laid down in Commission Delegated Regulation 2015/1970 and Commission Implementing Regulation 2015/1974.<sup>62</sup> In practice, the transfer of information to OLAF in the case of irregularities and/or suspected fraud must be done by any of the authorities involved in the implementation of structural funds by means of the Irregularity Management System or via the OLAF website. The basis for the transfer of information is therefore Union law.

#### **8.1.2.3 Type of information**

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

#### **8.1.2.4 Consequence of the official opening of an OLAF investigation**

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

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

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

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

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

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



### 8.1.2.5 Limitations on the transfer of information

#### *Speciality principle*

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

#### *Secrecy of investigations*

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

#### *Banking secrecy*

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

#### *Professional secrecy*

While the GALA does not specifically regulate the exchange of information between administrative authorities and EU law enforcement authorities (OLAF or others), it does impose a general duty of secrecy on administrative authorities. The GALA proscribes the disclosure of information, unless a statutory regulation<sup>63</sup> stipulates such a disclosure or if it is necessary for the performance of the authority's duties.<sup>64</sup> Statutory regulations which are applicable to the EU authorities' counterparts studied in this project impose such deviating duties from the general duty of secrecy laid down in the GALA. In addition, the GALA's duty of secrecy still applies to other administrative authorities, including those which are not governed by a specific regime on the transfer of information to EU authorities (see also the sections below on other administrative authorities and the cooperation with DG COMP, the ECB and ESMA).

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

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

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

64 GALA, Art. 2:5.

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

66 GALA, Art. 2:5.

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

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

exceptions to the rule are information concerning business or manufacturing data provided by natural or legal persons in confidence to the government<sup>69</sup> or special personal data<sup>70</sup> unless this data does not interfere with a person's private life.<sup>71</sup> Furthermore, information will not be made public when the interest at stake does not outweigh the importance of any of the following interests: the investigation and prosecution of criminal offences; inspection, control and supervision by administrative authorities; and respect for privacy.<sup>72</sup>

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

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

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

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

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

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

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

74 FSA, Art. 2:3.0d.

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

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

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

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

79 Cf. GALA, Art. 2:5.

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

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

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

#### *Business secrecy*

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

#### *Other legal limits*

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

### **8.1.2.6 Conditions on the use of transmitted information?**

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

## **8.1.3 Transfer of information from judicial authorities to OLAF**

### **8.1.3.1 Judicial authorities transmitting information to OLAF**

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

81 See supra note 45.

82 Aw, Art. 125a(3).

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

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

85 Wro, Art. 1(c).

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

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

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

### 8.1.3.2 Obligations as regards the information transfer

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

### 8.1.3.3 Type of information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97 Wjsg, Art. 1(b).

98 Ibid., Art. 8(6).

99 Ibid., Art. 8(9).

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

101 Wro, Art. 130.

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

103 See AWjsg, Section III. Para. 1.

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

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

criminal acts and the privacy of the persons concerned.<sup>106</sup> A decision is based on the principles of subsidiarity,<sup>107</sup> proportionality<sup>108</sup> and necessity.<sup>109</sup>

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

#### 8.1.3.4 Consequence of the official opening of an OLAF investigation

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

#### 8.1.3.5 Limitations on the transfer of information

##### *Speciality principle*

Both types of data may only be transferred<sup>112</sup> if this is necessary for the purposes defined by the Wjsg.<sup>113</sup> They may only be transferred for another purpose for which they were obtained insofar as the former is proportional and not contrary to the latter. In addition, a further transfer of both types of data may only be done by persons and authorities appointed by law, based on a major general interest.<sup>114</sup> The prevention of criminal acts is, amongst other things, considered to be a major general interest which justifies a transfer.<sup>115</sup> The interests of the individual natural or legal person do not, in and by themselves, constitute major general interests.<sup>116</sup>

##### *Secrecy of investigations*

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

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

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

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

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

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

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

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

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

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

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

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

*Banking secrecy*

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

*Professional secrecy*

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

*Business secrecy*

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

*Other legal limits*

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

**8.1.3.6 Conditions on the use of transmitted information**

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

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117 See Wro supra note 71.

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

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

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

121 Wsjg, Art. 52(1).

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

## 8.2 DG COMPETITION

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

#### 8.2.1.1 DG COMP national enforcement partner (NCA)

The Authority for Consumers and Markets (*Autoriteit Consument en Markt*, hereinafter *ACM*) is deemed to be the competent national authority for the enforcement of EU competition law, particularly with regard to Regulation 1/2003.<sup>123</sup> The ACM supervises the compliance of undertakings with the rules provided for in the Competition Act (*Mededingingswet*),<sup>124</sup> and is charged with executing a number of other statutory tasks laid down in sectoral legislation.<sup>125</sup> The ACM is an autonomous administrative authority (*zelfstandig bestuursorgaan*).<sup>126</sup>

#### 8.2.1.2 Obligations as regards the information transfer

The ACM transfers information in the context of Articles 101 and 102 TFEU to DG COMP directly on the basis of Union law. Regulation 1/2003 serves as a legal basis for the transfer of information.<sup>127</sup> Article 12 of Regulation 1/2003 states that for the purpose of applying Articles 101 and 102 TFEU, DG COMP and NCAs *have the power* to provide one another with, and use in evidence, any matter of fact or of law, including confidential information. That NCAs *have the power* to transfer information to DG COMP does not imply an obligation to do so. In practice, however, as the interviewees have pointed out, the ACM acts as though it is under an obligation to transfer information. More detailed rules on the transfer of information are laid down in the Commission Notice on cooperation within the Network of Competition Authorities<sup>128</sup> and in the Antitrust Manual of Procedures.<sup>129</sup> The latter lays down non-binding uniform procedures for the exchange of information within the ECN.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

### 8.2.1.3 Type of information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Certain types of information are, however, excluded from transfer on the basis of Dutch law. In 2014 the ACM adopted the ACM Procedure Concerning Legal Professional Privilege (*ACM werkwijze geheimhoudingsprivilege advocaat 2014*).<sup>151</sup> This Procedure provides insight into the way in which the ACM deals with information covered by legal professional privilege (hereinafter *LPP*). It applies mostly during the *gathering of information* by the ACM, particularly when the ACM uses its power to conduct interviews and to issue production orders<sup>152</sup> and its power to inspect business documents and records.<sup>153</sup> The Procedure states that a person – required by law to provide information – can claim that the information in question is covered by LPP.<sup>154</sup> If he or she can substantiate this claim by providing facts and circumstances which support the claim that the information is protected by the LPP,<sup>155</sup> this matter can be brought before a so-called LPP officer (*functionaris verschoningsrecht*). The LPP officer – who functions independently despite being employed by the ACM<sup>156</sup> – assesses whether the information in question is of a privileged nature.<sup>157</sup> If the LPP officer finds that this is the case, the information will not be transferred to the ACM file.<sup>158</sup> If the LPP officer finds that the information does not fall under the protective scope of LPP, he or she transfers the information to the ACM file after 10 working days.<sup>159</sup> Any information exchanged between the person concerned and the LPP officer may not be reused in another investigation or transferred to parties other than the person concerned.<sup>160</sup> Furthermore, the LPP officer must destroy all information exchanged between him/herself and the person concerned.<sup>161</sup>

#### 8.2.1.4 Consequence of the official opening of a DG COMP investigation

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

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

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

152 GALA, Art. 5:16.

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

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

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

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

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

158 *Ibid.*, Art. 5.2.

159 *Ibid.*, Art. 5.3.

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

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

### 8.2.1.5 Limitations on the transfer of information

#### *Speciality principle*

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

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

#### *Secrecy of investigations*

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

#### *Banking secrecy*

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

#### *Professional secrecy*

Article 7 Iw ACM contains a duty of secrecy incumbent upon the ACM<sup>165</sup> which states that, in principle, information obtained by the ACM in the performance of its tasks with which it is statutorily charged<sup>166</sup> can only be used insofar as this is necessary for the execution of any such task.<sup>167</sup> This duty of secrecy is – as stated above – of a general and supplementary nature meaning that if there are specific obligations that stem from national or Union law, these latter obligations will apply.<sup>168</sup> One of the exhaustively listed exceptions, as discussed above, is the transfer to ‘foreign institutions’ if the transfer concerns information that can be of use to that foreign institution in the performance of its tasks and is statutorily charged with the application of rules in areas in which the ACM operates.<sup>169</sup> In addition, the non-disclosure of the information by

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

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

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

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

166 See *supra* note [x].

167 Iw ACM, Art. 7(1).

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

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

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

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

#### *Business secrecy*

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

#### *Other legal limits*

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

### **8.2.1.6 Conditions on the use of transmitted information**

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

## **8.2.2 Transfer of information from other administrative authorities to DG COMP**

### **8.2.2.1 Administrative authorities transmitting information to DG COMP**

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

### **8.2.2.2 Obligations as regards the information transfer**

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

### **8.2.2.3 Type of information**

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

<sup>170</sup> Ibid., Art. 7(4).

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

<sup>172</sup> See Lamboo supra note 131, under a.

#### **8.2.2.4 Consequence of the official opening of a DG COMP investigation**

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

#### **8.2.2.5 Limitations on the transfer of information**

There are no limits under national law.

#### **8.2.2.6 Conditions on the use of transmitted information**

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

### **8.2.3 Transfer of information from judicial authorities to DG COMP**

#### **8.2.3.1 Obligations as regards the information transfer**

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

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

#### **8.2.3.2 Type of information**

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

#### **8.2.3.3 Consequence of the official opening of a DG COMP investigation**

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

#### **8.2.3.4 Limitations on the transfer of information**

There are no limits under national law.

<sup>173</sup> GALA, Art. 8:79.

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

<sup>175</sup> GALA, Art. 8:45a(3).

### 8.2.3.5 Conditions on the use of transmitted information

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

## 8.3 ECB

### 8.3.1 Transfer of information from national counterparts to ECB

#### 8.3.1.1 ECB national enforcement partner

Within the framework of the Single Supervisory Mechanism, the Dutch Central Bank (*De Nederlandsche Bank*, hereinafter *DNB*) is the national competent authority<sup>176</sup> in accordance with – and for the purposes of – the Capital Requirements Regulation and the Capital Requirements Directive 2013/36.<sup>177</sup> Under the Financial Supervision Act (*Wet op het financieel toezicht*, hereinafter *FSA*), which implements EU legislation on financial supervision,<sup>178</sup> the DNB exercises prudential supervision over financial enterprises and fosters the stability of the financial sector.<sup>179</sup> In addition to its prudential supervisory tasks, the DNB also functions as a central bank and, in that capacity, exercises a number of tasks in the field of monetary policy. Other tasks of the DNB include the resolution of banks within the Single Resolution Mechanism. This report only deals with the transfer of information within the framework of the Single Supervisory Mechanism. The DNB is a public company (*naamloze vennootschap*)<sup>180</sup> and an autonomous administrative authority.<sup>181</sup>

#### 8.3.1.2 Obligations as regards the information transfer

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

#### 8.3.1.3 Type of information

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

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

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

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

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

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

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

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

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

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

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

#### 8.3.1.4 Consequence of the official opening of an ECB investigation

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

#### 8.3.1.5 Limitations on the transfer of information

##### *Speciality principle*

See section on professional secrecy below.

##### *Secrecy of investigations*

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

##### *Banking secrecy*

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

##### *Professional secrecy*

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

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

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

187 GALA, Art. 5:13.

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

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

190 FSA, Section 1.5.1.

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

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



of *confidential* information that the DNB (i) has gathered *suo moto*,<sup>193</sup> (ii) has received from a supervisory authority from another Member State,<sup>194</sup> or (iii) has received from a delegated judge, administrator or liquidator appointed in bankruptcy proceedings<sup>195</sup> or appointed because of the application of emergency regulations to financial enterprises having their registered office in the Netherlands.<sup>196</sup>

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

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

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

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

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

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

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

198 *Ibid.*, p. 47.

199 *Ibid.*, p. 47.

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

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

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

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

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

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

#### *Business secrecy*

See section on professional secrecy above.

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

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

#### **8.3.1.6 Conditions on the use of transmitted information**

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

### **8.3.2 Transfer of information from other administrative authorities to ECB**

#### **8.3.2.1 Administrative authorities transmitting information to ECB**

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

See Section 8.4.1.1 for more information on the AFM.

#### **8.3.2.2 Obligations as regards the information transfer**

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

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

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

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

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

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

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

### 8.3.2.3 Type of information

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

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

### 8.3.2.4 Consequence of the official opening of a ECB investigation

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

209 Council

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

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

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

213 Ibid.

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

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

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

217 Ibid., Art. 3(1).

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

219 Ibid., Art. 5(2).

220 Ibid., Art. 5(3).

### 8.3.2.5 Limitations on the transfer of information

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

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

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

### 8.3.2.6 Conditions on the use of transmitted information

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

## 8.3.3 Transfer of information from judicial authorities to ECB

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

## 8.4 ESMA

### 8.4.1 Transfer of information from national counterparts to ESMA

#### 8.4.1.1 ESMA national enforcement partner

The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, hereinafter *AFM*) is the national competent authority for the purposes of Regulation 1060/2009 on credit rating agencies<sup>226</sup> and for trade repositories under Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).<sup>227</sup> The AFM, like the DNB, operates under

221 Ibid., Art. 6(4).

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

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

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

225 Ibid., Art. 7(2).

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

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

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

#### 8.4.1.2 Obligations as regards the information transfer

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

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

#### 8.4.1.3 Type of information

See Section 8.3.1.3.

#### 8.4.1.4 Consequence of the official opening of an ESMA investigation

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

228 FSA, Art. 1:25.

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

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

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

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

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

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

#### **8.4.1.5 Limitations on the transfer of information**

##### *Speciality principle*

See section 8.3.1.5. under professional secrecy.

##### *Secrecy of investigations*

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

##### *Banking secrecy*

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

##### *Professional secrecy*

See section 8.3.1.5 under professional secrecy.

##### *Business secrecy*

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

##### *Other legal limits*

See Section 8.3.1.6.

#### **8.4.1.6 Conditions on the use of transmitted information**

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

#### **8.4.2 Transfer of information from other administrative authorities to ESMA**

##### **8.4.2.1 Administrative authorities transmitting information to ESMA**

There are no other administrative authorities transferring information to ESMA.

#### **8.4.3 Transfer of information from judicial authorities to ESMA**

There are no obligations under national law.

## 9. UNITED KINGDOM

*P. Alldridge*

### 9.0 INTRODUCTION: THE UK CONSTITUTIONAL POSITION<sup>1</sup>

In the UK, legislative powers to share information are often referred to as “gateways”. They may be express powers, conferring power to share information, perhaps for a particular purpose, or with a particular public body. Alternatively, the power may be implied, where data sharing is reasonably incidental to an express power to do something else. The term “gateway” describes a statutory provision empowering (or, more rarely, requiring) a public body to disclose information held by it to another, usually also public, body. These provisions may be accompanied by criminal offences of unauthorized disclosure on the part of staff of the disclosing body and sometimes of unauthorized further disclosure by staff of the recipient body. They may contain provisions circumscribing the categories of information that may be disclosed and/or the circumstances in which, or purposes for which, it may be disclosed.

There are express and implied statutory gateways, and also (possibly) gateways created under the “Ram doctrine”, which, under certain circumstances, may allow ministers to legislate by *fiat*. Express statutory gateways are usually contained in primary legislation, which may also provide for the creation of further powers to share information under subordinate legislation. Gateways tend to be permissive, creating a discretion to share information, but not an obligation. Where a gateway is permissive, other factors may weigh against disclosure. If disclosure will be costly, or will not benefit the data holder, but will only benefit the recipient, there may not be adequate incentives to share. Alternatively, gateways may require the public body to disclose information. Gateways may also place restrictions on whom the information may be shared with, the purposes for which information may be shared, and on onward disclosure or use. Gateways tend to restrict as well as permit data sharing. The specific provisions may define any one or more of the following: (1) who may request or be supplied with the information; (2) who may act on behalf of the relevant authority; (3) from whom the information may be requested; (4) the purposes for which the information may be used; these may be narrowly defined, or they may be broader; for example the information may be used for the purpose of carrying out the organization’s functions under the Act; or the purposes for which the information may be used may be limited to those set out in a notice given by the holder to the recipient; (5) the level of necessity required before the information may be requested or disclosed; this might be limited to “necessity” or what is “necessary or expedient” or be as wide as “such documents as he may reasonably require” for the purposes of carrying out functions under the Act, or more specifically defined functions; (6) the type of information which may be used or required and information

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<sup>1</sup> What follows is based upon LC351, *Data Sharing between Public Bodies* report (2014).

that may not be used or required, such as information not obtained for an authorized purpose, or which is prohibited by the Data Protection Act 1998; (7) the amount of information that may be processed, which may include a proportionality requirement; (8) criminal offences for the misuse of information, or for any failure to furnish information or for providing false information; (9) any procedural requirements, such as prior consultation of a particular body or required matters to consider before reaching a decision, or prescribed forms; (10) limitations on onward disclosure of the information, which might include a requirement to obtain consent and compliance with the proportionality principle; (11) practical requirements as to how the document may be dealt with, such as restrictions on photocopying or disposal.

One gateway is enough. That is, gateways are generally permissive and the fact that the conditions set out by one do not apply does not stand on the way of the availability of others. That is, in each case it is necessary to have regard to the provisions governing the particular agency. In addition, it is necessary to have regard to data protection and human rights law and the (recently renovated) law of investigatory powers (Investigatory Powers Act 2016). The interplay between all these provisions can become very complex. The entire matter was the subject of a Law Commission Report in 2014,<sup>2</sup> which has yet to be acted upon.

One important statutory gateway applies to all public bodies, so long as prevention of fraud is in point. Section 68 of the Serious Crime Act 2007, provides the default position on disclosure of information to prevent fraud for any fraud investigation, by whichever body it is performed. Under the section, a public authority may, for the purposes of preventing fraud or a particular kind of fraud, disclose information as a member of a specified<sup>3</sup> anti-fraud organization<sup>4</sup> or otherwise in accordance with any arrangements made by such an organization.<sup>5</sup> The information may be information of any kind; and may be disclosed to the specified anti-fraud organization, any members of it or any other person to whom disclosure is permitted by the arrangements concerned.<sup>6</sup>

That is, this particular provision applies to all the authorities under consideration. (The AFCOS, PRA, CMA, FCO) and also to the tax authorities (HMRC). Note in particular, (i) that it provides a minimum gateway; and (ii) that there are two major qualifications. Disclosures which would violate data protection rules are not authorized;<sup>7</sup> and disclosures in breach of the relevant rules on Investigatory powers<sup>8</sup> are not allowed.<sup>9</sup> Those provisions having been noted, other gateways are usually specific to the agencies in point.

The other general point to make is that once Legal Professional Privilege (LPP) is established<sup>10</sup> the information can only be obtained where there is very clear<sup>11</sup> statutory authority. The right

2 Law Commission Report 351, *Data Sharing between Public Bodies* (2014).

3 “specified” means specified by an order made by the Secretary of State. S 68(8).

4 S. 68 (8) “an anti-fraud organization” means any unincorporated association, body corporate or other person which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes.

5 Ss 68(1).

6 Ss 68(2)

7 Serious Crime Act 2007 s.68(4)(a).

8 The Regulation of Investigatory Powers Act 2000 is in the process of being replaced by the Investigatory Powers Act 2016, most, but not all of which is, at the time of writing, in force.

9 Serious Crime Act 2007 s. 68(4)(b).

10 The boundaries of which seem to be contracting: see, e.g. *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2017] EWHC 1017 (QB); [2017] 2 Cr App R 24.

11 *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another* [2013] UKSC 1.



of the Serious Fraud Office to require such information to be produced<sup>12</sup> is read to be such an interference with legal professional privilege, which is otherwise (unlike confidentiality attaching to banking or other professions, sacrosanct). There are mechanisms – sometimes with court orders, sometimes by exercise of executive power, with procedural checks and balancing of interests, to obtain documents and information subject to any other duty of confidence.

## 9.1 OLAF

### 9.1.1 Transfer of information from national counterparts (AFCOS) to OLAF

#### 9.1.1.0 OLAF national enforcement partner (AFCOS)

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. This answer will proceed as if the relevant body is the Serious Fraud Office.

Cooperation with OLAF is not regulated by English law, but where an investigation is conducted by the Serious Fraud Office (SFO): ‘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.’<sup>13</sup> 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 Financial Conduct Authority (FCA), National Crime Agency and the SFO in the investigation of financial crime is a difficult one. The SFO is under-resourced and seemingly under constant threats of abolition.<sup>14</sup> 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),<sup>15</sup> the ‘regular’ Crown Prosecution Service. Prosecutions were then brought, some, but by no means all, of which were successful.<sup>16</sup> Tax authorities (HMRC) hold (almost)<sup>17</sup> all the powers of the powers of the police in the investigation of crime. FCA and Prudential Regulatory Authority (PRA) are funded from levies upon the bodies they regulate. The National Fraud Authority has a coordinating role and ‘works closely’<sup>18</sup> with various agencies, none of which is an EU agency. Allocation of roles where jurisdictions overlap is usually governed by memoranda of understanding.<sup>19</sup> The Conservative

12 Criminal Justice Act 1987 s. 3.

13 CJA 1987 s. 1(4).

14 The Rolls Royce scandal *SFO v Rolls Royce* [2017]. Case No: U20170036 is an important test. A proposal for the establishment of National Economic Crime Command was announced in December 2017. At the time of writing (Dec 2017) it is unclear what will become of this.

15 Criminal Justice Act 1987 s. 1(3) – serious or complex.

16 *R v Hayes* [2015] EWCA Crim 1944.

17 They do not have power to detain upon arrest, or to fingerprint.

18 <https://www.gov.uk/government/organisations/national-fraud-authority/about>

19 E.g. FSMA 2000 s. 3E

Party fought the 2017 General Election on a promise to abolish the SFO, but failed to secure a majority and dropped the promise.

#### **9.1.1.1 Obligations as regards the information transfer**

The Director of the SFO may impose whatever conditions s/he thinks appropriate.<sup>20</sup>

#### **9.1.1.2 Consequence of the official opening of an OLAF investigation**

There are no provisions under national law.

#### **9.1.1.3 Limitations to the transfer of information**

##### *Speciality principle*

There may be, if limits are imposed by the Director of the Serious Fraud Office.<sup>21</sup> This applies particularly to information collected for the purposes of taxation. The UK has traditionally placed a very high value upon taxpayer confidentiality. This will be dealt with below.

##### *Secrecy of investigations*

There are no formal legal restrictions.

##### *Banking secrecy*

There may be, if limits are imposed by the Director of the Serious Fraud Office.

##### *Professional secrecy*

Where the SFO is able to get the information at all, it may be disclosed to (m) ‘any person or body having, under the law of any country or territory outside the United Kingdom, functions corresponding to any of the functions of any person or body mentioned in any of the foregoing paragraphs.’<sup>22</sup>

##### *9.1.1.3.1 Customs (ie tax) information*

Where the investigation is accustoms one (or other tax investigation), the particular sensitivities of taxpayer confidentiality arise. Section 18 of the Commissioners for Revenue and Customs Act 2005 allows the disclosure of the information from HMRC to the Serious Fraud Office whose own powers of disclosure are set out in Criminal Justice Act 1987 s 3(1), and are restricted to the purpose of prosecution. This was subsequently extended to the purposes of “asset recovery”.<sup>23</sup> Disclosures of tax information to the Financial Conduct Authority and Prudential Regulation Authority may only be made by or under the authority of the Commissioners. Such information may not be used except: for the purpose of deciding whether to appoint an investigator;<sup>24</sup> or in the conduct of an investigation; in criminal proceedings brought against a person under the Financial Services and Markets Act 2000 or the Criminal Justice Act 1993 as a result of an investigation; or for the purpose of taking action under the Act against a person as a result of an investigation;

20 Criminal Justice Act 1987 s. 3(3).

21 The best modern account is in Law Commission Data Sharing between Public Bodies report (2014) LC 351 upon which this relies.

22 Criminal Justice Act 1987 s. 3(6)(m).

23 Serious Crime Act 2007 s 85(7).

24 Ie, Financial Services and Markets Act 2000 ((FSMA) s. 168

or in proceedings before a Tribunal as a result of such action taken.<sup>90</sup> Such information obtained from HMRC may not be disclosed except by or under the authority of the Commissioners of Inland Revenue or in the proceedings mentioned above or with a view to their institution, unless the person to whom it is disclosed is a person to whom it could have been disclosed under section 350(1).

Taxation (International and Other Provisions) Act 2010, section 128 provides that no obligation as to secrecy imposed by enactment prevents HMRC from disclosing information required to be disclosed under the Arbitration Convention in pursuance of a request made by an advisory commission set up under the Convention

#### *9.1.1.3.2 Disclosure within government otherwise than for the purposes of taxation*

A notice under Criminal Justice Act 1987 section 3(3) may override Legal professional privilege, both under the law of England and Wales or ECHR Article 8.<sup>25</sup> The courts have held that to give further guidance in s.3(5)(a) of the 1987 Act on the circumstances in which the discretion to disclose should be exercised would introduce undesirable rigidity. The discretion had to be exercised reasonably and in good faith, and remedies existed by way of judicial review if it was exercised inappropriately. The European Court of Human Rights had accepted that laws sanctioning disclosure might often need to be worded in wide terms.<sup>26</sup>

#### *9.1.1.3.3 Written Agreement by Director, SFO*

The Director of the SFO may enter into a written agreement for the supply of information to or by him subject, in either case, to an obligation not to disclose the information concerned otherwise than for a specified purpose.<sup>27</sup>

#### *9.1.1.3.4 Information acquired in SFO capacity*

Information obtained by any person *qua* member of the Serious Fraud Office may be disclosed by any member of that Office designated by the Director<sup>28</sup> to one or more of range of objects.

- (a) to any government department or Northern Ireland department or other authority or body discharging its functions on behalf of the Crown (including the Crown in right of Her Majesty's Government in Northern Ireland);
- (b) to any competent authority;<sup>29</sup>
- (c) for the purposes of any criminal investigation or criminal proceedings, whether in the United Kingdom or elsewhere,
- (d) for the purposes of assisting any public or other authority for the time being designated for the purposes of this paragraph by an order made by the Secretary of State to discharge any functions which are specified in the order.

In *Tchenguiz v Director of the Serious Fraud Office*<sup>30</sup> the court held that the absence from the statute (Criminal Justice Act 1987) of any express prohibition upon disclosing privileged information (i.e. information carrying legal professional privilege) left open the possibility that

25 *Omega Group Holdings Ltd v Kozeny* [2004] EWHC 189 (Comm).

26 *Z v Finland* (22009/93) (1998) 25 E.H.R.R. 371 and *MS v Sweden* (20837/92) (1999) 28 E.H.R.R. 313.

27 Criminal Justice Act 1987 s.3(4).

28 Criminal Justice Act 1987 s.3(5).

29 Widely defined by reference 15 categories in s.3(6).

30 *Tchenguiz v Director of the Serious Fraud Office* [2013] EWHC 2128 (QB); [2014] 1 W.L.R. 1476.

the information could be disclosed with the leave of a court. In *R (on the application of Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office*<sup>31</sup> the court held<sup>32</sup> that the interests of fairness demanded that, unless there was good reason for not doing so, the SFO should inform the owners of seized documents of an intention to disclose them. In that, the SFO had had no good reason for disclosing the documents after such a short notice period and had acted unfairly. Nonetheless, so long as the company had the chance to take action to restrain the use of the documents and had suffered no damage, the SFO's actions had not been unfair and were not open to review.<sup>33</sup>

#### **9.1.1.4 Conditions on the use of transmitted information**

This depends upon the particular gateway used. Where the disclosure is under Criminal Justice Act 1987 s.3(4), the SFO can impose whatever restrictions it may choose. While it is conceivable that this discretion might be subject to judicial review (if it were exercised for perverse reasons), in practice it is not.

### **9.1.2 Transfer of information from other administrative authorities to OLAF**

#### **9.1.2.0 Administrative authorities transmitting information to OLAF**

As concerns structural funds, the relevant authorities are HM Treasury, the Prudential Regulatory Authority and the Financial Conduct Authority, the latter two being governed by the Financial Services and Markets Act 2000 ss 347A et seq, as amended, for which see section below on FCA.. PRA is more concerned with high-level banking regulation and FCA, in this context, with cases. As concerns customs, the relevant administrative authority is HM Revenue and Customs, formed in 2005 (Commissioners for Revenue and Customs Act 2005). The merger of the Inland Revenue with Customs and Excise has given rise to the suggestion by some that the expertise in border-related matters which had been held by Customs and Excise has been lost or diluted. So far as concerns tax authorities (HMRC) the provisions as to confidentiality are found in the Commissioners of Revenue and Customs Act 2005,<sup>34</sup> as amended. FSMA s.350 permits the disclosure of information by HMRC to the FCA or the PRA, if the disclosure is made for the purpose of assisting or enabling the Financial Conduct Authority or Prudential Regulation Authority, if the disclosure is made for the purpose of assisting or enabling those regulators to discharge functions under the Act or any other Act, or to the Secretary of State, for the purpose of assisting in the investigation of a matter under section 168 of the Act or with a view to the appointment of a section 168 investigator.

31 *R. (on the application of Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office* [2004] EWCA Civ 1494.

32 Following *R. v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531

33 An art. 8 challenge was rejected *Kent Pharmaceuticals Ltd v United Kingdom (Admissibility)* (9355/03) (2006) 42 E.H.R.R. SE4; ECHR; 11 October 2005.

34 Ss 17 and 18.

### 9.1.2.1 Limitations on the transfer of information

#### *Speciality principle*

So far as concerns PRA and FCA, the gateways in question include such limitations. For HMRC information acquired by the Revenue and Customs may only be used in connection with a function may be used by HMRC in connection with any other function.<sup>35</sup>

#### *Secrecy of investigations*

As above, no.

#### *Banking secrecy*

Confidential information is in principle protected by FSMA s.348, subject to exceptions there and subsequently set out.

#### *Professional secrecy*

There are no specific relevant professional secretcies. Once the agency has the information it may disclose it under relevant gateways. Where relevant, legal professional privilege may prevent the initial access.

### 9.1.2.2 Conditions on the use of transmitted information

They can impose conditions generally by reference to the purposes for which it is held and transferred.<sup>36</sup>

## 9.2 DG COMPETITION

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

#### 9.2.1.0 DG COMP national enforcement partner (NCA)

Competition and Markets Authority (CMA), Financial Conduct Authority (FCA), both of which are governed for these purposes by the Enterprise Act 2002.

#### 9.2.1.1 Obligations as regards the information transfer

There are no provisions under national law.

#### 9.2.1.3 Consequence of the official opening of a DG COMP investigation

It may do, if the effect of that is to generate EU law obligations, thus gaining exemption from the 'normal'<sup>37</sup> restrictions upon transfer.<sup>38</sup>

#### 9.2.1.4 Limitations on the transfer of information

The relevant limitations are in Enterprise Act 2002 Part 9 (s. 239 et seq.)

<sup>35</sup> Commissioners of Revenue and Customs Act 2005 s. 17(1)

<sup>36</sup> FSMA s 349

<sup>37</sup> Enterprise Act 2002 Part 9

<sup>38</sup> Enterprise Act 2002 s.240.

*Banking secrecy*

There is no provision specific to banking, but the statute lists as matters to which regard is to be had in determining whether or not to disclose both legitimate business interests (i.e. of the bank) and the privacy of the individual.<sup>39</sup> Both would militate towards protecting banking confidentiality.

*Business secrecy*

One of the matters to be taken into account in determining whether or not to disclose is the 'legitimate business interests' of the undertaking to which the information relates.<sup>40</sup>

**9.2.1.5 Conditions on the use of transmitted information**

In particular it may limit the uses to the purposes for which it is shared.

**9.2.2 Transfer of information from other administrative authorities to DG COMP**

There are no administrative authorities transmitting information to DG COMP.

**9.3 ECB****9.3.1 Transfer of information from national counterparts to ECB****9.3.1.0 ECB national enforcement partner**

The Bank of England, the Prudential Regulatory Authority and the Financials Conduct Agency all have roles. The rules for the disclosure of information by the Prudential Regulatory Authority are the same as those for the FCA. ie (Financial Services and Markets Act 2000 Part XXIII (s. 347 et seq). For these provisions see under ESMA, below.

**9.3.1.1 Type of information**

Usually general information will be a Bank of England/PRA issue, and specific information an FCA one.

**9.3.1.2 Limitations on the transfer of information**

The rules relating to disclosure by the PRA are as for the FCA.

**9.3.2 Transfer of information from other administrative authorities to ECB****9.3.2.0 Administrative authorities transmitting information to ECB**

HM Treasury, FCA, PRA,

**9.3.2.1 Obligations as regards the information transfer**

There are no provisions under national law.

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39 Enterprise Act s 244(3).

40 Ibid.

## 9.4 ESMA

The Financial Conduct Authority is the ESMA national enforcement partner. The Financial Services and Markets Act 2000 348(1) prevents the FCA from disclosing any ‘confidential information’ it receives except in certain circumstances. Confidential information is any information which is not in the public domain, relating to the business or other affairs of any person, which was received by the FCA for the purposes of, or in the discharge of, its statutory functions.<sup>41</sup>

Where the information has lawfully been made available to the public or is in the form of a collection or a summary so that it cannot be attributed to a particular firm or individual, that information is not confidential information.<sup>42</sup> However, when the FCA receives information under Part 16A Financial Services and Markets Act, for example, for the purpose or in the discharge of its concurrent competition functions, including its functions under Competition Act 1998,<sup>43</sup> Part 9 of the Enterprise Act 2002 will apply to any disclosure of such information instead of section 348 Financial Services and Markets Act. Section 349 of Financial Services and Markets Act allows HM Treasury to make regulations to permit the disclosure of confidential information in certain circumstances. The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (the Gateway Regulations)<sup>44</sup> set out the circumstances in which disclosure may be made. The Gateway Regulations generally permit the disclosure of confidential information to the CMA (in relation to current or former authorized persons) under two main gateways: (a) The first is where the disclosure of confidential information is made for the purposes of enabling or assisting the FCA to discharge any of its public functions,<sup>45</sup> ie its functions under FSMA and certain other legislation. (b) The second is where the disclosure of confidential information is made for the purposes of enabling or assisting certain other bodies to discharge specified functions (see regulations 9(1) and 12 of the Gateway Regulations).

The bodies able to receive confidential information from the FCA, and the functions for which they may receive it, will depend on whether the FCA received it as a ‘competent authority’ under any of the single market directives. If so, regulation 9(1) prescribes a narrower set of gateways. In such cases, the FCA can only disclose information to the CMA in respect of the CMA’s functions under FSMA or under any other enactment where the CMA has supervisory functions over firms that are or were authorized under FSMA.<sup>46</sup>

There is a list of general purposes for which the disclosure may be made (including EU law) and special provision for confidential information, as to whose further use conditions may be made by FCA.

The national competent authority can impose conditions on the use of transmitted information under The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 rule 7.

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41 FSMA.s 348(2).

42 s 348(4).

43 See above, under CMA.

44 The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 **SI 2188**.

45 Gateway Regulations rule 3(1)(a).

46 Gateway Regulations Part 1 of Schedule 1.





## 10. COMPARATIVE ANALYSIS

*M. Luchtman, M. Simonato, J. Vervaele*

### 10.1 INTRODUCTION

Enforcement is a public action ‘with the objective of preventing or responding to the violation of a norm’.<sup>1</sup> It can be defined, in simple terms, as the process through which violations of substantive regulation are detected (monitored), investigated, and sanctioned.<sup>2</sup> In this context, one could imagine at least two basic scenarios. In the first scenario, an enforcement authority has direct powers vis-à-vis the addressees of the norms (citizens and companies), i.e. investigative powers in order to gather information held by physical and legal persons.<sup>3</sup> In the second scenario, in order to enforce substantive regulations, an enforcement authority uses information that has already been gathered by another public authority.

As a matter of fact, especially in the field of economic and financial crime, it is difficult to imagine authorities acting only in the first scenario. Information collected by other ‘partner’ authorities is essential to build up an information position and to decide whether and how to use the direct investigative and/or sanctioning powers. In particular, if one looks at the functioning of the EU authorities endowed with direct enforcement powers, one could easily realise how every authority performs its activities within a sort of ‘network’ of enforcement authorities, be it explicitly formalised/regulated or not. In the literature, terms like ‘composite enforcement’ or ‘enforcement in a shared legal order’,<sup>4</sup> have been used to describe such a complex reality.

As said, the reliance on information gathered by other authorities is necessary not only for OLAF, but for all authorities vested with enforcement tasks and powers, be they competent either in the internal market or in the Area of Freedom, Security and Justice,<sup>5</sup> and be they active at a national level or at a supranational level.

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1 V. Röben, ‘The Enforcement Authority of International Institutions’ in R. Wolfrum, A. von Bogdandy, M. Goldmann, P. Dann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2009), p. 821.

2 See 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* (Oxford, Hart, 1999), p. 131.

3 The direct enforcement powers of four EU authorities have been analysed in M. Luchtman – J. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities* (ECN/ESMA/ECB) (Utrecht University, April 2017).

4 See H. Hofmann, ‘Composite Procedures in EU Administrative Law’, in H. Hofmann, A. Turk (eds.), *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration* (Cheltenham, Edward Elgar, 2009), p. 136.

5 M. Busuioc, *EU Justice and Home Affairs Agencies: Securing Good Governance* (Study for the LIBE Committee, 2017) p. 34.

The exchange of information therefore becomes essential to ensure effective enforcement, and in a historical period in which enforcement tasks and powers are being increasingly granted to EU bodies,<sup>6</sup> this has become one of the biggest challenges for optimal EU governance. This is due, of course, to the fact that besides the more traditional horizontal dimension (i.e., cooperation between two actors belonging to the same level and legal order), the vertical dimension (i.e., cooperation between national and EU authorities) adds a further layer of complexity. The EU legislator therefore had to elaborate legislative and practical mechanisms to ensure an adequate flow of information from national to EU enforcement authorities.

The challenges raised by the vertical exchange of information are evident not only when thinking about the effectiveness of enforcement, but also when taking the fundamental rights dimension into consideration, more in particular the protection of privacy and the personal data of individuals and legal persons. An unlimited and uncontrolled exchange of information (including personal data) between public authorities, and its subsequent use for various purposes, would endanger people's human dignity, and would risk resulting in arbitrary interference with their rights.

Both the European Convention on Human Rights (ECHR) – namely, its Article 8 – and the Charter of Fundamental Rights of the EU (CFREU) – namely, its Articles 7 and 8 – provide for protection in this sense, and for limits on the gathering of information, on the one hand, and on the conditions under which the exchange of the gathered information may take place, on the other. A comprehensive analysis of the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) falls outside the scope of this project. Nonetheless, it is worth stressing that the jurisprudence emanating from both courts stresses the importance of the requirements enshrined in the different human rights instruments.

Article 52(3) CFREU provides that the meaning and scope of the rights enshrined in the CFREU, which correspond to the rights recognised by the ECHR, 'shall be the same' as those laid down by the ECHR, but this does not prevent the EU from providing 'more extensive protection'. Furthermore, according to the Explanations relating to CFREU, the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the ECtHR and the CJEU, and thus by the autonomous interpretation given by both courts. In addition, the Explanations clarify that the meaning and scope of the rights also include the 'authorised limitations' on such rights. This entails, therefore, that the Strasbourg case law represents a benchmark to assess any limitation on privacy, even if such legitimate limitations are spelled out slightly differently in the CFREU when compared to the ECHR. According to Article 8(2) ECHR, any interference with the right to private life must be necessary in a democratic society and pursue one of the legitimate objectives indicated in that provision.<sup>7</sup> The text of the CFREU is less formally structured, while explicitly mentioning the principle of proportionality.<sup>8</sup>

6 See M. Scholten, M. Luchtman, E. Schmidt, 'The proliferation of EU enforcement authorities: a new development in law enforcement in the EU', in M. Scholten – M. Luchtman (eds.), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (Cheltenham, Edward Elgar, 2017), p. 1.

7 Art. 8(2) ECHR: '2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

8 Art. 52(1) CFREU: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. See S. Peers, T.

For the purpose of this research project, it is worth stressing that both instruments require that the limitation on the right to privacy must be ‘provided for by law’ (CFREU) or ‘in accordance with the law’ (ECHR). A legal basis, in other words, is necessary to interfere with the private sphere of a person.<sup>9</sup> An abundant jurisprudence of the ECtHR clarifies the meaning and scope of this requirement when the interference with the right to private life is due to the gathering of information concerning private persons by public authorities. In this regard, the scrutiny of the ECtHR is not limited to verifying whether a legal basis is present or not and whether the interference has been conducted in compliance with domestic law. The expression ‘in accordance with the law’ also relates to the quality of that law, requiring it to be compatible with the rule of law.<sup>10</sup> In order to provide for a demarcation of the scope of discretion for public authorities, therefore, the legal basis must be clear, foreseeable, and adequately accessible.<sup>11</sup> On some occasions, however, the ECtHR has clarified that not only the gathering of information, but also the subsequent transfer of information to other public authorities, represents an interference with privacy. For example, in a decision on the inadmissibility of an application (because it was manifestly ill-founded) concerning the German powers to intercept telecommunications and to transmit them to other authorities, the ECtHR has observed that:

‘the transmission of data to and their use by other authorities, which enlarges the group of persons with knowledge of the personal data intercepted and can lead to investigations being instituted against the persons concerned, constitutes a further separate interference with the applicants’ rights under Article 8’.<sup>12</sup>

In other words, not only the first level of the interference with the right to privacy (i.e., the gathering of information held by suspects), but also the second level of interference (i.e., the transfer of such information to another enforcement authority) find some protection in the mentioned human rights instruments. Therefore, a legal framework should also regulate this aspect and provide for procedural safeguards in order to protect those data from misuse and abuse.<sup>13</sup>

The academic and policy analysis of how the exchange of information between EU and national enforcement authorities takes place in the EU is still at an embryonic stage.<sup>14</sup> There are no consolidated categories and distinctions taking into account all the variable factors. And neither are there any comprehensive studies highlighting differences and common trends in the various EU policy domains. A more transversal debate, extending beyond a specific policy

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Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford, Hart, 2014) p. 180 et seq.

9 The Court has adopted a broad interpretation of the concept of private data, which includes for example also bank documents. See ECtHR, *M.N. v San Marino*, 28005/12, 7 July 2015, §51.

10 ECtHR, *Halford v. the United Kingdom*, App. no. 20605/92, 25 June 1997, §49.

11 ECtHR, *Silver and others v. United Kingdom*, App. no. 5947/72, 25 March 1983, §87. ECtHR, *Fernández Martínez v. Spain*, App. no. 56030/07, 12 June 2014, §117.

12 ECtHR (dec.), *Weber and Saravia v. Germany*, App. no. 54934/00, 29 June 2006, §79. See also ECtHR, *Leander v. Sweden*, App. no. 9248/81, 26 March 1987, §48; ECtHR (GC), *Rotaru v. Romania*, App. no. 28341/95, 4 May 2000, §46.

13 ECtHR, *Gardel v. France*, App. no. 16428/05.

14 See H. Hofmann, G.C. Rowe, A.H. Turk, ‘Information and Administration’, in H. Hofmann, G.C. Rowe, A.H. Turk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2011); M. Eliantonio, ‘Information Exchange in European Administrative Law. A Threat to Effective Judicial Protection?’ (2016) 23(3) *Maastricht Journal of European and Comparative Law* 531.

area, has recently begun and there are a few studies that propose some distinctions as a sort of theoretical lens to analyse the different modalities of information transfer.

*Schneider*,<sup>15</sup> for example, puts forward a fourfold distinction. According to the modality for exchanging information, there can be: (a) a basic information exchange. This is the case of forms of mutual assistance and the exchange of requests; (b) obligations of spontaneous exchange, without prior request; (c) more structured forms of information exchange, including other obligations and arrangements (such as the duty to comply with certain deadlines, or tracking mechanisms allowing the requesting authority to control progress with regard to its request); (d) shared databases, which are seen as the most advanced form of information exchange. Their purpose is to confer direct information access on the participating authorities (the ‘availability principle’).<sup>16</sup>

Such a distinction, however, covers only the modalities of the exchange, but neglects other dimensions that are helpful to analyse the differences between various regimes. We have therefore developed the national questionnaires (see Annex I) taking the four different aspects into consideration:

(1) *the authorities*. We have divided the national authorities obliged to transfer information into three ‘circles’. The first inner circle is represented by national counterparts, i.e. by those authorities that EU law identifies as institutional partners in the enforcement tasks. The second broader circle includes other administrative authorities, not structurally linked to an EU authority but which could nonetheless be subject to reporting duties and information exchange obligations. Finally, the third circle encompasses national judicial authorities whose obligations are normally regulated by a different set of rules. As will be explained in the following sections, the relationship with judicial authorities is relevant only as regards some of the analysed EU enforcement authorities.

(2) *the enforcement phase*. Although not always evident in the applicable legal framework, we have aimed to disentangle the obligations concerning the exchange of information according to the moment at which it takes place: namely, before the official opening of an investigation at the EU level (in order to provide adequate information to decide whether an investigation needs to be initiated), and during the investigations (in order to provide adequate informational support to the investigative tasks of the EU authorities). We have excluded the post-investigative phase, i.e., the reporting duties concerning the follow-up of a EU investigation, from the scope of the research.

(3) *the type and purpose of the exchanged information*. Among the numerous reporting and cooperation duties, we aimed to distinguish information exchanged for enforcement purposes from information exchanged for policy-making purposes. We have therefore asked the national rapporteurs to focus only on the obligation concerning operational information, i.e. information that is useful for an ongoing case file or for the potential opening of an investigation.

(4) *the modalities*. Finally, we have taken into consideration the different modalities for transferring information – as in the mentioned work by *Schneider* – and asked the rapporteurs how the obligations are formulated in the applicable legal framework, particularly as regards the requirement of a previous request, the obligation of spontaneous exchange, and the automatic exchange through digital databases. The specific content of such databases, however, falls outside the scope of the research.

15 JP Schneider, ‘Basic Structures of Information Management in the European Union’ (2014) 20(1) *European Public Law* 89.

16 See A. Klip, *European Criminal Law. An Integrative Approach*, 3<sup>rd</sup> ed. (Cambridge, Intersentia, 2016) p. 395.

As explained in the introduction, the research question triggering the project is whether there is a need to improve the framework for the exchange of information related to suspicions of fraud affecting the EU budget. In order to answer that question, we have endeavoured to:

(i) offer an up-to-date and exhaustive analysis of the complex multi-level legal framework governing the exchange of information between enforcement authorities;

(ii) identify the obstacles to realising OLAF's mandate. In that regard, we have focused on the obstacles of a legal nature, distinguishing those from other types of obstacles, being aware that 'national reluctance to co-operate can be due to a variety of other reasons ranging from legitimate national political considerations, austerity and budgetary constraints of national administrations, impact of EU-level cooperation initiatives on the workload and mandates of national agencies, divergences within administrative traditions, a resistant/conservative professional culture etc.'<sup>17</sup>

(iii) identify models for improving the current legal framework of the exchange of information between OLAF and other EU and national enforcement authorities. For that purpose, we have compared the OLAF legal framework with that governing the exchange of information between national authorities and three other EU enforcement authorities, namely DG COMP, ECB, and ESMA. The choice of these authorities has allowed this project to complement the previous research conducted on the investigative powers granted to EU enforcement authorities, whose results have been published in 2017.<sup>18</sup>

The following sections will bring together the findings of the previous chapters – two EU reports and six national reports – by analysing how the multi-level legal framework regulates the transfer of information between national and EU authorities, and how the protection of the different interests at stake has been integrated into the respective frameworks. As explained in Chapter 1, a terminological clarification is necessary: although normally the legal framework refers to the 'exchange of information', in the national reports we have adopted the term 'transfer of information'. Our choice is due to the specific focus of the research on the flow from national to EU authorities (and not on the flow in the other direction, i.e., from EU to national authorities). The 'transfer', therefore, is to be considered as one part of the 'exchange' that normally takes places between two authorities.

## 10.2 TRANSFER OF INFORMATION TO OLAF

### 10.2.1 General remarks

As is well known, OLAF does not have proper monitoring or supervisory tasks, and neither does it investigate a very specific group of economic operators (as, for instance, the ECB does for systemic banks). For this reason the information position is of crucial relevance for OLAF, not only during its investigative phase, but even in a preliminary stage in order to assess whether it should open an investigation. As OLAF does not have sanctioning powers – as the other ELEAs – it also needs information about the follow-up by the national authorities, once an OLAF report has been sent out. All of these types of information transfer from the national authorities to OLAF

17 M. Busuioc, *EU Justice and Home Affairs Agencies: Securing Good Governance* (Study for the LIBE Committee, 2017), p. 36.

18 See M. Luchtman, J. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (Utrecht University, April 2017).

are crucial for compliance with its mission and the effective use of its enforcement tasks and tools.

The transfer of information is obviously very much related to the organisational design of the law enforcement cooperation. The question of how OLAF is interlinked with the national competent authorities for the prevention and enforcement of EU fraud therefore arises. How is the inner-OLAF circle of national competent authorities (being AFCOS or other preferential ones) set up and under which conditions do they transfer this information to OLAF? It is of course also possible that relevant information for the prevention and enforcement of EU fraud is not in the hands of the inner-circle of authorities, but is the responsibility of other authorities, such as, for instance, the tax authorities or public authorities dealing with real estate registers. Also the information flow from these authorities to OLAF can be of relevance.

Last but not least, OLAF serves many goals. Although it is an administrative investigative body, its information can and should end up in national criminal proceedings if there is a reasonable suspicion that PIF offences or related issues like corruption or money laundering have been committed. It is also possible that national judicial authorities take the lead and that OLAF comes into the picture at a later stage. The information flow from judicial authorities to OLAF can be relevant for OLAF investigations, but also for other related goals, such as, for instance, civil recovery actions by the Commission or disciplinary proceedings against EU civil servants.

From this brief overview we can already deduce that OLAF is not the central unit of a closed network (as we will find in the DG COM, ECB and ESMA setting). This not only has consequences for the organisational design of the cooperation between OLAF and national bodies, but also for the empowerment of information transfer and the limits imposed upon the transfer by privileges of secrecy and purpose limitation. In fact, the information transferred to OLAF does not necessarily remain in the hands of OLAF. Quite the opposite, it is more probable that it is channelled to several other competent authorities for specific law enforcement purposes, which can be European (disciplinary action) or national (in different countries) and might of course include judicial criminal action. The transfer of information from the national competent authorities is not a closed system in which national competent authorities exchange information, knowing that the information provided by them is to be kept secret and is not to be used for other purposes, as we find, for instance, in the ECB setting.

Finally, the transfer of information by national competent authorities, including the judicial ones, to OLAF is legally difficult to define under national law. In many countries, the rules on mutual administrative legal assistance ('Amtshilfe') are generally elaborated for horizontal cooperation, not for cooperation with the Commission. The same can be said for the national rules on mutual legal assistance (MLA) in criminal matters. They are designed for the competent national judicial authorities.

It is in this context that EU law comes into play and prescribes specific obligations as to the transfer of information to OLAF. This is the reason why we first take a look at the EU dimension and, during a second stage, at the national implementation and to verify if and how national statutory provisions have or have not created 'gateways', meaning an empowerment for public bodies to disclose information to OLAF and to which extent these national laws are creating an equivalent playing field for OLAF's mission and tasks.

### 10.2.2 The top-down perspective: The EU legal framework

The transfer of existing (law enforcement) information from national authorities to the Commission is certainly not a new issue. Already in 1979 the Commission started an infringement procedure before the Community Court of Justice against Italy. The Italian competent authorities (the financial police and the customs authorities) had obtained evidence of fraudulent declarations in the common agricultural sector of butter and transferred the evidence to the investigating magistrate. The magistrate refused to send the evidence to the Commission, a decision motivated by the privilege of non-disclosure in relation to the judicial inquiry or the so-called secrecy of judicial inquiry. The Commission stated that Community loyalty and information flow obligations based on secondary EC law overruled that privilege. The Commission underlined that it needed that information for eventually starting civil or administrative procedures to guarantee its own resources (in the case of customs duties). The Court of Justice<sup>19</sup> ruled, against the opinion of the Advocate General in this case,<sup>20</sup> that Italy, under the existing legal framework, had not infringed the obligations under the Treaty and secondary Community law, as the national administrative authorities could not obtain the information either. In other words, the Italian secrecy of judicial inquiry was a bar both for the Commission and the national administrative authorities.

The ECJ has pointed out very clearly that Union loyalty is a source of obligations for the Member States' authorities, including in the field of enforcing EU law. Moreover, already in the *Zwartveld* rulings<sup>21</sup> the ECJ stressed the duty of reciprocity and joint obligations when it comes to the enforcement of EU law and the protection of the Union's financial interests.

However, the enforcement obligations concerning Union loyalty do not provide for a very clear and precise content of the obligations. It is therefore not surprising that the EU was interested in having more precise obligations on the transfer of information from national authorities to the Commission. This was obtained for instance in Regulation 595/91.<sup>22</sup> In its preamble it was clearly stated that the Commission should be systematically informed of judicial and administrative procedures against persons who have committed irregularities; whereas it would also be advisable to ensure the systematic transmission of information concerning the measures taken by the Member States to safeguard the Community's financial interests. Under Article 6(4) it was stipulated that: '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'. Article 9 then imposed professional confidentiality and purpose limitations on the flow of information.

Also the Second Protocol to the Convention on the protection of the European Communities' financial interests of 1997 deals specifically with cooperation and information exchange with the European Communities. Article 7(1) establishes a general cooperation duty and empowers the Commission to offer technical and operational assistance in order to facilitate the coordination of national investigations. Article 7(2) deals specifically with information exchange:

19 CJEU, Case 267/78, 10 January 1980.

20 CJEU, Case 267/78, Opinion of the Advocate General *Warner*, 7 November 1979.

21 Court of Justice, Case C-2/88, *Imm., J.J. Zwartveld and others* [1990] E.C.R I-365

22 The regulation has been replaced by Commission Regulation 1848/2006 of 14 December 2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field.

‘The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering. The Commission and the competent national authorities shall take account, in each specific case, of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed’.

That the information flow from judicial authorities to the EC remains delicate is clearly expressed in the Joint Declaration on Article 13(2), dealing with the Court of Justice’s competence in relation to the criminal law obligation of mutual legal assistance:

‘The Member States declare that the reference in Article 13 (2) to Article 7 of the Protocol shall apply only to cooperation between the Commission on the one hand and the Member States on the other and is without prejudice to Member States’ discretion in supplying information in the course of criminal investigations’.

The PIF Convention of 1995 and its Protocols (including the just mentioned second Protocol of 1997) have recently been replaced by PIF Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law.<sup>23</sup> Article 15 clearly stipulates similar provisions:

‘1. Without prejudice to the rules on cross-border cooperation and mutual legal assistance in criminal matters, the Member States, Eurojust, the European Public Prosecutor’s Office and the Commission shall, within their respective competences, cooperate with each other in the fight against the criminal offences referred to in Articles 3, 4 and 5. To that end the Commission, and where appropriate, Eurojust, shall provide such technical and operational assistance as the competent national authorities need to facilitate coordination of their investigations.  
2. The competent authorities in the Member States may, within their competences, exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against the criminal offences referred to in Articles 3, 4 and 5. The Commission and the competent national authorities shall take into account in each specific case the requirements of confidentiality and the rules on data protection. Without prejudice to national law on access to information, a Member State may, to that end, when supplying information to the Commission, set specific conditions covering the use of information, whether by the Commission or by another Member State to which the information is passed’.

As is well known, 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). In its sectoral instruments<sup>24</sup> the EU legal framework also provides for a general obligation for the competent national authorities to share

23 OJ L 198/29, 28 July 2017.

24 See, for example, Regulation (EU) 2015/1525 of 9 September 2015 amending 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 [2015] OJ L 243/1.



information with OLAF. However, such an obligation is formulated in such a way that it often refers back to national law.

Being aware of this problem, OLAF's general Regulation 883/2013 aims to facilitate access to information held by national authorities. Regulation No. 883/2013 obliges Member States to designate an anti-fraud coordination (AFCOS) service to facilitate access to information held by competent national authorities,<sup>25</sup> and to enhance effective cooperation and the exchange of information with OLAF. However, the Regulation does not harmonise the structure and functioning of the AFCOs, hence 'there are considerable differences among the national Coordination Services in terms of relative size and powers. Some have limited coordinating roles, while others have full investigative powers'.<sup>26</sup>

As it stands, the EU picture remains very unclear and even very circular. We can easily say that there are hardly any provisions that subject PIF information flows to a common regime of secrecy. Article 10(1) of Regulation 883/2013 provides that 'information transmitted or obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions'. Which provisions that might be is not very clear from the text. When we look at the relevant provisions, such as Regulation 515/97 we find the following provision in its Article 45(1):

'Regardless of the form, any information transmitted pursuant to this Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities'.

The EU provisions therefore seem to refer to each other, without a clear content result, as well as to the applicable national law. Also the reference to national law is not without problems. So, it is high time to assess how all the provisions and obligations have been implemented and/or elaborated in the respective legal orders of the Member States.

### **10.2.3 The bottom-up perspective: national statutes for a transfer from national counterparts (AFCOS) to OLAF**

From the domestic perspective a whole set of questions are relevant. What are the authorities that share information with OLAF in the pre-investigative and investigative phases? What are their tasks and powers? What type of information can they transfer? Under what conditions are they allowed to provide OLAF with information? Can information originally covered by some form of privilege also be provided? If yes, under what conditions? To what extent may the information be used for purposes other than those for which it was originally received? To what extent does the secrecy of (ongoing or closed) investigations prevent an authority from sharing the information with a EU body?

These questions are relevant for an information exchange with all EU enforcement authorities. However, the OLAF dimension has some very specific features. The OLAF situation is a complex one because of the multiplicity of substantive fields, dealing with EU irregularities and fraud in all EU policy areas from the common agricultural policy to customs, related national

<sup>25</sup> Art. 3(4) of Regulation No. 883/2013.

<sup>26</sup> OLAF Report 2015, p. 22.

authorities and applicable statutes. Even the ECB and ESMA are also sharing information with other authorities, as their own field of enforcement – for which they may need to have a flow of information – is much more delineated. Furthermore, the OLAF EU regulations to a large extent refer back to national law for (i) the existence of investigative powers; (ii) the scope of application of these powers; (iii) cooperation with OLAF, including the exchange of information, and (iv) the applicable legal safeguards.

Although OLAF has many similarities with the other EU enforcement authorities such as the ECB, ESMA and DG COMP, the context in which OLAF has to operate is nevertheless quite different. 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 great deal of attention to the set-up and powers of their national partners, as we will demonstrate below. That level of harmonization is lacking in the OLAF setting. OLAF's partners at the national level can be subject to a criminal law statute, but also to an administrative law provision. 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, OLAF cannot issue production orders to economic operators under investigation, so it is more dependent upon the national authorities, which may be in possession of relevant information.

For all of these reasons we need to look at the relevant national partners for OLAF in the specific setting of every national legal order that we have selected for the comparative study. Obviously we first have to look at the specific AFCOS structure and then to move on to the other competent administrative authorities. We will end with a specific sub-chapter on the information flow from the judicial authorities to OLAF.

### 10.2.3.1 Transfer of information from AFCOS to OLAF

#### *Germany*

The national partner of OLAF is the Federal Ministry of Finance. The function of the Ministry of Finance as AFCOS is not regulated at all. Nor are there any rules on exchanging information. As the Ministry itself does not gather information, its role is limited to coordinating investigations and providing contacts with the relevant national enforcement authorities. The Ministry is not even always informed about the transfer of information. Accordingly, for the purposes of this project, it is mainly the other administrative and judicial authorities that are relevant (see point 10.2.3.2)

#### *Hungary*

The Hungarian national enforcement partner of OLAF is the OLAF Coordination Office (hereinafter HU AFCOS). The HU AFCOS is a unit within the National Tax and Customs Administration (NTCA), which itself is part of the Ministry for National Economy. The HU AFCOS has no authority or independent legal personality and no monitoring competences. Its possibilities for information gathering are very specific:

- a) it may gather *information in general about tenders* regarding EU funding, contracts with beneficiaries and the use of the funds;
- b) *it manages personal data and criminal personal data* within the framework of a specific OLAF investigation, limited to reporting purposes in the specific case;
- c) *it presents annual reports* to the Minister responsible for taxation. These reports deal with irregularities against the financial interests of the Union.

The HU AFCOS is required to provide OLAF with information, both on request and through reporting obligations. As regards the transfer of information the HU AFCOS:

- a) *compiles statistics* – excluding personal data – about irregularities against the financial interests of the EU
- b) *forwards reports to OLAF* concerning irregularities detected in the use of the EU budget.

However, it is not clearly regulated for which information there is a transfer of information for which no request from OLAF is needed.

### *Italy*

Italy's AFCOS-designated authority is the Italian Financial Police (*Guardia di Finanza*), a division which specializes in combating EU fraud at the Department of European Policies. It represents the 'intermediary' of the National Committee for Combating Community Fraud (COLAF), operating at the Department for European Policies at the Presidency of the Council of Ministers. The COLAF has been designated as the central anti-fraud Coordination service for Italy. It is a Committee regulated as a public law agency but it has no direct operational authority. Part of its task are explicitly: (a) Providing advice and coordination at the national level against fraud and irregularities in the fields of taxation, the Common Agricultural Policy and structural funds; (b) monitoring the flow of information on unlawfully obtained European funds and on their recovery in the case of misuse and reporting to the European Commission according to Article 325 TFEU. A new MOU in 2012 between the *Guardia di Finanza* and OLAF also covers the exchange of information, including strategic information. However, the text of the MOU is not publicly available. According to informal information obtained by telephone interviews, the exchange of information covers all sorts of data related to a potential criminal activity affecting the EU's interests. Confidentiality should be respected by both sides.

There is no further specific legal provision in national law concerning the transfer of information to OLAF. The lack of a specific legal basis does not mean that information is not transmitted but only that this data flow is not formalized.

### *Luxembourg*

Luxembourg has designated the Directorate of International Financial Relations, Development Aid and Compliance, within the Ministry of Finance, as the national AFCOS. Accordingly, the Luxembourg AFCOS constitutes an administrative unit without an independent legal status.

Luxembourg law does not lay down specific rules governing the exchange of information between OLAF and the national AFCOS. Although AFCOS constitutes a national contact point vested with the task of facilitating cooperation and the exchange of information between OLAF and the competent administrative and judicial authorities within the country, it does not have access to information related to ongoing – especially criminal – investigations carried out by the other competent national authorities.

### *The Netherlands*

The Act on administrative assistance to the European Commission during inspections and on-the-spot checks designates the Minister of Finance as the *competent authority* under Regulation 883/2013. The act stipulates that the Minister of Finance serves as a contact point for OLAF. The Minister of Finance, in light of the purpose and object of the OLAF investigation envisaged, determines in turn who is the appropriate Minister to offer assistance. The AFCOS itself is

organisationally part of Customs and operates directly under the Director of Customs for the Rijnmond Region. Customs falls under the Tax Authority, which, in turn, falls under the Ministry of Finance. AFCOS serves as a central and first point of contact for OLAF, both in cases relating to expenditure and in cases concerning revenues. When it comes to cases involving revenue (specifically cases concerning customs duties, the levying of VAT on imports and the levying of consumption taxes and excise duties on imports) AFCOS is in charge of transferring information to OLAF. When it comes to expenditure (specifically cases concerning structural funds) AFCOS informs the national authority in charge. The relevant national authority, in turn, is in charge of the transfer of information to OLAF.

Obligations concerning the transfer of information stem from directly applicable Union law, particularly Articles 17 and 18 of Regulation 515/97. Also the means by which information is to be transferred (on request, spontaneously, or automatized) are laid down in Union law. The General Customs Law states that the customs officials charged with its application are to transfer the information defined in Articles 12 and 47(2) of the (directly applicable) Union Customs Code to OLAF.

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

The limits imposed by the speciality principle under the General Customs Law stem directly – just like the types of information that can be transferred to OLAF – from Union law. Information listed under Article 47 of the Union Customs Code may be transferred for the purposes of minimizing risk and combating fraud and for the purpose of ensuring a uniform application of the customs legislation.

### *The UK*

The UK has designated a police authority as AFCOS: the National Police Coordinator's Office for Economic Crime – Economic Crime Directorate, part of the City of London Police.

When it comes to the transfer of information there is one important general statutory gateway that applies to all public bodies as far as the prevention of fraud is concerned. Section 68 of the Serious Crime Act 2007 provides the default position on the disclosure of information to prevent fraud for any fraud investigation, by whichever body it is performed. This particular provision applies to all the authorities under consideration, such as the AFCOS, PRA, CMA, and the FCO, and also to the tax authorities (HMRC).

Cooperation with OLAF as such is not specifically regulated by English law, but where an investigation is conducted by the Serious Fraud Office (SFO): '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'. Representation from OLAF might be such persons.

### **10.2.3.2 Transfer from other administrative authorities to OLAF**

What qualifies as other administrative authorities depends strongly on the positioning of AFCOS within the national legal order. In some countries AFCOS is akin to a central authority (the inner circle), although all of the relevant substantive field is not covered. So it could cover

customs as the inner circle for instance, but not structural funds that would qualify for ‘other administrative authorities’. In other countries AFCOS is just a ‘post box’, which means that the ‘other administrative authorities’ are the main players, including for exchanging information. In some countries, AFCOS can be both, depending upon the substantive area.

### *Germany*

As we have seen under 10.2.3.1 in Germany the AFCOS plays a non-significant role. This is the reason why there are several administrative authorities that are competent to transmit information to OLAF. Which of them has jurisdiction to do so depends on the area of law in which they operate. There is no central authority for cooperating with OLAF in all areas of the law.

In the area of customs, the Customs Investigations Bureau (ZKA) is the central office for coordinating the proceedings of the Customs Investigations Offices and the Customs Intelligence Services. The task of the ZKA is to enforce income taxes and to oversee EU subsidies, but also the investigation of criminal and administrative offences and so accordingly it has investigative powers in both administrative and criminal proceedings.

The ZKA is also the competent authority and the central office for providing legal and administrative assistance to the EU authorities. This includes cooperation that is required by the OLAF Regulation and EU Customs Law, e.g. the Union Customs Code. However, the decentralised system of legal and administrative assistance in the EU means that the customs authorities themselves can be directly addressed for the purpose of legal and administrative assistance.

In the area of structural funds, the rules are different. In Germany, structural funds are coordinated by the Federal Ministry of Economy. The administration and supervision of the programmes are generally undertaken by Ministries or offices of the *Länder*. The relevant rights and necessary investigative measures for gathering information are included in the grant agreement. The agreement contains clauses that oblige the beneficiary to transfer information about the grant to the granting EU authority. This authority can also ask for information on the use of the grant. In the case of non-compliance, the grant can be revoked. A special provision for informing OLAF is generally not included. Nor are there any secrecy clauses in the agreement. One might argue that, by concluding the grant agreement, the beneficiary implicitly consents to transferring relevant information to OLAF, but this does not comply with the requirement of express consent under German data protection law. Instead, the transfer of data to OLAF may be based upon the general provisions of the applicable data protection acts (BDSG and the corresponding statutory acts of the *Länder*). According to these provisions, an administrative authority may transmit personal data to an EU authority if the transfer is necessary for performing the duties of the transferring authority or the EU institution to which the data are transmitted. Recourse to these rather general provisions has raised serious concerns as to whether this is in conformity with the constitutional requirement of a precise and area-specific legal basis. If, however, the transfer data is transferred for purposes closely linked to the context in which the data has been previously collected, the interference with the right to privacy cannot be considered to be of such gravity that a specific legal basis is required.

German law does not provide for an obligation to transfer information to OLAF; nevertheless, the principle of loyal cooperation calls upon the national authorities to exercise their discretion. However, the general rules on international cooperation in administrative proceedings within the

EU do not apply to vertical cooperation with supranational institutions such as the Commission or OLAF.

Since German law does not provide for any rules on cooperation with OLAF in the area of expenditure, the following analysis will focus on customs only. Whether and to what extent the competent authority is obliged to transfer information to OLAF depends on the applicable law. In the case of customs administration, the relevant rules are laid down in Council Regulation 515/97 of 13 March 1997 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. This means that most cases of legal assistance are directly covered by EU law. If national law is relevant, the question of which provisions apply will arise. There are several possibilities in customs administration law. The ZKA is granted the right to establish an information system for the purpose of legal and administrative assistance if required by international treaties or other regulations. This means that it would be possible to grant OLAF direct electronic access to information if such an obligation is laid down in EU or national legislation. The ZKA can use automatic procedures to transfer personal data to an international database if required by EU law. An example of such a database is the Customs Information System (CIS), which is managed by OLAF.

Apart from these automated information systems, the transfer of information to OLAF is covered by national customs laws that allow the transfer of information to supranational authorities that deal with the prevention of crime and criminal prosecutions. The wide scope of the legal basis (the prevention and prosecution of crime) corresponds to the double function of the ZKA performing tasks in administrative (customs) and criminal proceedings. Even though OLAF does not deal with criminal prosecutions, its task is to protect the EU's financial interests by preventing fraud.

According to §117(2) General Tax Law, the revenue authorities may provide international legal and administrative assistance on the basis of the nationally applicable legal instruments of the European Union. The OLAF Regulation is one of these instruments because it is directly applicable without any implementation. The same is true for Regulation 1997/515/EC which deals with cooperation between the Commission and the customs authorities.

As for the type of information to be transferred, the national authorities may transmit any information that is required under the OLAF Regulation. The German provisions do not distinguish between the situation before an investigation is initiated by OLAF and subsequently. However, OLAF can only request specific information after an investigation has been opened.

As to the speciality and purpose limitation, according to the tax legislation, the powers of the authorities and the rights and obligations of the participants and other persons are based on the provisions applying to taxes in cases of legal and administrative assistance. The crucial provision in this context is §30 General Tax Law. This provision obliges all public officials to observe tax secrecy. This means that they are not allowed to disclose information that has been received in an administrative investigation or an investigation into a tax crime or a commercial secret. This rule also applies in the context of administrative or legal assistance. However, one could argue that transmitting information to OLAF serves administrative proceedings in tax matters, respectively customs matters, because it enables OLAF to compile a more accurate report which can be used as a source of information in proceedings on the recovery of tax and customs duties which have been evaded. By applying this reasoning, it would be possible to construct a legal basis for the transfer of enforcement information to OLAF.

Even though the provision on the secrecy of investigations does not apply, it must be noted that the customs authority may still refuse to transfer information to OLAF because although the legal basis for an exchange of information does impose an obligation, it leaves it to the discretion of the competent authority to decide whether or not to transfer information to OLAF. In addition, one might argue that the ground for refusing horizontal cooperation accordingly applies to vertical cooperation. On the other hand, the competent authority should reflect on whether the transfer of information bears the risk of jeopardizing the ongoing investigation as OLAF officials will ensure the confidentiality of this information.

As for professional secrecy, this should have been observed by the revenue or customs authorities when gathering information. Only in that case can data be transferred to OLAF.

#### *Hungary*

As seen under 10.2.3.1. all transfers of information to OLAF are channelled through the Hungarian AFCOS.

#### *Italy*

As for customs, the Customs Agency is a non-economic public body established by Legislative Decree in 1999. It is competent to transfer information to the CIS customs information system, as it has been designated as the competent authority under relevant EU regulations.

In general, when it comes to anti-corruption, in 2016 OLAF signed a cooperation agreement with the Italian national Anti-Corruption Authority (ANAC). Article 3 provides that ‘The Partners will provide each other, on their own initiative or upon request, with information which might be relevant for the other partner in view of their common interest, as spelled out in the Preamble of the Arrangement, including allegations of fraud, corruption or any other illegal activities potentially affecting the financial interests of the European Union’.

For the other areas, such as, for instance, structural funds, no specific provisions seem to exist under Italian law.

#### *Luxembourg*

In customs matters, the national competent authority is the Luxembourg Customs Administration, that has direct access to the Customs Information System (CIS) and is entitled to use the data stored in the said database. The Luxembourg Customs Administration is further responsible for the collection and processing of information within the CIS.

The national authorities which are competent for administering structural funds in Luxembourg and are therefore likely to report irregularities are administrative services within different ministries in their sectoral field of competence. For instance, the national FEDER managing authority is the Directorate for Regional Policy within the Ministry of Economics. Agricultural funds such as FEAGA and FEADER fall within the competence of the Control Unit within the Ministry of Agriculture.

Luxembourg law does not provide for specific rules governing the duty for the administrative authorities to report irregularities and, broadly speaking, to transfer information to OLAF. Thus, the legal basis for the exchange of information between Luxembourg’s competent authorities and OLAF lies in the directly applicable legal provisions of Union law. Yet, the relevant EU legal instruments governing the exchange of information refer back to national law. Thus, the lack of specific implementing provisions in the domestic legal order results in legal loopholes that can

hinder the transfer of information. This holds particularly true with regard to general provisions imposing confidentiality duties on the national competent authorities.

In particular, a violation of professional secrets constitutes a criminal offence under Luxembourg law, unless a statutory provision authorises the communication of confidential information. However, Luxembourg law does not have such legal provisions with regard to OLAF as it does for other Union institutions and agencies (such as, for instance, DG Com and the ECB). This further highlights the legal limbo surrounding the exchange of information between the Luxembourg competent authorities and OLAF.

#### *The Netherlands*

When it comes to expenditure (specifically cases concerning structural funds) AFCOS informs only the national authority in charge. The relevant national authority, in turn, is in charge of the transfer of information to OLAF.

Within the context of the ERDF, the management, certifying, and audit authorities all transfer information directly to the Commission on a structural basis. These authorities only report directly to OLAF in cases of irregularities or suspected fraud. All of the above-mentioned authorities fall within the scope of the General Administrative Law Act that provides for general rules which govern the relationship between administrative authorities and citizens that can be qualified as interested parties. However, it does not specifically regulate or impose obligations with regard to the exchange of information between administrative authorities and EU law enforcement authorities.

For obligations on the transfer of information recourse must be had to Union law. Article 122(2) of Regulation 1303/2013 holds that Member States must notify the Commission (OLAF) of any irregularities that exceed € 10 000 in contributions from the structural funds and to keep it informed of significant progress in related administrative and legal proceedings. In practice any national duty of secrecy incumbent on an administrative authority is superseded by EU obligations on the transfer of information. The duty of secrecy laid down in the General Administrative Law Act therefore does not impose a limitation on the transfer of information from the administrative authorities to OLAF.

#### *The UK*

Also in the UK the regulation strongly depends on the relevant sector. Concerning structural funds, for example, the relevant authorities are HM Treasury, the Prudential Regulatory Authority and the Financial Conduct Authority, the latter two being governed by the Financial Services and Markets Act.

### **10.2.3.3 Transfers from the judicial authorities**

As we have seen in the introduction, the flow of information from the judicial authorities is a specific category both at the national and at the supranational level. The main reason for this is that the judicial investigation might require secrecy even in relation to administrative authorities. However, OLAF, because of its hybrid mission, is very relevant, even for the ongoing judicial investigation. OLAF and national judicial authorities can have a strong reciprocal interest in exchanging information, both before the opening of an OLAF case, during its investigation and certainly also after OLAF's reporting to the national (judicial) authorities.



*Germany*

There is a provision on the cooperation of judicial authorities with OLAF in no. 151b of the Guideline on Cooperation in Criminal Matters. This Guideline has been initiated by the Ministry of Justice and ranks lower than formal law. According to no. 151b sent. 1, the judicial authorities can render assistance to OLAF. However, the guideline makes it clear that OLAF cannot oblige the German judicial authorities to transfer information that is part of criminal investigative proceedings.

The interference with human rights resulting from international cooperation with OLAF requires a statutory Act adopted by Parliament. Accordingly, no. 151b can only be deemed to form the basis for judicial cooperation if it is combined with existing law, such as the OLAF Regulation. This result, however, is barred because the OLAF Regulation, in turn, refers to national law.

If OLAF requires information on ongoing criminal investigations, it should contact other cooperation partners such as the AFCOS and ask them to provide the relevant information. There are ways to transfer information between national authorities that are not applicable to supranational authorities. This means that the AFCOS could probably have access to the information that is needed by OLAF and it can transfer it if necessary. The same is true for other revenue authorities.

*Hungary*

The key provision on the exchange of information between judicial authorities and OLAF (or other EU bodies) is laid down in Article 71/B(2) BE of the Hungarian Code of Criminal Procedure. Accordingly, the exchange of information is based on a request and is limited to the specific purposes of such requests:

‘Upon the request of a body established by international or Union law the court, the prosecutor, the investigating authority or the national member of Eurojust shall provide the respective body with information, access to files and with authentic copies of criminal records to the extent necessary for the performance of its tasks’.

According to the interviewees, in practice it is assumed without further examination that the requested information is necessary for OLAF in order to perform its tasks. Although, as a main rule, the exchange of information takes place at the initiative of one of the parties, a spontaneous transfer of information might also take place

*Italy*

COLAF, the national AFCOS, has no – or very limited – access to operational information related to ongoing investigations that are being conducted by the competent law enforcement authorities. As a consequence, all the relevant flows of information concerning fraud are transmitted by judicial investigative authorities, especially the financial police.

On 23 June 2006, OLAF signed a cooperation protocol with the Prosecutor General of the Italian Court of Auditors in Brussels, which also regulates information exchange. Although the Court of Auditors is formally not a judicial authority, it does have extensive investigate powers at its disposal.

### *Luxembourg*

Luxembourg law does not impose nor does it provide for specific rules governing an obligation for the national judicial authorities to inform OLAF. In other words, the duty to report to or inform the Office stems from directly applicable rules under sectoral Regulations and Regulation 883/2013. With regard to the latter, no specific implementing measures have been adopted in Luxembourg, even where Union law refers to domestic law.

Thus defined, the secrecy of criminal investigations constitutes an obstacle to the transfer of information to OLAF. Insofar as the Anti-Fraud Office has no specific legal status in national criminal proceedings, it does not have access to the materials in the case file. The cross-reference between Union and Luxembourg law leads to a legal limbo that is an obstacle to information exchange.

### *The Netherlands*

The rules on mutual legal assistance in criminal matters only apply to state-state cooperation and not to cooperation between EU authorities and judicial officers. In addition, OLAF proceedings (and proceedings of other EU authorities) are not criminal in nature.

There are no obligations for the judicial authorities to transfer information to OLAF under Dutch law. However, transfers are allowed under the Judicial Data and Criminal Records Act, a *lex specialis* of the Personal Data Protection Act and its implementing Decree on Judicial Data and the Instruction on Judicial Data and Criminal Records.

## **10.2.4 Interim conclusions**

The EU has tried to prescribe stricter obligations for Member States, including obligations on information exchange and the establishment and functioning of AFCOS. However, many provisions on information exchange refer back to national law when it comes to the legal basis, modalities, limitations etc. One would at least then expect that in the domestic legal orders general administrative law or specific acts regulate the referral by EU law. However, in many countries this is still not the case. The result is a legal limbo in many countries. It is very unclear what the national authorities are obliged to do vis-à-vis OLAF (although the obligations of the Member States are defined in EU law) and what they are allowed to do, also in relation to privacy, confidentiality, purpose limitations, judicial privileges, etc. or specific requirements as prior judicial authorization for the exchange and/or use for certain purposes.

The establishment of AFCOS has not solved this problem, as they have very different statutes under national law. The status of AFCOS remains a real patchwork. Although all selected countries seem to have established an AFCOS, that does not mean that we have a design of similar agents with a similar mission and equivalent powers. Quite the contrary. As we have seen in some countries AFCOS is simply designated to one of the existing Ministries or law enforcement agencies. Many AFCOS have no operational powers at all and are purely coordination units. AFCOS do not cover all relevant substantial fields of EU fraud. Structural funds are mostly out of its reach. Even under the coordination function AFCOS are not central units that are able to collect and transfer all relevant enforcement information to OLAF.

We have also noticed considerable differences between the powers of these AFCOS, ranging from purely administrative powers to coercive powers under criminal law. The designation of AFCOS seems to depend to a large extent on the perception of the OLAF mission by the Member

States. The Netherlands and Germany, for instance, regard OLAF as a purely administrative body and, in doing so, they seem to disregard the often intrinsic connection between punitive and non-punitive investigations. At the other end of the spectrum, the UK and Italy, for instance, have made criminal law powers available, at least in theory.

The result is that in the selected Member States we do not have comparable OLAF partners to work with and certainly not a structure that could resemble a network of national agencies such as in the field of competition or financial supervision. This has quite substantial consequences for the ‘internal circle of the flow of information’, as the borders of this ‘internal circle’ are very different from one Member state to another (from non-existing to substantial), but also very different within single Member States depending upon the substantive policy field (for instance, the difference between customs and structural funds).

Given the limited functions of AFCOS in most countries, the other administrative authorities are key players, but there the situation is even worse, as they are very sectoral and not necessarily linked to OLAF in one way or another. This is certainly the case for the area of structural funds. Astonishing is also that the legal basis for information exchange from the Member States to OLAF is sometimes simply non-existent, sometimes based directly upon provisions in EU regulations or sometimes laid down in general and specific statutes. When EU provisions are a sufficiently clear legal basis for the exchange of information is not at all clear and neither is this foreseeable. Even in cases of a complete legal limbo, exchanging information seems to be possible informally (cf. Italy), which of course triggers questions as to the applicable safeguards and the protection of relevant interests (confidentiality, purpose limitations, etc.). Finally, the relation between the legal basis in general administrative laws and specific statutes is not very clear either. As for the information exchange itself, the analysis clearly shows that there is no such distinction between information exchange before OLAF officially opens the case, during the OLAF investigation or after OLAF has reported to the national authorities. Even stronger, there is also no real distinction between the types of information. This can be general information, case-related information, etc.

### **10.3 TRANSFER OF INFORMATION TO THE EU COMMISSION (DG COMP)**

#### **10.3.1 The EU legal framework**

The Commission (namely, its DG COMP) enforces EU competition rules together with the national competition authorities (NCAs) of the Member States. 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<sup>27</sup> (Regulation 1/2003) set up a decentralized enforcement system by conferring on the EU Commission and the NCAs the power to enforce EU competition rules in parallel. When conducting its own investigations, the Commission is vested with autonomous investigative powers – which can be enforced through fines – and sanctioning powers. Compared with OLAF, indeed the most evident peculiarity of this system is that DG COMP not only may use the received information to conduct investigations, but also to impose sanctions on undertakings.<sup>28</sup>

27 [2003] OJ L1/1.

28 See N. Kahn, *Kerse & Kahn on EU antitrust procedure* (London, Sweet & Maxwell, 2012), p. 263 ss.; M. Blachucki, S. Józwiak, ‘Exchange of Information and Evidence between Competition Authorities and

Regulation 1/2003 provides that Member States should designate the NCAs and empower them to apply Articles 101 and 102 TFEU. Both the EU Commission and the Member States have enforcement powers and they can exercise them under the same circumstances. The investigating authorities are part of the European Competition Network (ECN), a ‘network of public authorities’. Within such a network, NCAs and the European Commission exchange information through a secure digital service.<sup>29</sup>

The ECN as such, however, does not have investigative powers. The powers are exerted by either the 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. In this case, EU officials and other accompanying persons authorised by the Commission may assist the officials of the authority 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); (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 (a) in order to facilitate coordination with investigations on the national level; and (b) in order to enable NCAs to provide for effective assistance.

As a general rule, Article 28 of Regulation 1/2003 provides that the Commission and the NCAs, ‘their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy’. However, the same Regulation does provide for exceptions to such a duty of secrecy.

EU law indeed clearly states that for the purpose of applying Articles 101 and 102 TFEU, DG COMP and NCAs ‘have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information’.<sup>30</sup> Furthermore, Regulation 1/2003 is clear in stating that, notwithstanding any national provisions to the contrary, the flow of information between national competition authorities and DG COMP and its use in evidence is allowed, even if such information is confidential.<sup>31</sup>

EU law formulates the obligations to transfer information in a fairly broad way. First, it does not limit the exchange of information to a specific type of information, which can thereby range from documents and statements to digital information.<sup>32</sup> Second, it does not distinguish between a spontaneous exchange of information and a transfer of information following a request from

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Entrepreneurs’ Rights’, in *Yearbook of Antitrust and Regulatory Studies* (2012), 5(6), p. 137; M. Squitieri, ‘The use of information in EU competition proceedings and the protection of individual rights’, in *Georgetown Journal of International Law*, 2011, vol. 42, p. 449.

29 See Commission Notice on cooperation within the Network of Competition Authorities (2004/7C 101/03) [2004] OJ C 101/43.

30 Art. 12(1) Regulation 1/2003.

31 Recital 16 Regulation 1/2003.

32 ECN Notice.

the Commission. Third, there is no a real distinction according to the enforcement phases, in the sense that the official opening of an investigations by the Commission does not have an explicit effect on the obligations upon national authorities.

EU law identifies some limits to the exchange of information, namely in the form of purpose limitation. Information can only be used for the application of Articles 101 and 102 TFEU (or – if it is the NCA that is to receive information – for the application of national competition law, as long as the latter relates to the same case and does not lead to a different outcome).<sup>33</sup> Article 12(2) of Regulation 1/2003 therefore establishes an explicit limitation, but only insofar as the use of information in evidence is concerned, thus it does not affect the transmission *per se*: exchanged information can be used in evidence only in respect of the subject matter for which it was collected by the transmitting NCA.<sup>34</sup>

Furthermore, according to EU law, professional secrecy does not impose any limits on the exchange of information within the ECN. Rather, it forbids members of the ECN from disclosing information outside the ECN, such as to undertakings or other interested parties that might request access to the case file.

A form of limitation on the exchange and use of information between enforcement authorities is provided by EU law with regard to leniency applications. There is, indeed, a ‘potential conflict between the exchange of information between Network members for its use as evidence and the expectations engendered by leniency regimes’,<sup>35</sup> which are not fully harmonised in the EU.<sup>36</sup> According to the Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03),<sup>37</sup> information will only be transmitted pursuant to Article 12 Regulation 1/2003 if the leniency applicant consents to its transmission.<sup>38</sup> Consent is not necessary if the applicant has applied for leniency also with the receiving authority, or if the receiving authority provides a written commitment not to use the information transmitted or any information it may obtain after the date of the transmission to impose sanctions on the applicant, its subsidiaries or its employees.<sup>39</sup>

Outside the inner circle (i.e., the ECN), the EU legal framework is less straightforward. As regards the question of a possible transfer of information by other administrative authorities to DG COMP, the interviews conducted in the course of this project confirmed that such a scenario is fairly unrealistic, since all the exchange of information takes place through NCAs. The EU legal framework is indeed silent on this point.

On the other hand, EU law provides for some obligations for national judicial authorities to transfer information to DG COMP (and vice versa). The judicial authorities envisaged by Regulation 1/2003 are not criminal law courts or prosecutors, but – as explained by the Commission notice on co-operation between the Commission and the courts of the EU Member States<sup>40</sup> – are ‘those courts and tribunals within an EU Member State that can apply Articles 101 and 102

33 Recital 16, Regulation 1/2003; Article 12 Regulation 1/2003.

34 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. Volume 1* (Oxford, Hart, 2013), 838, p. 852.

35 N. Kahn, *Kerse & Kahn on EU antitrust procedure* (London, Sweet & Maxwell, 2012), p. 284.

36 Commission Notice 2004/C 101/03, para. 38.

37 [2004] OJ C 101/43.

38 Commission Notice 2004/C 101/03, para. 40.

39 Commission Notice 2004/C 101/03, para. 41.

40 Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/4 (Cooperation Notice).

TFEU'.<sup>41</sup> Article 15 of Regulation 1/2003, together with secondary sources, govern cooperation between DG COMP and the national courts. There are two main obligations. First, Member States must transmit to DG COMP a copy of any written judgment of a national court deciding on the application of Articles 101 and 102 TFEU. Second, the Commission may submit written observations to the national courts. In that case, Regulation 1/2013 provides that the Commission may request a national court to transmit or ensure the transmission of any documents necessary for the assessment of a case.

From this brief overview, it emerges how the EU legal framework on the vertical exchange of information, and in particular on the transfer of information from national authorities to the competent European enforcement authority, is quite far reaching and does not leave much room for national laws. A Recital of Regulation 1/2003 even states that the obligation to transfer information to DG COMP should prevail over any national provision that may represent a limit on such a transfer. It remains to be seen, therefore, whether this clear hierarchy is also reflected in the national framework. The following analysis of the relative parts of the national reports aims to highlight to what extent EU law provides for a sufficient self-standing legal basis for the exchange of information, and to what extent national laws comply with the rationale of the EU legal framework.

### 10.3.2 Transfer of information by the national counterparts (NCAs) to the EU Commission

From the analysis of the national reports, it is worth pointing out three aspects that will be relevant for the final conclusions. They concern: (i) the presence of a national legal basis identifying the NCA and its tasks; (ii) the type of obligation deriving from such a legal basis, with regard to the duty of secrecy as well as the powers, modalities, and conditions for the transfer of information; (iii) the consequence of the official opening of an EU investigation upon such an obligation.

First, every analysed Member State provides for a national legal basis designating the NCA and authorising it to transfer information to the Commission. In Germany, the law 'implementing' Article 12(1) Regulation (EC) No. 1/2003 designates and authorises the national authority – the Federal Cartel Office (*Bundeskartellamt*, BKartA) – to transfer any kind of information to the Commission, without any previous consultation with the undertaking concerned. In Luxembourg, the relevant national law identifies the competent national authority – the 'Conseil de la concurrence' – and authorises it to transfer information to the Commission and other national competition authorities. Only if information needs to be transferred to foreign NCAs (i.e., not to the Commission) does national law provide for two conditions: that the requesting authority should be authorised to gather that type of information and should be authorised, in similar circumstances, to transfer it to the Luxembourg authority (reciprocity); and that the confidentiality rules applicable to the requesting authority are equivalent to those applicable in Luxembourg. In Hungary, the legal basis designates the authority (*Gazdasági Versenyhivatal*, HCA) and confirms the obligation deriving from EU law; furthermore, it adds further obligations of cooperation than those provided by EU law, namely to forward its position to the Commission before the preliminary hearing in national proceedings. It is worth highlighting that, according to the results of the interviews, in the Netherlands the national legal basis identifying the NCA – the Authority for Consumers and Markets (*Autoriteit Consument en Markt*, ACM) – is considered just as a

41 Para. 1, Cooperation Notice.

secondary and supplementary basis, which applies only insofar as it does not conflict with EU law or where EU law does not provide for more detailed rules on the transfer of information. The directly applicable EU law (namely, Article 12 of Regulation 1/2003) is considered to be, as such, a sufficient legal basis to authorise the exchange of information.

The second and third aspects represent less nuances at the national level. National laws, indeed, do not distinguish between a spontaneous transfer of information and a transfer of information upon request. This seems to be due to the fact that the legal basis is formulated as an authorisation/empowerment for the transfer of information, rather than a real obligation. Nevertheless, some national reports – namely, the German<sup>42</sup> and the Dutch<sup>43</sup> reports – have stressed that it is perceived by practitioners as an implicit but real obligation to transfer information, deriving from the principle of loyal cooperation.

Furthermore, national laws in every Member State do not attach any consequence to the fact that the Commission has officially opened an investigation or not. This is not really surprising, since even the EU legal framework does not distinguish the investigative powers of the Commission on the basis of the enforcement phase.<sup>44</sup>

#### *Limitations on the transfer of information to EU authorities deriving from national law*

As mentioned above, EU law provides for a limit to the transfer of information – or rather to its use – deriving from the purpose-limitation principle. Furthermore, it is far reaching in stating that other limits – namely professional secrecy – should not constitute an obstacle to the free flow of information within the inner circle occupied by DG COMP and NCAs. We asked the national rapporteurs to clarify whether this approach is consistent with national legal frameworks, and to point out the situations in which national law protects certain interests in a way that may hinder the transfer of information to the EU Commission. The answers are quite straightforward in confirming the absence of further national limits not envisaged by EU law.

The *purpose limitation* is one of the most important safeguards when it comes to the exchange of information. The fact that the Commission is obliged to use the received information only for the purposes of applying EU competition law, and in respect of the subject matter for which it has been collected, confirms its relevance also within the ECN. The German report pointed out that, in principle, the national competition authority may refuse to transmit information if that information is requested for a purpose other than the enforcement of EU competition law (e.g., for the preparation of a legislative proposal), or if that information has been collected for another purpose. This, however, does not seem to be a very likely scenario and no cases of a refusal have been reported. A clear difference can then be observed if information needs to be transferred outside the ECN (i.e., not to DG COMP but to other authorities): in that case, BKartA requires a guarantee that the receiving authority will comply with the principle of purpose limitation. The Luxembourg report stressed that, in practice, the purpose limitation might only apply as a limit to the use of the received information, and not as a limit to a transfer to the Commission.

In accordance with the rationale and objectives of EU law, in no Member State does the *secrecy of investigations* represent a limit to the exchange of information within the ECN.

In every Member State all civil servants are, in principle, bound by the *duty of professional secrecy*, unless there is a legal basis authorising them to transfer the information to another

42 M. Böse, A. Schneider, Chapter 4.

43 K. Bovend'Eerd, Chapter 8.

44 See M. Luchtman, J. Vervaele (eds.) 2017.

authority, as is the case – as seen above – in competition law. The Italian report, for example, stresses that without the specific legal basis for the exchange of information within the ECN, the data regarding undertakings under investigation cannot even be transferred to other government departments. Only the German report mentions that a limit on the transfer of information to the Commission could arise when evidence has been gathered illegally (i.e., if national competition law has violated the law), since national law applies only to the exchange of information collected in accordance with the law. This may also have an impact on information received from the national competition authorities of other Member States: BKartA is prevented from transferring that piece of information to the Commission if the corresponding national rules on the protection of professional secrecy would prohibit the collection of that information (e.g., the seizure of documents protected by legal professional privilege).<sup>45</sup>

Furthermore, the design of the applicable EU law reduces the possible relevance of *business secrecy*, which could determine, in principle, the confidentiality of certain information. All reports seem to indicate that, even if the information is confidential within national competition proceedings (i.e., it cannot be accessed by third parties), this does not prevent NCAs from transferring it to DG COMP, since EU law provides for a duty for the Commission to keep the received information confidential. Only if confidential information is requested by authorities outside ECN – as clarified in the German report<sup>46</sup> – is the transfer subject to the condition that the receiving authority will only transmit the information to other authorities if the NCA agrees to such a transfer.<sup>47</sup> Furthermore, in Germany a condition may be imposed on the use of transferred information (even non-confidential) when it is transferred outside the ECN; however, the report clearly stresses that a transfer to DG COMP for the purposes of applying EU competition law cannot be subject to conditions.

Only the German report provides an overview of the rules concerning the transfer of information contained in leniency applications, demonstrating how national rules simply confirm the applicable EU law, which – as explained above – subjects the transfer to the consent of the applying undertaking, as a form of protection for the undertaking itself rather than for other national interests.

Finally, only the Luxembourg report points to, as a possible limitation, a law providing for a possibility to refuse the transfer if there is a risk that the execution of a request for information will affect the sovereignty, security, or the fundamental economic interest of the public order of Luxembourg. However, that law does not explicitly refer to the Commission in competition cases, and there are no available cases concerning its application.<sup>48</sup>

### 10.3.3 Transfer of information by other administrative authorities

The absence of any reference, in EU law, to a possible transfer of information by other administrative authorities, different from the NCAs, is reflected in the analysed national legal frameworks. No Member State provides for a legal basis in this regard. Interviews in Germany confirmed that all exchanges of information take place only through the designated counterpart

45 M. Böse, A. Schneider, Chapter 4.

46 M. Böse, A. Schneider, Chapter 4.

47 On the other hand, when BKartA receives information from merger control proceedings, the consent of the undertaking is necessary in order to transfer information outside the ECN, since the undertaking has the right to decide whether or not to apply for a decision of the Commission in merger control proceedings.

48 V. Covolo, Chapter 7.



(BKartA).<sup>49</sup> Cooperation between the Commission and the administrative authorities has only been reported in the field of state aid in Hungary.<sup>50</sup>

#### 10.3.4 Transfer of information by judicial authorities

As regards the transfer of information by the (administrative and civil) judicial authorities applying EU competition law, one can observe two approaches. On the one hand, some Member States, like Luxembourg and Italy, do not provide for any national legal basis in this regard, therefore relying exclusively on the directly applicable Article 15 Regulation 1/2003. On the other hand, in Germany one can find a legal basis mirroring the EU provisions, providing for the obligation to forward a duplicate of any decision to the Commission without undue delay. The designated judicial authority may also request civil courts to provide copies of all briefs, records, orders and decisions in civil proceedings on the application of EU competition law. Nevertheless, this is not an obligation; it merely provides authorisation to transfer information, unless the Commission intends to submit written observations in court proceedings: in that case national courts must provide, upon request, all documents necessary for the assessment of the case.<sup>51</sup> Similarly, in the Netherlands there is a legal basis restating the obligations deriving from EU law. In particular, Article 8:79 GALA states that a copy of judgments deciding on the application of Arts 101 and 102 TFEU must be sent, without delay, to the EU Commission, and that if the Commission wishes to submit written observations before the national courts, there is an obligation for judges to transmit to the Commission any document that is necessary for the assessment of the case.

Finally, it is worth mentioning that the German report clarifies that in Germany there are no rules on the transfer of information from public prosecutors to DG COMP. This is due to the fact that in the rare cases where there is a criminal investigation and prosecution against individual offenders for cartel offences, public prosecutors act in close cooperation with the national competition authority, and the transfer of information takes place through the national competition authority.

##### *Limitations on the transfer of information to EU authorities deriving from national law*

The absence of a national legal basis in most Member States makes it impossible to assess whether new limits to the transfer of information are created by national law. Nonetheless, it is worth mentioning that, as pointed out by the Luxembourg report, in principle the secrecy of investigations could be an obstacle if the Commission decided to request information from judicial authorities acting within criminal proceedings. However, in every analysed jurisdiction the rare interactions between competition and criminal law prevented the rapporteurs from finding any relevant case studies.

#### 10.3.5 Interim conclusions

The analysis of the EU and national legal framework on the transfer of information from national authorities to DG COMP highlights some clear differences with the OLAF setting. Besides

49 M. Böse, A. Schneider, Chapter 4.

50 A. Csúri, Chapter 5. The Dutch report mentions that the Ministry of Economic Affairs may transfer information to DG Competition. Nevertheless, it has not been possible to clarify what kind of information or for what purposes. See K. Bovend'Eerd, Chapter 8.

51 This is in line with Art. 15(3) of Regulation No. 1/2003.

the different tasks and powers granted to the two EU authorities – namely, the possibility for DG COMP to impose sanctions in the case of a refusal to cooperate, as well as for substantive violations – the first aspect that can be observed is the role of NCAs. EU law indeed obliges Member to designate a national authority in charge of the transfer of information to DG COMP. The same authority may conduct investigations concerning infringements of EU competition law and have direct access to information held by private actors. Furthermore, NCAs are the only competent (administrative) actors for the exchange of information with the Commission, which therefore takes place only within the inner circle composed of national counterparts.

EU law completely governs the exchange of information within this circle (the ECN), as well as the exchange of information between DG COMP and national (administrative and civil) courts applying EU competition law, without referring to national law. It clarifies: *(i)* that the power to transfer information to the Commission trumps the general duty of secrecy concerning confidential information; *(ii)* the limits on the use of exchanged information deriving from the purpose-limitation principle; and finally *(iii)* that national law cannot create further limits to such a transfer.

Such a hierarchy has been confirmed by this research, whose results show that national legislators and practices do not hamper NCAs from transferring any kind of information to the Commission. On the other hand, the research has not clarified whether the EU provisions contained in Regulation 1/2003 are a sufficient self-standing legal basis for the exchange of information. Although the answer seems to be in the positive, several Member States rely on the national legal basis mirroring the EU legal framework. In any case, several rapporteurs have pointed out that the interviewed national authorities perceive the exchange of information as an obligation directly deriving from the principle of loyal cooperation, despite the fact that EU law formulates the legal basis more as a power than a real obligation.

Finally, for the purposes of the comparative analysis, it is worth mentioning that neither EU law, nor the related national legal frameworks, distinguish between the duties on the basis of the moment at which the information is requested (before or after the official opening of an EU investigation), nor the different modalities of the transfer (spontaneous or on request).

## **10.4 TRANSFER OF INFORMATION TO THE EUROPEAN CENTRAL BANK/ECB**

### **10.4.1 The EU legal framework**

The ECB is exclusively responsible for the prudential supervision of the euro area banks. In principle, the ECB supervises the significant banks, while NCAs carry out the day-to-day supervision of less significant ones. A key element of the highly integrated system of the Single Supervisory Mechanism (SSM) is the constant flow of information between the ECB and the national central banks. In order for that system to function properly, EU law dictates, of course, the organization, tasks and powers of the ECB. But the EU has also greatly influenced the organization of the NCAs, particularly through the Capital Requirements Directive (CRD IV) and its predecessors. In our previous report, we analyzed the ECB's investigative powers and observed that even though the ECB has been given exclusive competences,<sup>52</sup> it is highly dependent on cooperation with national partners.<sup>53</sup> As said, this comparative overview does

52 See also the relevant parts on the ECB framework in this report.

53 M. Luchtman, J. Vervaele (eds.) 2017, chapters 2 and 10.2.

not focus on the cooperation and exchange of information in the process of the gathering of information; it focuses on the transfer of information that is already in the possession of NCAs and, potentially, other national authorities. It is therefore relevant that the ECB's investigative powers, as discussed in our 2017 report, focus on the investigative powers *vis-à-vis* supervised entities; the ECB cannot issue production orders to, for instance, national authorities which may be in possession of relevant information.

The SSM mechanism does foresee provisions on the mutual exchange of information with national authorities. Union law has introduced a closed system of information exchange in that respect that essentially consists of two pillars. On the one hand, the ECB has been given the duty to treat all information obtained for the fulfilment of its tasks confidentially.<sup>54</sup> Moreover, it may use the information it has received only for a limited number of purposes (*cf.* Article 54 CRD IV). On the other hand, information must flow freely within the SSM mechanism, as is stressed in EU law. Articles 6 (2, 3, 7 and 8) and 27 of Reg. 1024/2013, as implemented by Articles 19-24 of the SSM framework Regulation, stipulate, *inter alia*, that all SSM partners cooperate in good faith,<sup>55</sup> and provide the ECB with the information that it needs for the fulfilment of its tasks. From the system of the SSM Regulation it can be deduced that once information is in the hands of the ECB, any information protected by duties of (professional) secrecy (for lawyers, banks, *et cetera*) is no longer protected as such.<sup>56</sup>

Outside the SSM framework, EU law encourages the ECB to seek cooperation with other partners, including the national authorities (*cf.* Article 3 SSM Regulation), and to enter into memoranda of understanding for that purpose; the SSM Regulation does not therefore entail a directly applicable obligation to share information with those authorities. Now that the ECB can be regarded as a competent authority under those directives,<sup>57</sup> CRD IV offers possibilities to exchange information with other (public law) authorities, mostly with tasks in or related to the financial sector (Arts. 53-62 CRD IV). The amount of detail in the relevant provisions of the CRD IV Directive is quite striking. References to national law are brought down to a minimum or are subjected to relatively strict conditions. Although this is a controversial matter, it could consequently be defended, first, that those provisions may be applied directly where a conflict with a national duty of secrecy is eminent and a national legal basis for the transfer of data is lacking or insufficient. Secondly, we submit that member states that nonetheless introduce wider provisions on information exchange – in particular, a wider circle of potential receiving partners – in national law violate Article 53 CRD IV that introduces a closed system of data exchange. Questions of direct effect may after all emerge, as the professional duty of secrecy arguably provides rights for individuals, where the outer boundaries of these provisions are disregarded (certainly when personal data are at stake). This regime thus also provides clarity on the use

54 Art. 27 Regulation 1024/2013, which refers to, *inter alia*, Art. 53 *et seq.* CRD IV.

55 See also Decision ECB/2014/29 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No. 680/2014, OJ [2014] L 214/34.

56 Duties of professional secrecy do not after all prevent the exercise of the ECB's powers (*cf.* Art. 10 (2) SSM Regulation); the ECB's confidentiality provisions, on the other hand, do not make mention of any further limitations. The latter provisions are therefore considered as an appropriate legal basis for the provision of information that was originally covered by, for instance, professional secrecy.

57 Now that the ECB has taken over the role of NCAs in the SSM system, that position is certainly defensible; *cf.* also Arts. 4 (3), 6 (8) and 27 (2) SSM Regulation.

of (banking) information in relation to taxation (banking secrecy); fiscal authorities are not mentioned as such in the articles.<sup>58</sup>

The relevant provisions thus create a closed system of information exchange, in which partners are enumerated exclusively and are bound by purpose limitations.<sup>59</sup> Having said that, the relationships with authorities in the area of criminal justice are unclear. That relationship is defined in very vague terms in Article 53 (1) CRD IV; confidential information may only be disclosed in a summary or aggregate form, so that individual credit institutions cannot be identified, but ‘without prejudice to cases covered by criminal law.’ This provision seems to provide some leeway for supervisors to provide information to judicial bodies, on request or spontaneously. It also offers a margin for the provision of information where this does not serve the tasks of the central bank itself, but only those of the police or prosecutors. Meanwhile, the ECB has issued Decision 2016/1162 on the disclosure of confidential information in the context of criminal proceedings.<sup>60</sup> The relationship between that decision and Article 53 CRD IV is unclear.<sup>61</sup> The Decision mainly deals with the provision of information in the SSM framework to judicial authorities and is therefore particularly relevant because the forwarded information may contain information received by national partners. Nonetheless, the main focus of this study is on the reverse scenario, i.e. the transfer of information by judicial authorities. The relevant EU rules do not deal with that situation, leaving it to national law. The implication of that, at any rate, is that there is no EU obligation to provide information to the ECB.

#### 10.4.2 The transfer of information by NCAs to the ECB

How are these EU provisions implemented in national law? As indicated before, our comparison concerns: (i) the presence of a national legal basis identifying the NCA and its tasks; (ii) the type of obligation deriving from such a legal basis with regard to the duty of secrecy and powers, modalities, and conditions for the transfer of information; (iii) the consequence of the official opening of a EU investigation for such an obligation. It goes without saying that, as the UK and Hungary are not part of the SSM mechanism, those legal orders are less relevant for this part of the study.

The picture that emerges from the country reports corresponds with our main findings in the 2017 report on investigative powers. The SSM system has increased the level playing field in banking supervision. National legal bases for the designation of the NCA, its cooperation with the ECB (for the SSM states) and duties of professional secrecy and purpose limitation are found in every legal order that participates in the SSM framework. We have focused on the degree to which those provisions allow for a transfer of information to the ECB.

For Germany, the BaFin is the national competent authority within the SSM, together with the Bundesbank. Although certain statutes regulate cooperation with the ECB, specific provisions on the exchange of information were not deemed necessary. The general duty of confidentiality

<sup>58</sup> M. Luchtman 2008, p. 21-22.

<sup>59</sup> See also recital 29 of the Preamble to CRD IV: ‘It is appropriate to allow the exchange of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should be strictly limited.’

<sup>60</sup> OJ EU [2016] L 192/73; it is discussed briefly in the EU report.

<sup>61</sup> From the preamble to the decision, Recital 8, it does follow that the decision is meant to ensure that national procedural (criminal) law is applied in conformity with EU law, including the duty to cooperate loyally.

does not apply to the transfer of information to the ECB. The exchange of information covers any type of information, while German law does not further limit the transfer of information that was originally classified as, for instance, privileged information or information relating to business secrets.

The Dutch Central Bank (*De Nederlandsche Bank/DNB*) is the Dutch national competent authority. The Dutch FSA states that the DNB cooperates with the ECB in its capacity as the supervising authority (Article 1:69 FSA). Although national law imposes a strict duty of confidentiality on the DNB, the latter may provide the ECB with all the data and information required for its tasks. It is striking, however, that Dutch law only regulates this under certain conditions. As indicated in the national report,<sup>62</sup> the DNB must, for instance, take into account whether the provision of data or information is compatible with Dutch law or public order. Those provisions do not seem to be in line with the unconditional duties put forward in the SSM regulations. Moreover, in those cases where the ECB aims to use the received information for other purposes, it needs to ask permission from the DNB.<sup>63</sup> This is a rare example of an exception to the main rule that within the SSM system information is to flow freely. These additional requirements under Dutch law seem to be at odds with the SSM system establishing an unconditional obligation to transfer information.

For Luxembourg, the *Commission de surveillance du secteur financier/CSSF* qualifies as the national competent authority within the legal framework of the SSM. Pursuant to Luxembourg law, professional secrecy applies to all members and officers of the CSSF ‘without prejudice to the provisions of the laws and regulations governing supervision’. Thus, the duty of secrecy does not constitute an obstacle to the exchange of information with the ECB within the SSM; Luxembourg laws explicitly allow for the CSSF to exchange information with the ECB. Additional requirements for the provision of information apply where specific laws – including, so we submit, directly applicable EU laws – do not expressly authorize the CSSF to disclose certain facts to other competent authorities. Those requirements relate mainly to provisions protecting the principle of purpose limitation and the guaranteeing of equivalent levels of protection.

For Italy, the ECB Italian counterpart is the Bank of Italy, which is in charge of supervising the banking and financial system (together with the *Commissione nazionale per la borsa e il mercato/CONSOB*). It is bound by an obligation of professional secrecy concerning all the information it receives by virtue of its supervisory tasks. However, the Italian report indicates that ‘once it is entered into the SSM through the NCAs – the point of entry for all supervisory information from credit institutions – the information is available to all the SSM components consistently with the allocation of responsibilities therein, professional secrecy being applicable only outside the System.’<sup>64</sup> Italian law also provides for the duty for *Banca d’Italia* to transfer all the information and data in its possession that are relevant within the SSM framework.

Outside the SSM system, with respect to the United Kingdom the Prudential Regulatory Authority is the relevant authority, although the Bank of England and the Financial Conduct Agency also have roles to play.<sup>65</sup> The Financial Services and Markets Act 2000 generally prevents UK authorities from disclosing confidential information that they receive. However, cooperation with other authorities – in the UK or elsewhere – with similar tasks is considered to

62 See K. Bovend’Eerd, Chapter 8.

63 Cf. Art. 1:90 (8) FSA in combination with Art. 1:90 (1-3) FSA.

64 See S. Allegrezza, Chapter 6.

65 M. Luchtman, J. Vervaele (eds.), p. 155.

be a part of their task. The FSMA consequently provides for the legal framework to exchange the relevant information. On that basis the so-called Gateway Regulations set out in greater detail the circumstances in which disclosure may be made. Generally, the authorities are allowed to provide information to public bodies in order for them to discharge their own functions (except where EU law imposes further restrictions)<sup>66</sup> or in pursuance of a Community obligation.<sup>67</sup> Moreover, as regards information covered by EU (financial market) directives, information may also be provided for the discharge of the tasks of the receiving bodies, but, simultaneously, additional restrictions may apply. The position of the ECB is unclear in the latter respect; in the (outdated) publicly available version of the Gateways, the ECB is only mentioned in its monetary capacity.

For Hungary, the national counterpart of the ECB is the Hungarian National Bank (*Magyar Nemzeti Bank/HNB*), which is also entrusted with the tasks under CRR IV. The HNB Act regulates the relationship between the HNB and certain European Union institutions, also addressing the transfer of information. The relationship between the HNB's professional secrecy and the EU framework for the sharing of information with the ECB is however not entirely clear. In principle, the persons exercising public supervisory powers are bound by a confidentiality obligation with regard to this confidential information. Article 150 HNB Act holds that the employees of the HNB and the members of the supervisory board shall not be required to disclose any personal data, classified data, banking secrets, securities secrets, payment secrets, fund secrets, insurance secrets, occupational retirement secrets and business secrets which have come to their knowledge in performing their duties and to comply with the legal regulations governing the management of such data.<sup>68</sup> How do these provisions relate to the sharing of information with the ECB? In the above (section 10.4.1.), we already noticed that the relevant EU provisions for cooperation with respect to non-participating Member States do not easily lend themselves to direct application. Yet, on the other hand, the legal basis for a transfer to the ECB is not dealt with in great detail either, according to the Hungarian national report. The ECB is not mentioned in the relevant national provisions on the sharing of information with EU institutions, whereas the relevant provisions on international cooperation and the exchange of information refer to national ('foreign') authorities.<sup>69</sup> However, according to the Hungarian report, that does not necessarily mean that a transfer of information to the ECB is generally prohibited; the relevant provisions also hold that disclosure by the HNB is possible with 'proper authorisation' (Article 150 (2) HNB Act).

Finally, in none of the national legal orders of this project is the fact that the ECB has opened an investigation considered to be a relevant factor for the lawful transfer of information to the latter.

### 10.4.3 The transfer of information by other administrative authorities

The provision of data to the ECB by other administrative authorities is particularly relevant for those authorities with tasks that are related to those of the ECB or that cover the same supervised

66 It is not clear how this provision is applied as most of the relevant provisions are contained in directives – for instance CRD IV – which need to be transposed into national law. Arguably, some of those provisions can be applied directly; see *supra*.

67 See Arts. 3(3) and 6 Gateway Regulations 2001.

68 Purpose limitations are found in Arts. 57 and 163 HNB Act. These also include the relationship with criminal proceedings.

69 See Art. 44 HNB Act. Arguably, the ECB could be regarded as such, *supra* note 57.

entities. German law does not however provide for an obligation for other administrative authorities or judicial authorities to transfer information to the ECB. As regards the Netherlands, the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten/AFM*) does allow for the transfer of information to the ECB on certain occasions. It is also bound by the aforementioned provisions of the FSA, some of which contain additional provisions for the transfer of information and its use. Outside the SSM system, however, those conditions are less controversial and do not appear to contradict EU law. For Luxembourg, there are no legal provisions that govern the transfer of information between the national and European central banks within the framework of the SSM, nor has the Luxembourg Central Bank entered into memoranda of understanding with the ECB. By contrast, however, the Luxembourg Central Bank can communicate information to the CSSF, which in turn may transfer that information to the ECB. In Italy, particularly Consob may transfer information to the ECB. Finally, no special provisions apply in the UK, whereas in Hungary no other national authority may share information with the ECB, mainly because the MNB is responsible for overseeing the entire financial sector in Hungary and therefore there are no shared competences or different national authorities assigned to a particular subject.

#### **10.4.4 The transfer of information by judicial authorities**

The same picture as in the previous section emerges with respect to the transfer of data by national criminal justice authorities. Although most national laws do provide for the possibility for a transfer of information by the NCA to judicial bodies, specific provisions that deal with the reverse situation – the provision of information to the ECB – are absent. That means that the ordinary rules of national criminal procedure apply. In those types of situations, therefore, national provisions protecting the secrecy of investigations, such as in Italy or Luxembourg, or establishing a duty of professional secrecy determine the situation. The German and Dutch reports for instance indicate that the transfer of information is at any rate not an obligation. Indeed, in the Netherlands the provision of information to the ECB is not explicitly mentioned in the relevant statutes, but it is not excluded either. The provision of data will have to be in the interest of the tasks of the Prosecution Service in those cases. Where such direct venues for transferring information do not exist, that transfer of information could be made indirectly, i.e. via the NCAs.

#### **10.4.5 Provisional conclusions**

The system for exchanging information in the area of banking supervision has a longer history than the SSM mechanism. Since the 1990s, EU directives have aimed to introduce a closed system of information exchange in which national competent authorities exchange information, knowing that the information provided by them is to be kept confidential and is not to be used for other purposes. This system functions in an area of the law where national laws have been aligned to realize integrated financial market supervision. The level of detail in the provisions covering secrecy and information exchange is significant and needs to be seen in light of the particular sensitivity of banking supervision; what is to be prevented at all times are market disturbances as a result of the unnecessary disclosure of sensitive data.

This system has not changed much with the introduction of the SSM mechanism and the transfer of supervisory tasks to the ECB, although the free flow of information within the SSM system was clearly the main regulatory goal, enforced through directly applicable rules in the SSM Regulation and the Framework Regulation. The substance of the system of professional secrecy and the exchange of information is to a large extent still determined by CRD IV. With respect to the outer markers of that system, however, the ECB will still need to apply national law; its own duty of secrecy in the SSM Regulation refers back to the national implementing provisions.

Once it is within the SSM system, all information is, as a rule, treated in the same way; that means that the fact that the information was originally obtained from, for instance, banks (banking secrecy) is no longer of relevance. The picture in the SSM system therefore resembles our conclusions with respect to competition law.<sup>70</sup> That, apparently, is also what the relevant European rules aim to achieve. Some jurisdictions, like the Netherlands, do however attach additional conditions to the transfer of information, also within the SSM system. Most of these conditions reiterate the main rules on which the system of information exchange is built (purpose restrictions and secrecy). Yet some of these conditions go further than that (the Netherlands). Particularly within the SSM system, we do not see any room for the inclusion of such conditions. With banking supervision now being an exclusive competence of the ECB, the SSM system does raise questions as to the position of the ECB *vis-à-vis* other national authorities. The applicable EU rules do provide for some possibilities to cooperate with administrative bodies with tasks that are related to banking supervision or that concern supervised entities. The relationship with criminal justice actors is largely untouched. None of the national reports indicate that the NCAs have the power to obtain information from judicial bodies. The matter is consequently exclusively regulated by national criminal procedure and is outside the ECB's powers of instruction. None of the reports indicate that the ECB as such has been recognized as a body that may receive information, yet the possibility does not appear to be excluded either in some jurisdictions (the Netherlands, for instance). Overall, this scenario does not appear to have occurred as yet under the SSM system in the jurisdictions that were studied. The ECB itself has recognized the potential of communications with actors in the area of criminal justice through its decision 2016/1162. *Vice versa*, national legal systems do not seem to be aware of the potential consequences of the SSM system for national criminal justice.

## 10.5 TRANSFER OF INFORMATION TO THE ESMA

### 10.5.1 The EU legal framework

The ESMA has been established with the purpose of establishing a sound, effective and consistent level of financial regulation and supervision, preventing regulatory arbitration and promoting equal competition conditions. As part of its mission, the ESMA plays an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union, *inter alia*, through promoting an effective bilateral and multilateral exchange of information between competent authorities, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation. The ESMA has issued, on the basis of Article 16

70 *Supra* section 10.3.



ESMA Regulation, Guidelines on cooperation arrangements and information exchange between competent authorities themselves and between competent authorities and the ESMA.<sup>71</sup> The MoU includes the ESMA in its capacity as a direct supervisor of financial market participants.

Although it has many other tasks, the ESMA is also entrusted with registration, authorization, supervision and enforcement with respect to credit rating agencies (CRAs) and trade repositories (TRs). Like the ECB, it has investigative powers *vis-à-vis* those entities. Its powers of investigation do not however extend to other bodies, including other authorities with tasks in related areas. Those relationships are defined by the rules on professional secrecy, cooperation (including the exchange of information) and data protection. As is the case with the ECB, the provision of information by judicial bodies to the ESMA is not foreseen by EU law. Such provision of information – if it exists at all – is more likely to take place indirectly, i.e. *via* the NCAs.

The relevant duties of secrecy and purpose limitation will of course not prevent the ESMA from sharing such confidential information with EU and national partners with tasks related to those of the ESMA. Cooperation is explicitly considered to be part of the partners' joint mandate, as laid down in directly applicable EU regulations.<sup>72</sup> The condition of purpose limitation is also defined broadly in this respect; Article 70 ESMA Regulation cannot hinder the operation of the (many) EU acts that are mentioned in Article 2 Reg. 1025/2010. Specifically with respect to CRAs and TRs, close cooperation with the national competent authorities and other EU and national financial supervisors is part and parcel of the ESMA's mission.<sup>73</sup> These parties *shall* therefore share information on the basis of Article 27 CRAR,<sup>74</sup> where this is necessary for the purpose of carrying out their duties under CRAR. Clearly, what we see here is that supervision is perceived as a joint task and the sharing of information as a common goal, i.e. not a goal that 'only' serves the tasks of the transmitting or receiving party.<sup>75</sup> The wording of these provisions also suggests that they do not need further implementation by national laws.

With regard to the information that the ESMA receives from its partners and, potentially, from other authorities, the agency is committed to a general duty of secrecy, defined in Article 70 ESMA Regulation 1095/2010. As regards the content and scope of the duty, it refers to Article 339 TFEU, Article 17 Staff Regulations and sectoral EU legislation, including Article 32 CRAR and Article 83 EMIR. The relationship between these many provisions is a complex one; they may overlap in substance, yet cover different persons with diverging personal statutes.<sup>76</sup> The wording of these provisions is not mutually attuned to one another. For instance, where the ESMA regulation generally excludes 'cases covered by criminal law' from professional secrecy, Article 23e (8) CRAR seems to have a much more limited scope.<sup>77</sup> Which of the two regulations then takes precedence?

71 See: [https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-298\\_guidelines\\_on\\_cooperation\\_arrangements\\_and\\_information\\_exchange\\_0.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-298_guidelines_on_cooperation_arrangements_and_information_exchange_0.pdf).

72 Cf. Art. 26 CRAR. Quite strikingly, a similar provision is lacking for TRs.

73 See also Art. 26 CRAR; Art. 84 EMIR.

74 Art. 84 EMIR.

75 The ESMA has further refined these rules in its [Guidelines and Recommendations](#) on cooperation including delegation between the ESMA, the competent authorities and the sectoral competent authorities under Regulation (EU) No. 513/2011 on credit rating agencies, para. 45 *et seq.*

76 See further Decision [ESMA/2011/MB/4](#) of the ESMA Management Board Adopting Rules of Procedure on Professional Secrecy for Non-Staff, and repealing Management Board Decision on Professional Secrecy of 11 January 2011. ESMA Staff fall under Art. 17 of the Staff regulations.

77 Art. 23e (8) CRAR contains a more specific provision, dealing only with the (*ex officio*) reporting of information by ESMA to criminal justice authorities. This suggests that where national judicial authorities require information from the ESMA on the basis of their procedural laws, the duty of secrecy contained in Art.32 CRAR prevails.

There are also differences between the scope of the secrecy provisions under CRAR and EMIR. Whereas CRAR rules seemingly aim to create a closed system as discussed before, Article 83 EMIR explicitly refers back to national law, as regards the way confidential information is handled.<sup>78</sup> Article 83 (5) EMIR holds that the EU rules on secrecy and speciality shall not prevent the competent authorities from exchanging or transmitting confidential information, *in accordance with national law* [our italics], that has not been received from a competent authority of another Member State., save for information that has been obtained from a competent authority of another Member State. Secrecy and speciality provisions are therefore only harmonized to the extent that they are necessary to guarantee the transnational flow of information. Quite astonishingly, from a literal interpretation of Article 83 (5) EMIR it follows that information transmitted by ESMA does not seem to be covered by these secrecy and speciality provisions.

Cooperation with judicial bodies ('cases covered by criminal law') is taken outside the scope of directly applicable EU rules regarding secrecy and purpose limitation. That information may however be obtained from other NCAs or relevant partners. On the one hand, the ESMA may want to inform judicial authorities *ex officio* of certain facts or offences. On the other hand, national procedural laws in the area of criminal justice may entail deviations from such a duty of secrecy; on the basis of such national provisions, judicial authorities may for instance require the ESMA to produce information on the basis of national procedural laws. Some guidance for those situations is found in Article 7 of the aforementioned MoU. That MoU holds that where information has not been exchanged pursuant to provisions of EU law, the ESMA shall use the information exchanged solely for, *inter alia*, purposes of securing compliance with or enforcement of the laws and regulations specified in the request, but also initiating, conducting or assisting in criminal, administrative, civil or disciplinary proceedings resulting from a violation of the laws and regulations specified in the request. Moreover, if the ESMA has received unsolicited information, it may use that information solely for the purposes stated in the transmission letter or for the purposes of criminal or administrative proceedings resulting from a breach of the laws and regulations or for discharging the obligation to report to judicial authorities.

### 10.5.2 The transfer of information by NCAs to the ESMA

The national mirror of the NCAs regimes with respect to CRAs and TRs is as follows. In Germany, the Federal Financial Supervisory Authority (BaFin) is the competent authority for the supervision of credit rating agencies and of OTC derivatives, central counterparties, trade repositories and credit rating agencies. Accordingly, the ESMA's national enforcement partner is the BaFin. German law both entrusts BaFin with the task of cooperating with the ESMA for the fulfilment of the latter's task, as well as providing for the legal basis to share information with the ESMA, where EU law is silent. The BaFin is obliged to transfer information, irrespective of whether or not the ESMA has officially opened an investigation. National provisions on professional secrecy cannot, of course, stand in the way of sharing information with the ESMA. Neither does German law limit the transfer of information that has been collected for other purposes, since EU law establishes a general obligation to transfer information to the ESMA. There are no special provisions aiming at the protection of banking secrecy or the professional

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78 Incidentally, Art. 83 EMIR is a common provision for the whole EMIR regulation, not only for the supervision of trade repositories.

secrecy of administrative bodies. Finally, there is no special protection for business secrets. If the requested information is available, it must be transmitted to the ESMA.

The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten/AFM*) is the national competent authority for CRAs and TRs. Like the DNB, the AFM operates under the FSA. That means that what was mentioned before in section 10.4.2. will apply, *mutatis mutandis*, to the AFM; specifically with respect to CRAs and TRs, Article 1:69 FSA obliges the AFM to cooperate with the ESMA and to share information, also for the fulfilment of the ESMA's tasks. As was mentioned before, Dutch law attaches conditions to such transfers that are not in line with – directly applicable – EU law. The Dutch report indicates, however, that in legal practice the transfer of information to the ESMA in relation to CRs and CRAs is non-existent.

As in the banking area (SSM), in Luxembourg the CSSF (*Commission de Surveillance du Secteur Financier*) is the competent national partner. The 1993 Law on the financial sector provides for its basic framework, in which the influence of EU law is clearly discernible. The CSSF has a duty of secrecy; confidential information received in the course of its duties may not be divulged to any person or authority whatsoever, except in summary or collective form, so that individual professionals in the financial sector cannot be identified, without prejudice to cases covered by criminal law. The restriction of purpose limitation uses similar wording; the CSSF may use confidential information received only in the performance of its duties and for the exercise of functions within the scope of the law, or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, the law does not prevent the CSSF from exchanging confidential information with relevant partners in the financial sector. The relevant provisions are worded in general terms, making no distinctions between the modalities of transmission (upon request, spontaneous, etc.) or with respect to the original source of the information (e.g. banking information). The CSSF may therefore also exchange information with the ESMA, if this is needed for carrying out the latter's mission (Article 44-2 (2) LFS). Compared to other national partners, there appears to be one slight difference: cooperation with the ESMA is not defined as a task for the CSSF – i.e. part of its mission –, unlike the cooperation of the ECB with national partners in, for instance, banking supervision (cf. Article 44-1 LFS).

For Italy, the ESMA's national counterpart is CONSOB. It is appointed by law as the NCA with respect to CRA (Article 4-bis CLF) and – together with other authorities – for the purposes of the EMIR regulation (Article 4-quater CLF). Italian law perceives cooperation with its European partner as an explicit part of CONSOB's mission; CONSOB is to exercise, *inter alia*, its powers in harmony with the provisions of the European Union and to apply the regulations and decisions of the European Union. Promoting the convergence of supervisory practices and instruments within Europe is part of its mandate (Article 2). The law determines that Consob is to collaborate with the authorities and committees comprising the ESFS, in order to facilitate their respective duties. Professional secrecy, which binds all the employees of Consob as well as consultants and experts engaged by Consob, is no obstacle in this respect. The Consolidated Financial Law consequently provides a set of obligations that require the CONSOB to transfer information to the ESMA for the fulfilment of its tasks. CONSOB transmits both 'spontaneously' and on request, but in both cases the applicable rules are the same.

As for the United Kingdom, the national report indicates that the situation with respect to ESMA is governed by the same rules as mentioned in the above with respect to the ECB (the SSM framework). The FSA is the competent authority.

In Hungary, the national enforcement partner of the ESMA is the Hungarian National Bank/MNB. No other national authority shares information with the ESMA, mainly because the MNB is responsible for overseeing the entire financial sector in Hungary and therefore there are no shared competencies or different national authorities assigned to a particular subject. With a view to its membership of the European System of Financial Supervision, the MNB performs the tasks imposed upon it with regard to the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority and the European Systemic Risk Board. It is also the competent national authority with respect to the supervision of credit rating agencies and trade repositories (Article 41 (5 and 8) HNB Act). The law explicitly states that close cooperation with the EU's supervisory authorities is one of the tasks of the MNB (cf. Article 140 (1) HNB Act). The duty of secrecy, already discussed supra in section 10.5.1, does not stand in the way of such an exchange; the HNB may release data to, *inter alia*, the ESMA – which, unlike the ECB, is explicitly mentioned in Hungarian law – to carry out its duties defined by legal acts of the European Union (Article 57 HNB Act). Whether or not the ESMA has opened investigations is of no relevance. Further transmission methods and the status of the source of the information are not further dealt with by Hungarian law.

### **10.5.3 Transfer of information from other administrative and judicial authorities to the ESMA**

With respect to other potential partners of the ESMA at the national level, the picture offered by the national reports seems to be fairly homogeneous. In Germany, due to the BAFin's coordinating function as the national counterpart of the ESMA, there are no other administrative authorities that communicate directly with the ESMA, nor is there any specific obligation for the judicial authorities to transfer information to the ESMA. The same holds true for the Netherlands, Luxembourg and Hungary. The Luxembourg report notes that if information held by national administrative bodies is to be transferred to the ESMA, it is likely that the CSSF will intervene as an intermediary in order to transfer this information. The same probably holds true for the other jurisdictions.

The situation in Italy is somewhat different. Here, we can find an example where national law offers CONSOB the possibility to request information from judicial bodies with respect to certain financial offences. For this aim, and without prejudice to the prohibition on information covered by investigative secrecy pursuant to Article 329 of the Code of Criminal Procedure, Consob may request information from the relevant judicial authority with regard to the investigations and criminal proceedings for certain economic offences. The Italian report notes that these provisions partially mitigate the general rule under Article 329 Code of Criminal Procedure, according to which information related to ongoing criminal investigations cannot be divulged until the end of those investigations in order to protect the secrecy of criminal investigations. When it comes to financial supervision, this provision might be trumped by the abovementioned rules allowing financial regulators to have access to criminal information. However, it seems that any transfer of information between criminal judicial authorities and the ESMA should be 'mediated' by Consob or the Bank of Italy.

## 10.6 COMPARATIVE ANALYSIS OF THE FOUR EU AUTHORITIES

### 10.6.1 Introduction

As was explained in the introduction, the research question triggering the project is whether there is a need to improve the framework of the exchange of information related to suspicions of frauds affecting the EU budget. In order to answer that question, we have endeavoured to:

- i. offer an analysis of the multi-level legal framework governing the exchange of information between enforcement authorities;
- ii. identify the legal obstacles to realising OLAF's mandate;
- iii. identify the models for improving the current legal framework of the exchange of information.

All of this was done on the basis of a comparative analysis of the legal frameworks of EU authorities with tasks in the sphere of investigating and, sometimes, sanctioning violations of EU law by individuals or legal persons. In our previous report, we explained the reasons for this comparison, despite the eminent differences in tasks and legal bases of the relevant authorities.<sup>79</sup> The most important difference is that particularly ECB and ESMA are supervisory authorities. They are in constant communication with the natural and legal persons they supervise, thus ensuring a constant flow of information. Their investigative and sanctioning powers do not, as a rule, extend beyond those supervised authorities. DG COMP and OLAF, on the other hand, operate in a much more open setting. Their tasks are to identify the persons which, thus far, have remained 'below the radar' and, possibly, to initiate punitive or non-punitive follow-up actions against these persons.

Having said that, these differences in tasks and the 'institutional environment', as well as the interactions with national partners, can certainly not ignore the fact that a great number of topics in the area of information exchange are equally relevant for OLAF, as they are for ECB, ESMA and DG COMP. They deal with the peculiarities of law enforcement in a transnational setting and the need for swift and effective enforcement cooperation. Despite the differences in tasks, ECB and ESMA are, after all, also entrusted with tasks in the sphere of law enforcement, defined here as 'the monitoring, investigating and sanctioning of violations of substantive norms'.<sup>80</sup> That means that they need to have the necessary investigatory tools; they need to deal, on occasion, with the national criminal justice authorities; and they also need to take into account the necessary legal safeguards and remedies.

Whereas the 2017 report focused on the investigative powers *vis-à-vis* legal and natural persons, this report focuses on the implications of these commonalities for the operational information exchange between the EU authorities and their national partners. Obviously, these two reports are interconnected. In the complex institutional setting of the four EU authorities, involving multiple legal orders and multiple areas of law, law enforcement is seriously hampered if information can only be used for the purposes for which it was originally gathered. The different legal statutes of the many authorities involved require not only a comparative analysis of the legal framework with respect to their own investigative powers, but also their ability to mutually share this information

79 M. Scholten, M. Luchtman (eds.), *Law Enforcement by EU Authorities: Political and judicial accountability in shared enforcement* (Cheltenham, Edward Elgar Publishing, 2017), p. 320-322.

80 M. Scholten, M. Luchtman 2017, p. 4-5.

in light of certain common goals. The transfer of information, as part of the legal framework for investigating crime, poses interesting challenges in light of effective law enforcement, but also in light of legal protection (e.g. the circumvention of safeguards and forum shopping). The alignment between the 2017 report and this one is therefore another reason for choosing ECB, ESMA and ECN for a legal comparison.

Indeed, many of the legal questions that ECB, ESMA and DG COMP face – or could face<sup>81</sup> – are comparable to those which play a role in the OLAF setting. The key challenge is how to reconcile considerations of professional secrecy with those of swift and loyal cooperation. The interests that are protected by professional secrecy are already diverse and range from protecting ongoing investigations to the personal data of individuals.

Like OLAF, the ECB's, DG COMP's and ESMA's mandates therefore stress the need for a solid legal framework. Who are the authorities that may share information with the EU authorities in the pre-investigative and investigative phases? What are their tasks and powers? What type of information can they transfer? Under what conditions are they allowed to provide their EU partners with information? Can information originally covered by some form of privilege also be provided? If yes, under what conditions? To what extent may the information be used for purposes other than those for which it was originally received? To what extent does the secrecy of (ongoing or closed) investigations prevent an authority from sharing information with a EU body?

As we noted in the introduction to this chapter, we need to take into account that the processing of information – including the transfer thereof – creates legal problems of their own, i.e. not related *per se* to the stage of the gathering of information, the transfer of information from one partner to another needs a legal framework in and of itself. In light of the above, the main peculiarities of the OLAF regime can be observed and assessed from a series of intertwined perspectives on the legal framework for the transfer information from the national to the EU level. In the following, we will focus on the means and ways in which EU law ensures or promotes that national authorities are indeed aware of the EU dimension of their tasks, including information exchange (section 1.1.2); on what elements define the content and scope of the duty to transfer information to the EU level (1.1.3); as well as on how the corresponding safeguards are given shape (1.1.4). The transfer of information to OLAF by other EU authorities (IBOAs) is dealt with in chapter 3.

### 10.6.2 Organizational set-up; defining common goals and missions

The first order of findings concerns the differences in how the institutional landscape of the four authorities determines their ways and methods of obtaining information from their national partners. For that, we have analysed both the legal framework at the EU level and the 'mirror' provisions at the national level. At the EU level, our focus has been on the issue of to which extent the EU rules truly create a level playing field between the authorities involved. Specifically with respect to the exchange of information, we have looked at the extent to which EU rules define a common/shared mission – for the EU and the national authorities – in their respective policy areas to cooperate and share operational information.<sup>82</sup> As was the case in the first report

81 We have noticed on several occasions, for instance, that ESMA hardly contacts its NCAs to provide information. The legal framework for that is nevertheless in place and does offer inspiration for OLAF, as we will see below.

82 For examples of such common missions, see sections 10.4.1 and 10.5.1.

on the gathering of information, this point is inextricably connected to how EU law influences the designs of the national partners.

A common mission at the EU and national level goes beyond the general duty of loyal cooperation, as put forward in the Treaties (cf. Art. 4 (3) TEU or, for OLAF, Art. 325 TFEU). The duty of loyal cooperation (imposed on the Union and its Member States) cannot, as such, provide for a legal basis to provide information, despite duties of secrecy and purpose limitation for the relevant authorities at either level. However, a common mission can, because duties of secrecy and purpose limitation generally do not stand in the way of the transfer of information that is in the interest of one's own task/mandate. The sharing (transferring) of information for the realization of a common purpose will create significantly less legal problems (the lack of a legal basis, *et cetera*) than the transfer of information to authorities which have related, but nonetheless distinguishable tasks.

In the field of competition law, EU law obliges Member States to designate a single national authority in charge of the transfer of information to DG COMP and, in line with this, creates a common mission for the EU and the national authorities to cooperate and share information in their networks. NCAs are even the only competent (administrative) actors for exchanging information with the Commission; all transmissions are channelled through them. In that way, EU law deliberately creates an inner-circle, in which information flows freely. At the national level, the relevant provisions are then 'mirrored' in the tasks of the NCAs, as is confirmed by all national reports. After all, it can only be national law that establishes the national authorities (within the parameters set by EU law) and endows them with the task of cooperating with their EU partners. An EU directive would be the appropriate instrument for defining such parameters, although we have also noticed that such common missions are laid down in the 'founding regulations' of the relevant EU authorities, as is the case for DG COMP.

Similarly, EU law conceives the national counterparts of ECB as the main authorities for operational cooperation. The parameters for the mandates of the national partners are set via CRD IV and explicitly include effective cooperation with ECB.<sup>83</sup> EU law exhaustively regulates the conditions for transferring information within the 'inner-circle', including the safeguards in terms of secrecy and confidentiality. But the SSM system goes further than in competition law; the applicable EU rules also provide for possibilities to cooperate with administrative bodies with tasks that are *related* to banking supervision or that concern supervised entities.

Looking at the ESMA scenario, one can also observe that EU law obliges Member States to assign national competent authorities and to define cooperation with ESMA as part of their mandate. Our national reports indicate that, as far as trade repositories and CRAs are concerned, the ESMA regime does not oblige any actors outside this 'inner-circle' to act as authorities that are able to transfer information to ESMA although, as such, this possibility is not excluded.

By contrast to the foregoing, there are very few EU parameters for the national authorities in the OLAF setting. We did not find, for instance, unconditional 'mission statements' and corresponding duties for the specific national authorities (i.e. not the Member States) to cooperate and share information with OLAF. The provision that comes closest to that is Art. 7 (3) Reg. 883/2013, which reads as follows: '[t]he competent authorities of the Member States shall, *in conformity with national rules*, give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively [emphasis added].'<sup>84</sup> It refers back to national law.

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83 As has been mentioned many times by others, this also means that ECB has to apply the relevant national implementing laws.

This means that the designation of the national partner authorities is still predominantly a national matter, and so are the definitions of their relationships with OLAF, as well as the content of their obligation to share information with the office. As a consequence, there is a lack of a coherent design of the ‘inner-circle’, i.e. the circle composed of national authorities having a specific institutional mission as a counterpart of the EU authority. It may not even be an exaggeration to say that such an inner-circle is absent, making the flow of information towards OLAF a particularly difficult and complicated matter.

At present, AFCOS do not fulfil this function. Art. 4(3) Reg. 883/2013 states that ‘Member States shall, for the purposes of this Regulation, 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.’ The national status of AFCOS, however, remains a real patchwork.<sup>84</sup> In the absence of EU rules, the national legal systems greatly differ as regards their mission, tasks, and powers. In some countries one of the existing Ministries or law enforcement agencies is designated as the AFCOS. Many AFCOS have no operational powers at all and are at best purely coordination units; in addition, they do not even cover all relevant substantial fields of EU fraud (structural funds are mostly excluded). As a result, even under their coordination functions, AFCOS are far from being the central units that are able to collect and transfer all relevant enforcement information to OLAF.

As regards the powers granted to AFCOS, they range from purely administrative powers to coercive powers under criminal law. The Netherlands and Germany regard OLAF as a purely administrative body and, in doing that, seem to disregard the often intrinsic connection between punitive and non-punitive investigations. At the other end of the spectrum, the UK and Italy have made criminal law powers available, at least in theory. Also considering the variety in the substantive fields in which OLAF acts and the necessary links with administrative-punitive and criminal justice authorities, this explains why EU law may need to regulate the broader circles, too. We will come back to this in section 10.7.

### 10.6.3 Content and scope of the transfer of information to the EU authorities

As is the case for OLAF, the other three EU authorities have no powers to issue production orders or to request statements from their national partners. Their investigatory powers are limited in their personal scope to the economic actors and natural or legal persons under their supervision. The transfer of information by national authorities is therefore governed by the relevant EU rules on the exchange of information, secrecy and purpose limitation and, on occasion, by national law (i.e. a mostly discretionary power to transfer information to EU authorities).

Where the EU provides for directly applicable rules for the competent authorities, rules on the exchange of information can and should set aside contradictory national provisions on, for instance, professional secrecy. Most of the provisions studied in this project are indeed laid down in regulations that lend themselves for direct operational use.<sup>85</sup> *Vice versa*, where EU law is silent or unclear, national law will have to take account of the EU dimension of their legal order, also

84 See also the Commission Report on the evaluation of the application of Regulation No. 883/2013, COM(2017) 589 and Commission Staff Working Document of 2 October 2017, SWD(2017) 332, pp. 24-25, 34-35 and 41.

85 As was noted previously in section 10.4.1, ECB may sometimes be confronted with the incorrect implementation of EU directives. In such situations questions of direct effect arise; to which extent can provisions (on the exchange of information and secrecy) that have been incorrectly implemented in one legal order be set aside, in order to transfer information to the authorities of another legal order (horizontal or vertical)?



where no common European mission at the EU level exists. This is, after all, part of the duty of loyal cooperation incumbent upon EU Member States. It is at both levels (EU and national) that we have encountered problems, particularly for OLAF, but sometimes also for the other authorities.

The most distinctive feature of the OLAF setting is the recurring reference to national law (see Chapter 2). Yet looking at the national side, the legal basis for information exchange from the Member States to OLAF is sometimes simply non-existent (e.g., Italy) and sometimes based directly upon provisions in EU regulations (which refer back to national law, for example Luxembourg). In other words, national law often seems not to respond to the EU legal order and offers a ‘legal limbo’. Even in these cases, however, information exchange seems to be possible informally (cf. Italy), which of course triggers questions as to the applicable safeguards and the protection of relevant interests (confidentiality, purpose limitations, etc.).

Here, the OLAF framework is clearly lagging behind the legal rules of the other authorities, particularly at the EU level. We have seen that, in the field of competition law, EU law completely governs the exchange of information within the inner-circle (the ECN), as well as between DG COMP and national (administrative and civil) courts, applying EU competition law, without referring to national law. EU law clarifies: (i) that the power to transfer information to the Commission overcomes the general duty of secrecy concerning confidential information; (ii) the limits on the use of exchanged information deriving from the purpose-limitation principle; and last but not least (iii) that national law cannot create further limitations on such a transfer. Similar considerations could be made with regard to ECB and ESMA.

Also at the national level we have seen that the need to transfer information by NCAs to the EU level is generally recognized, at least as far as ECB, ESMA and DG COMP are concerned. National legislators and practices do not hamper NCAs from transferring any kind of information to the Commission. The comparative analysis, however, does not entirely clarify whether EU provisions are always considered to be a sufficiently clear legal basis for the operational exchange of information. As indicated, one would think that without a reference to national law a (directly applicable) EU legal basis for the transfer of information should suffice. This would certainly be compatible with ECHR and CFREU, which require a foreseeable and accessible legal basis, but not necessarily a national law. Nevertheless, also with regard to DG COMP or ECB/ESMA, some countries (e.g. the Netherlands) have considered EU law to be insufficient in this regard, and have enacted national laws mirroring the relevant EU provisions. Whereas it is a good thing to lay down in national law that cooperation with EU bodies is part and parcel of the national authorities’ mission,<sup>86</sup> it makes no sense (and it may even contradict EU law) to duplicate the legal basis for the operational exchange of information.

In any case, the reference in the OLAF framework to national law (*‘in as far as national law allows’*) makes EU law insufficiently clear to authorise an interference with the right to privacy. If such a reference to national law is maintained, an obligation to provide for a clear legal basis in national law seems to be necessary to prevent conflicts with professional secrecy or the secrecy of (criminal) investigations. However, this has only been explicitly acknowledged in a few jurisdictions (e.g. Germany and the Netherlands), and mostly only for the customs area.

Besides the question of the reference to national law, it is also worth pointing out a series of commonalities between the analysed EU authorities’ regimes. First, national reports have demonstrated that the terminological differences in the way an obligation is formulated (e.g.,

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86 See the previous section.

‘may’ vs. ‘shall’) do not seem to have much practical relevance. Due to the EU principle of loyal cooperation, most national rapporteurs state that practitioners perceive the power to transfer information to an EU authority as an obligation, particularly if it derives from a request by the EU authority. This does not mean, of course, that defining an obligation to transfer information in clear terms is of no value, especially for the national authorities in the broader circles which have no institutional relations with OLAF, and particularly as regards the spontaneous exchange of information.

Secondly, it seems that the distinction between the enforcement phases – i.e., the moment at which the information is requested or is to be provided (before or after the official opening of an EU investigation) – has no real practical relevance either, at least in the relationships with the national authorities.<sup>87</sup> Unlike in Regulation 883/2013, the legal frameworks of the other authorities do not differentiate between the (preliminary) stages of the proceedings. For ECB and ESMA this lack of differentiation also makes sense, in light of their supervisory tasks, but the same also holds true for DG COMP. At the same time, we must note that also with respect to OLAF, this differentiation is not recognizable in the relevant national laws. All stages are covered by the same national rules.

Thirdly, the flow of information from criminal justice authorities to their EU partners generally deserves attention. Obviously, this problem is most prominent concerning OLAF, which is confronted in a number of jurisdictions with provisions on the secrecy of criminal investigations (cf. Italy and Luxembourg). But also in a wider context, the overlap with and potential conflicts between law enforcement by EU authorities (including all four authorities dealt with in this project) and national criminal justice are not always recognized. EU rules generally do not regulate the relationship with criminal justice actors. The matter is consequently exclusively regulated by national laws, including those of criminal procedure. NCAs sometimes adopt the role of an intermediary (for DG COMP, ECB, ESMA), provided they have the necessary authority, or are otherwise able to obtain information from criminal justice actors. With the exception of Italy, where CONSOB indeed has the possibility to ask judicial bodies for information concerning certain financial offences, in the other countries there are no other administrative authorities that seem to have this authority, nor is there any specific obligation for judicial authorities to transfer relevant information to the EU authorities. However, in some jurisdictions (e.g. the Netherlands) this is not excluded either, provided that it also serves the tasks of those actors.

Finally, as regards the content of the relevant provisions on the transfer of information, we must notice that our initial presumption that there could be a connection between the original source of the information and the applicable rules with respect to its transfer cannot be substantiated in general. In principle, and quite importantly, information that was originally protected by, for instance, professional or banking secrecy or that qualifies as a business secret loses that status as such once it is transferred to the EU level.<sup>88</sup> In that respect, there is no difference in treatment between different types of information.

87 According to the horizontal report of this study, there are differences in the conditions upon which access is granted to OLAF, depending on the stage in question. Before the opening of an investigation, the thresholds appear to be higher.

88 This can be different with respect to the protection of leniency policies (DG COMP), see *supra* section 10.2.

#### 10.6.4 Content and scope of the secrecy and purpose limitations by EU authorities

Duties of secrecy and purpose limitation/speciality are not only of relevance as a potential barrier to the transfer of information to the EU authorities (see the previous section); they are also important safeguards to protect personal data, as well as to ensure swift and effective cooperation between the EU and the national level, particularly within the inner-circle. This is why information that was exchanged in a transnational setting is usually considered to be ‘confidential’ information as such. Duties of secrecy/speciality and provisions to share information between EU authorities and national enforcement partners are therefore two sides of the same coin. Common duties of secrecy and speciality guarantee (a minimum degree of) understanding and reciprocity on the use and disclosure of highly confidential information, despite the differences in the applicable legal regimes of the authorities involved. In many cases, secrecy duties and purpose limitations set stricter standards than the rules on the protection of personal data. In addition, their scope is different as they cover all confidential information (not only personal data). Incidentally, the disclosure and use of the exchanged information in the context of related judicial/court proceedings are usually allowed.

Yet despite this common *rationale* of the relevant provisions, we have sometimes noticed considerable differences in the ways the relevant provisions take up this function. In competition law and certainly banking supervision, EU rules establish a more or less closed circuit of information in which the applicable rules exhaustively establish the allowed usage and potential recipients of confidential information. National laws are left with little discretion in this respect, if any at all. To the extent that they allow for, for instance, the sharing of information among a wider circle of authorities or persons, such provisions would contradict EU law. For the SSM framework this even begs the question as to why these rules were laid down in a directive (CRD IV), instead of in a regulation.

The fact that closed circuits are established does not mean that only the NCAs are recognized as potential receivers of information. CRD IV allows for the possibility to transfer information to a wider body of other authorities, also by ECB. However, the wording of the relevant provisions and the absence of references to national law suggest that it is still a ‘closed’ system which is designed to protect the stability of the financial markets. The exception to the rule relates to criminal justice. ‘Cases covered by criminal law’ are exempt from the duty of secrecy and disclosure. Quite interestingly, ECB has issued a decision on how to deal with requests for ‘SSM information’ to the ECB itself or to the NCA by judicial authorities.<sup>89</sup> An important goal of that decision is to guarantee that the interests of banking supervision are sufficiently taken into account by judicial partners and the duty of loyal cooperation is thus respected. As we have already noticed, there are no EU rules for the opposite scenario: the transfer of information to ECB.

With respect to ESMA, the applicable rules look slightly different. Some of the applicable regulations also appear to create a closed system, but others do not. Art. 83 EMIR for instance refers back to national law as regards the way in which confidential information is dealt with, save for information that has been obtained from a competent authority of another Member State. Secrecy and speciality provisions are therefore only harmonized to the extent that they are necessary to guarantee the transnational flow of information.<sup>90</sup>

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<sup>89</sup> See section 10.4.1.

<sup>90</sup> See section 10.5.1.

What is striking in the legal systems of all the EU authorities is that their duties of secrecy and speciality are often dealt with in a number of instruments, which may overlap in substance, but which are not always the same in their wording and aims.<sup>91</sup> The risk of contradictory provisions is imminent here. The most obvious example can be found in OLAF's legal framework. Regulation 883/2013 states that confidential information be kept secret and in essence refers to other instruments, including the applicable sectoral regulations. Those instruments, however, in turn also refer to the relevant provisions of EU and national law (*cf.* Art. 45 (1) Reg. 515/97). A level playing field for the transfer of information cannot be said to be achieved in this respect. More in general, and particularly because OLAF's competences touch upon so many areas and also on the interface between criminal law and administrative law or disciplinary proceedings, a minimum level of certainty and clarity on the consequent use of transferred information is likely to improve the flow of information.

### 10.7 CONSIDERATIONS FOR IMPROVING OLAF'S LEGAL FRAMEWORK

The foregoing analysis of the legal framework governing the transfer of information to DG COMP, ECB and ESMA served as a comparison to assess the relationship between national authorities and OLAF. Some common features have been found; yet, certain differences between the four regimes must also be stressed. In some cases, they can be understood in light of the different mandates, tasks, and powers conferred on the four ELEAs. Although all of them have been entrusted with powers of law enforcement, their organizational setting is different. Nonetheless, the comparison with the other authorities also reveals a series of common problems and considerations to be taken into account when searching for conclusions. We have grouped what we consider to be the most relevant points for OLAF among the following considerations and questions:

*– Is it possible and desirable to define an ‘inner-circle’ for OLAF to guarantee a free flow of information, and if not, how can one guarantee a continuous flow of information?*

Unlike the other authorities, which all have clearly appointed national partners to provide assistance in their tasks, there is no real delineation of such an inner-circle for OLAF. The competent national authorities and their relationships with OLAF are not delineated by the EU level, and neither is the content of their duty to cooperate with the office. Our analysis therefore begs the question, first of all, of whether it would be possible or advisable to entrust the AFCOS with tasks which are comparable to those of the NCAs in the other areas of EU law and thus to stimulate a rapid exchange of information. That would position the AFCOS as the ‘gateway’ or intermediary between the relevant national authorities and OLAF.

We believe that such a course of action should not be chosen, although this is not to say that there is no need to further facilitate and strengthen the role of the AFCOS. It would require a significant harmonization of the relevant national laws. Due to the diversity of the policy areas and the actors involved, we believe that the best way of guaranteeing a constant flow of information to OLAF is through the creation of an EU system of directly applicable rules, defining, first of all, the duty to cooperate for the relevant national competent authorities under the sectoral regulations. Such a duty is different from most, if not all, of the current provisions in relation to OLAF, which

<sup>91</sup> For an example, see section 10.5.1.

mainly impose such duties on the EU Member States, not on their authorities. Consequently, EU law can arrange for the duty of and the modalities to exchange operational information, by directly applicable regulations. We therefore suggest making references to national law in Regulation 883/2013 and incorporating all the necessary provisions, which are common to an effective system of information transfers to OLAF, in directly applicable EU laws (regulations). Those provisions should directly address the relevant national authorities and, preferably, these authorities should include cooperation with OLAF as a part of their mission.

*– Is it advisable to streamline the relevant PIF sectoral regulations?*

The OLAF legal framework is laid down in a large number of applicable rules, some of them defining OLAF's institutional set-up (and, partially, duties for MS authorities), others specifying the duties for the Commission and the Member States in sectoral areas. Sectoral regulations all contain specific arrangements for the transfer of information by the national authorities, but also with respect to the duty of secrecy and purpose limitation/speciality for OLAF/the Commission. The question is to what extent is it possible to harmonize/codify the different building blocks of information transfers as much as possible in order to avoid gaps and duplications.

Those building blocks are needed at the EU level, as well as at the national level. On the one hand, on the 'demand' (EU) side, there is a need to tackle a number of common issues in an integrated legal framework (with respect to the way in which OLAF deals with the information received – particularly secrecy and purpose limitations), as these issues should preferably be dealt with in a single instrument. Regulation 883/2013 seems to be the proper instrument to deal with this. Yet on the 'supply' (national) side, sectoral rules could deal with the establishment of duties to designate the competent authorities, and the introduction of a sufficiently precise corresponding legal basis to provide information to OLAF, without further conditions. There are good reasons to deal with this in EU regulations, but directives may also suffice in this respect. What is equally important is that national legislators acknowledge their EU dimension and facilitate this process and do not impose additional hurdles.

*– To which extent can the OLAF legal framework include the transfer of information by judicial bodies to OLAF?*

The interaction between the EU authorities and criminal justice is not clearly regulated. Some EU provisions deal with the transfer of information by EU authorities, but the reverse scenario is largely untouched. Particularly for OLAF, however, this is vital. Leaving the Member States with the discretion to appoint their relevant competent authorities in all PIF areas (and to endow them with the task of cooperating with OLAF) cannot mean that the flow of information from criminal justice actors to OLAF can be ignored by the Member States and their legal orders. Such competent authorities, if not criminal justice actors themselves, need to have access to information held by such actors. There is no doubt that this interferes with the domain of national criminal justice. There are other areas of EU law where this has already been recognized. We can point to the area of market abuse where it has been made clear that, regardless of the institutional choices that Member States make with respect to the criminal and/or administrative enforcement of market abuse rules, those institutional choices cannot at any rate affect the effectiveness of the

transnational information flows between the competent national supervisors.<sup>92</sup> Such examples merit further study.

*– Should such rules provide for a closed system of information transfers to OLAF, and if not, how can one establish a good flow of information, while still respecting diverging legal systems?*

A common level playing field with respect to the consequent disclosure and use of information by OLAF is a vital element in any system of information exchange. The OLAF framework needs to provide clarity on how the office will use the information it receives and what conditions, if any, must be respected. As said, it is questionable in light of its broad mandate to which extent a closed information circuit, as in the CRD IV/SSM system, is feasible in the PIF area. On the other hand, leaving this matter to national law would certainly hinder information flows. A compromise can be found in those systems that guarantee the flow of information from one legal order to another (horizontally: state-state, as well as vertically: EU (OLAF) – national level). Such a regime should guarantee that OLAF, on the one hand, is allowed to use the information for the realization of its mandate (including the reporting of offences to national judicial bodies) and for consequent legal proceedings in the PIF area, whereas, on the other, it would also need to make clear that OLAF may use and disclose received information only for those purposes.

Such a system could establish that once the information enters the OLAF legal framework – through its transfer to OLAF by national or other EU authorities – it no longer has a special status in principle.<sup>93</sup> Moreover, as such rules would be laid down in directly applicable EU rules, additional conditions or requirements would be invalid and could not to be applied by OLAF. Finally, such rules could make clear that they would also cover information held by judicial bodies, except possibly for those cases where the transfer of information to OLAF would unduly prejudice ongoing criminal investigations in their jurisdiction.

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92 Recital 76 of Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) *OJEU* L 173/1, states the following: ‘Even though nothing prevents Member States from laying down rules for administrative as well as criminal sanctions for the same infringements, they should not be required to lay down rules for administrative sanctions for infringements of this Regulation which are already subject to national criminal law by 3 July 2016. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they can do so if their national law so permits. However, maintenance of criminal sanctions rather than administrative sanctions for infringements of this Regulation or of Directive 2014/57/EU should not reduce or otherwise affect the ability of competent authorities to cooperate and access and exchange information in a timely manner with competent authorities in other Member States for the purposes of this Regulation, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.’

93 Exceptions could be possible, for instance where such information has been obtained through intrusive investigative techniques.

# ANNEX I: QUESTIONNAIRES

## A) QUESTIONNAIRE FOR THE EU VERTICAL REPORT (CHAPTER 2)

### I. OLAF

#### 0. General

- 0.1 Introduction: tasks of OLAF and information needed to perform these tasks
- 0.2 Who are the national partners? What is their legal status? (not only AFCOS – limited to customs and structural funds)
- 0.3 Can OLAF receive information that cannot be gathered with its investigative powers (e.g., information on bank accounts, recording of communications, etc.)?

#### 1. Exchange of information with national counterparts (AFCOS)

- 1.1 How are the obligations for AFCOS to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated? Is there a special regime?
- 1.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 1.5 Are there references to limits created by national law?
- 1.6 For what purposes can OLAF use the received information?
- 1.7 What obligations for OLAF to transfer information to AFCOS? Are they subject to any express limit?

#### 2. Exchange of information with other national administrative authorities

- 2.1 How are the obligations for national administrative authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated? (*E.g., Art. 8, Art. 11(6) Regulation 883/2013*)
- 2.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 2.3 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 2.5 Are there references to limits created by national law? (*E.g., Art. 8 Regulation 883/2013*)

- 2.6 For what purposes can OLAF use the received information?
  - 2.7 What obligations for OLAF to transfer information to national administrative authorities? Are they subject to any express limit?
3. Exchange of information with national judicial authorities
    - 3.1 How are the obligations for national judicial authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated?
    - 3.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
    - 3.3 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
    - 3.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
    - 3.5 Are there references to limits created by national law?
    - 3.6 For what purposes can OLAF use the received information?
    - 3.7 What obligations for OLAF to transfer information to national judicial authorities? Are they subject to any express limit?

## II. DG Competition

### 0. General

- 0.1 Introduction: tasks of DG COMP and information needed to perform these tasks
- 0.2 Who are the national partners? What is their legal status?
- 0.3 Can DG COMP receive information that cannot be gathered with its investigative powers (e.g., information on bank accounts, recording of communications, etc.)?

### 1. Exchange of information with national counterparts (NCAs)

- 1.1 How are the obligations for NCAs to transfer information (through digital automatized systems, spontaneous, or on-request) to DG COMP regulated? Is there a special regime?
- 1.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of a DG COMP investigation have any consequence on the information transfer? (i.e., does it make a difference if DG COMP needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 1.5 Are there references to limits created by national law?
- 1.6 For what purposes can DG COMP use the received information?
- 1.7 What obligations for DG COMP to transfer information to NCAs? Are they subject to any express limit?

### 2. Exchange of information with other national administrative authorities

- 2.1 Are there other obligations for national administrative authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to DG COMP? How are they regulated?
- 2.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)



- 2.3 Does the official opening of an DG COMP investigation have any consequence on the information transfer? (i.e., does it make a difference if DG COMP needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 2.5 Are there references to limits created by national law?
- 2.6 For what purposes can DG COMP use the received information?
- 2.7 What obligations for DG COMP to transfer information to national administrative authorities? Are they subject to any express limit?

### 3. Exchange of information with national judicial authorities

- 3.1 How are the obligations for national judicial authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to DG COMP regulated?
- 3.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 3.3 Does the official opening of a DG COMP investigation have any consequence on the information transfer? (i.e., does it make a difference if DG COMP needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 3.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 3.5 Are there references to limits created by national law?
- 3.6 For what purposes can DG COMP use the received information?
- 3.7 What obligations for DG COMP to transfer information to national judicial authorities? Are they subject to any express limit?

## III. ECB

### 0. General

- 0.1 Introduction: tasks of ECB and information needed to perform these tasks
- 0.2 Who are the national partners? What is their legal status?
- 0.3 Can ECB receive information that cannot be gathered with its investigative powers (e.g., information on bank accounts, recording of communications, etc.)?

### 1. Exchange of information with national counterparts

- 1.1 How are the obligations for national counterparts to transfer information (through digital automatized systems, spontaneous, or on-request) to ECB regulated? Is there a special regime?
- 1.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of a ECB investigation have any consequence on the information transfer? (i.e., does it make a difference if ECB needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 1.5 Are there references to limits created by national law?
- 1.6 For what purposes can ECB use the received information?
- 1.7 What obligations for ECB to transfer information to national counterparts? Are they subject to any express limit?

## 2. Exchange of information with other national administrative authorities

- 2.1 Are there other obligations for other national administrative authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to ECB? How are they regulated?
- 2.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 2.3 Does the official opening of a ECB investigation have any consequence on the information transfer? (i.e., does it make a difference if ECB needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 2.5 Are there references to limits created by national law?
- 2.6 For what purposes can ECB use the received information?
- 2.7 What obligations for ECB to transfer information to national administrative authorities? Are they subject to any express limit?

## 3. Exchange of information with national judicial authorities

- 3.1 How are the obligations for national judicial authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to ECB regulated?
- 3.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 3.3 Does the official opening of a ECB investigation have any consequence on the information transfer? (i.e., does it make a difference if ECB needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 3.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
- 3.5 Are there references to limits created by national law?
- 3.6 For what purposes can ECB use the received information?
- 3.7 What obligations for ECB to transfer information to national judicial authorities? Are they subject to any express limit?

## IV. ESMA

### 0. General

- 0.1 Introduction: tasks of ESMA and information needed to perform these tasks
- 0.2 Who are the national partners? What is their legal status?
- 0.3 Can ESMA receive information that cannot be gathered with its investigative powers (e.g., information on bank accounts, recording of communications, etc.)?

### 1. Exchange of information with national counterparts

- 1.1 How are the obligations for national counterparts to transfer information (through digital automatized systems, spontaneous, or on-request) to ESMA regulated? Is there a special regime?
- 1.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of a ESMA investigation have any consequence on the information transfer? (i.e., does it make a difference if ESMA needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?

- 1.5 Are there references to limits created by national law?
  - 1.6 For what purposes can ESMA use the received information?
  - 1.7 What obligations for ESMA to transfer information to national counterparts? Are they subject to any express limit?
2. Exchange of information with other national administrative authorities
- 2.1 Are there other obligations for national administrative authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to ESMA? How are they regulated?
  - 2.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
  - 2.3 Does the official opening of an ESMA investigation have any consequence on the information transfer? (i.e., does it make a difference if ESMA needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
  - 2.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
  - 2.5 Are there references to limits created by national law?
  - 2.6 For what purposes can ESMA use the received information?
  - 2.7 What obligations for ESMA to transfer information to national administrative authorities? Are they subject to any express limit?
3. Exchange of information with national judicial authorities
- 3.1 How are the obligations for national judicial authorities to transfer information (through digital automatized systems, spontaneous, or on-request) to ESMA regulated?
  - 3.2 What information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
  - 3.3 Does the official opening of a ESMA investigation have any consequence on the information transfer? (i.e., does it make a difference if ESMA needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
  - 3.4 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, or other interests)?
  - 3.5 Are there references to limits created by national law?
  - 3.6 For what purposes can ESMA use the received information?
  - 3.7 What obligations for ESMA to transfer information to national judicial authorities? Are they subject to any express limit?

## **B) QUESTIONNAIRE FOR THE EU HORIZONTAL REPORT (CHAPTER 3)**

1. Exchange of information with the EU Commission (in the fields of customs and structural funds)
- 1.1 What units and/or offices are in charge of exchanging information with OLAF?
  - 1.2 How are the obligations to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated?
  - 1.3 Are there differences between general information exchange obligations, and specific obligations when OLAF is conducting an investigation on members of the Commission?
  - 1.4 What information has to be transferred? (i.e., general information on economic actors, or specific information related to cases or potential cases)
  - 1.5 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)

- 1.6 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, immunities, or other interests)?
- 1.7 Are there references to limits created by national law?
- 1.8 May conditions on the use of information (by OLAF) be imposed?

## 2. Exchange of information with the EU Parliament

- 2.1 What units and/or offices are in charge of exchanging information with OLAF?
- 2.2 How are the obligations to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated?
- 2.3 Are there differences between general information exchange obligations, and specific obligations when OLAF is conducting an investigation on members of the Parliament?
- 2.4 What information has to be transferred? (i.e., general information on economic actors, or specific information related to cases or potential cases)
- 2.5 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.6 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, immunities, or other interests)?
- 2.7 Are there references to limits created by national law?
- 2.8 May conditions on the use of information (by OLAF) be imposed?

## 3. Exchange of information with Eurojust

- 3.1 What units and/or offices are in charge of exchanging information with OLAF?
- 3.2 How are the obligations to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated?
- 3.3 Are there differences between general information exchange obligations, and specific obligations when OLAF is conducting an investigation on members of Eurojust (if applicable)?
- 3.4 What information has to be transferred? (i.e., general information on economic actors, or specific information related to cases or potential cases)
- 3.5 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 3.6 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, immunities, or other interests)?
- 3.7 Are there references to limits created by national law?
- 3.8 May conditions on the use of information (by OLAF) be imposed?

## 4. Exchange of information with Europol

- 4.1 What units and/or offices are in charge of exchanging information with OLAF?
- 4.2 How are the obligations to transfer information (through digital automatized systems, spontaneous, or on-request) to OLAF regulated?
- 4.3 Are there differences between general information exchange obligations, and specific obligations when OLAF is conducting an investigation on members of Europol (if applicable)?
- 4.4 What information has to be transferred? (i.e., general information on economic actors, or specific information related to cases or potential cases)

- 4.5 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 4.6 Does EU law provide for limits to the exchange of information (based on speciality principle, secrecy of investigations, banking secrecy, professional secrecy, business secrecy, immunities, or other interests)?
- 4.7 Are there references to limits created by national law?
- 4.8 May conditions on the use of information (by OLAF) be imposed?

## 5. Conclusions

- 5.1 A variable geometry in the exchange of information at the EU level?
- 5.2 Main limits and obstacles to the exchanges of information

## C) QUESTIONNAIRE FOR THE NATIONAL REPORTS (CHAPTERS 4 – 9)

### I. OLAF

#### 1. Transfer of information from national counterparts (AFCOS) to OLAF

##### 1.0 Who is the OLAF national enforcement partner (AFCOS) and what is its legal status?

- 1.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 1.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Do the following interests give rise to limitations to the transfer of information?
  - 1.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
  - 1.4.b *Secrecy of investigations* (Are there limits to the information transfer to OLAF if a national investigation is ongoing, and if so, why?)
  - 1.4.c *Banking secrecy* (Are there limits to the information transfer to OLAF in order to protect the financial privacy, and if so, why?)
  - 1.4.d *Professional secrecy (i.e., professional secretaries of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to OLAF in order to protect professional secretaries, and if so, why?)
  - 1.4.e *Business secrecy* (Are there limits to the information transfer to OLAF aiming at protecting business secretaries of persons concerned and if so, why?)
  - 1.4.f Are there any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 1.5 Can AFCOS impose conditions on the use of transmitted information, and if so, why?

#### 2. Transfer of information from other administrative authorities to OLAF

- 2.0 Who are the administrative authorities transmitting information to OLAF? (*please limit the analysis to customs and structural funds*)

- 2.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
  - 2.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
  - 2.3 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
  - 2.4 Do the following interests give rise to limitations to the transfer of information?
    - 2.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
    - 2.4.b *Secrecy of investigations* (Are there limits to the information transfer to OLAF if a national investigation is ongoing?)
    - 2.4.c *Banking secrecy* (Are there limits to the information transfer to OLAF in order to protect the financial privacy?)
    - 2.4.d *Professional secrecy (i.e., professional secrecies of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to OLAF in order to protect professional secrecies?)
    - 2.4.e *Business secrecy* (Are there limits to the information transfer to OLAF aiming at protecting business secrecies of persons concerned?)
    - 2.4.f Are there any other legal limits to transfer of information coming from domestic law or from domestic practice?
  - 2.5 Can these administrative authorities impose conditions on the use of transmitted information?
3. Transfer of information from judicial authorities (other than AFCOS, if of judicial nature) to OLAF
- 3.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
  - 3.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
  - 3.3 Does the official opening of an OLAF investigation have any consequence on the information transfer? (i.e., does it make a difference if OLAF needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
  - 3.4 If yes, do the following interests give rise to limitations to the transfer of information?
    - 3.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
    - 3.4.b *Secrecy of investigations* (Are there limits to the information transfer to OLAF if a national investigation is ongoing?)
    - 3.4.c *Banking secrecy* (Are there limits to the information transfer to OLAF in order to protect the financial privacy?)
    - 3.4.d *Professional secrecy (i.e., professional secrecies of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to OLAF in order to protect professional secrecies?)
    - 3.4.e *Business secrecy* (Are there limits to the information transfer to OLAF aiming at protecting business secrecies of persons concerned?)
    - 3.4.f Are there other legal limits to transfer of information coming from domestic law or from domestic practice?
  - 3.5 Can the judicial authorities impose conditions on the use of transmitted information?

## II. DG Competition

[In the following sections, you may refer to the answers above. Please elaborate only if there are significant differences]

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## 1. Transfer of information from national counterparts (NCAs) to DG COMP

- 1.0 Who is the DG COMP national enforcement partner (NCA) and what is its legal status?
- 1.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 1.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of an DG COMP investigation have any consequence on the information transfer? (i.e., does it make a difference if DG COMP needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Do the following interests give rise to limitations to the transfer of information?
  - 1.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
  - 1.4.b *Secrecy of investigations* (Are there limits to the information transfer to DG COMP if a national investigation is ongoing, and if so, why?)
  - 1.4.c *Banking secrecy* (Are there limits to the information transfer to DG COMP in order to protect the financial privacy, and if so, why?)
  - 1.4.d *Professional secrecy (i.e., professional secrecies of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to DG COMP in order to protect professional secrecies, and if so, why?)
  - 1.4.e *Business secrecy* (Are there limits to the information transfer to DG COMP aiming at protecting business secrecies of persons concerned and if so, why?)
  - 1.4.f Are there any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 1.5 Can the NCA impose conditions on the use of transmitted information?

## 2. Transfer of information from other administrative authorities to DG COMP

- 2.0 Are there other administrative authorities transmitting information to DG COMP?
- 2.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 2.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 2.3 Does the official opening of a DG COMP investigation have any consequence on the information transfer? (i.e., does it make a difference if DG COMP needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.4 Do the following interests give rise to limitations to the transfer of information?
  - 2.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
  - 2.4.b *Secrecy of investigations* (Are there limits to the information transfer to DG COMP if a national investigation is ongoing?)
  - 2.4.c *Banking secrecy* (Are there limits to the information transfer to DG COMP in order to protect the financial privacy?)
  - 2.4.d *Professional secrecy (i.e., professional secrecies of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to DG COMP in order to protect professional secrecies?)
  - 2.4.e *Business secrecy* (Are there limits to the information transfer to DG COMP aiming at protecting business secrecies of persons concerned?)
  - 2.4.f Are they any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 2.5 Can these administrative authorities impose conditions on the use of transmitted information?

### 3. Transfer of information from judicial authorities to DG COMP

- 3.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 3.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 3.3 Does the official opening of an DG COMP investigation have any consequence on the information transfer? (i.e., does it make a difference if DG COMP needs information before the initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 3.4 If yes, do the following interests give rise to limitations to the transfer of information?
  - 3.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
  - 3.4.b *Secrecy of investigations* (Are there limits to the information transfer to DG COMP if a national investigation is ongoing?)
  - 3.4.c *Banking secrecy* (Are there limits to the information transfer to DG COMP in order to protect the financial privacy?)
  - 3.4.d *Professional secrecy (i.e., professional secretaries of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to DG COMP in order to protect professional secretaries?)
  - 3.4.e *Business secrecy* (Are there limits to the information transfer to DG COMP aiming at protecting business secretaries of persons concerned?)
  - 3.4.f Are there other legal limits to transfer of information coming from domestic law or from domestic practice?
- 3.5 Can the judicial authorities impose conditions on the use of transmitted information?

### III. ECB

*[In the following sections, you may refer to the answers above. Please elaborate only if there are significant differences]*

#### 1. Transfer of information from national counterparts to ECB

- 1.0 Who is the ECB national enforcement partner and what is its legal status?
- 1.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 1.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of an ECB investigation have any consequence on the information transfer? (i.e., does it make a difference if ECB needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Do the following interests give rise to limitations to the transfer of information?
  - 1.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
  - 1.4.b *Secrecy of investigations* (Are there limits to the information transfer to ECB if a national investigation is ongoing, and if so, why?)
  - 1.4.c *Banking secrecy* (Are there limits to the information transfer to ECB in order to protect the financial privacy, and if so, why?)
  - 1.4.d *Professional secrecy (i.e., professional secretaries of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to ECB in order to protect professional secretaries, and if so, why?)
  - 1.4.e *Business secrecy* (Are there limits to the information transfer to ECB aiming at protecting business secretaries of persons concerned and if so, why?)



- 1.4.f Are there any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 1.5 Can the national competent authority impose conditions on the use of transmitted information, and if so, why?
2. Transfer of information from other administrative authorities to ECB
- 2.0 Are there other administrative authorities transmitting information to ECB?
- 2.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 2.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 2.3 Does the official opening of an ECB investigation have any consequence on the information transfer? (i.e., does it make a difference if ECB needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.4 Do the following interests give rise to limitations to the transfer of information?
- 2.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
- 2.4.b *Secrecy of investigations* (Are there limits to the information transfer to ECB if a national investigation is ongoing?)
- 2.4.c *Banking secrecy* (Are there limits to the information transfer to ECB in order to protect the financial privacy?)
- 2.4.d *Professional secrecy (i.e., professional secretcies of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to ECB in order to protect professional secretcies?)
- 2.4.e *Business secrecy* (Are there limits to the information transfer to ECB aiming at protecting business secretcies of persons concerned?)
- 2.4.f Are they any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 2.5 Can these administrative authorities impose conditions on the use of transmitted information?
3. Transfer of information from judicial authorities to ECB
- 3.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 3.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 3.3 Does the official opening of an ECB investigation have any consequence on the information transfer? (i.e., does it make a difference if ECB needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 3.4 If yes, do the following interests give rise to limitations to the transfer of information?
- 3.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
- 3.4.b *Secrecy of investigations* (Are there limits to the information transfer to ECB if a national investigation is ongoing?)
- 3.4.c *Banking secrecy* (Are there limits to the information transfer to ECB in order to protect the financial privacy?)
- 3.4.d *Professional secrecy (i.e., professional secretcies of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to ECB in order to protect professional secretcies?)
- 3.4.e *Business secrecy* (Are there limits to the information transfer to ECB aiming at protecting business secretcies of persons concerned?)

- 3.4.f. Are there other legal limits to transfer of information coming from domestic law or from domestic practice?
- 3.5 Can the judicial authorities impose conditions on the use of transmitted information?

#### IV. ESMA

*[In the following sections, you may refer to the answers above. Please elaborate only if there are significant differences]*

##### 1. Transfer of information from national counterparts to ESMA

- 1.0 Who is the ESMA national enforcement partner and what is its legal status?
- 1.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 1.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 1.3 Does the official opening of an ESMA investigation have any consequence on the information transfer? (i.e., does it make a difference if ESMA needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 1.4 Do the following interests give rise to limitations to the transfer of information?
- 1.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
- 1.4.b *Secrecy of investigations* (Are there limits to the information transfer to ESMA if a national investigation is ongoing, and if so, why?)
- 1.4.c *Banking secrecy* (Are there limits to the information transfer to ESMA in order to protect the financial privacy, and if so, why?)
- 1.4.d *Professional secrecy (i.e., professional secretaries of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to ESMA in order to protect professional secretaries, and if so, why?)
- 1.4.e *Business secrecy* (Are there limits to the information transfer to ESMA aiming at protecting business secretaries of persons concerned and if so, why?)
- 1.4.f Are there any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 1.5 Can the national competent authority impose conditions on the use of transmitted information, and if so, why?

##### 2. Transfer of information from other administrative authorities to ESMA

- 2.0 Are there other administrative authorities transmitting information to ESMA?
- 2.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 2.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 2.3 Does the official opening of an ESMA investigation have any consequence on the information transfer? (i.e., does it make a difference if ESMA needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 2.4 Do the following interests give rise to limitations to the transfer of information?
- 2.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
- 2.4.b *Secrecy of investigations* (Are there limits to the information transfer to ESMA if a national investigation is ongoing?)
- 2.4.c *Banking secrecy* (Are there limits to the information transfer to ESMA in order to protect the financial privacy?)

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- 2.4.d *Professional secrecy (i.e., professional secrets of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to ESMA in order to protect professional secrets?)
- 2.4.e *Business secrecy* (Are there limits to the information transfer to ESMA aiming at protecting business secrets of persons concerned?)
- 2.4.f Are there any other legal limits to transfer of information coming from domestic law or from domestic practice?
- 2.5 Can these administrative authorities impose conditions on the use of transmitted information?
3. Transfer of information from judicial authorities to ESMA
- 3.1 Are there specific obligations as regards the information transfer, through digital automatized systems, spontaneous, or on-request?
- 3.2 If so, what type of information has to be transferred? (i.e., general information on economic actors or specific intelligence related to cases or potential cases)
- 3.3 Does the official opening of an ESMA investigation have any consequence on the information transfer? (i.e., does it make a difference if ESMA needs information before the official initiation of the investigation for a preliminary assessment of the cases, or during its investigations?)
- 3.4 If yes, do the following interests give rise to limitations to the transfer of information?
- 3.4.a *Speciality principle* (Are there limits to the transfer of information collected for other purposes?)
- 3.4.b *Secrecy of investigations* (Are there limits to the information transfer to ESMA if a national investigation is ongoing?)
- 3.4.c *Banking secrecy* (Are there limits to the information transfer to ESMA in order to protect the financial privacy?)
- 3.4.d *Professional secrecy (i.e., professional secrets of judicial and other administrative bodies, including at least competition authorities, financial supervision authorities, and (direct) tax authorities)* (Are there limits to the information transfer to ESMA in order to protect professional secrets?)
- 3.4.e *Business secrecy* (Are there limits to the information transfer to ESMA aiming at protecting business secrets of persons concerned?)
- 3.4.f Are there other legal limits to transfer of information coming from domestic law or from domestic practice?
- 3.5 Can the judicial authorities impose conditions on the use of transmitted information?



## ANNEX II: LIST OF INTERVIEWED PERSONS

<i>Name of the interviewee</i>	<i>Organisation</i>	<i>Member State</i>	<i>Position</i>
Matteo Gargantini	Commissione Nazionale per le Società e la Borsa ('CONSOB')	Italy	Assistant to the Commissioner (official)
Raffaele D'Ambrosio	Banca d'Italia	Italy	Avvocato anziano dell'Ufficio legale
Antonio Pantè	Segreteria Tecnica del Colaf	Italy	Luogotenente della Guardia di Finanza
Gerard Jensma	Douane Landelijk Tactisch Centrum	The Netherlands	
Cilia van Veen	Douane Landelijk Tactisch Centrum	The Netherlands	
Ellen Boelema	Autoriteit Financiële Markten	The Netherlands	Strategic Policy Advisor
Marit de Vrijer	Autoriteit Financiële Markten	The Netherlands	Policy Advisor Public & International Affairs
<i>Anonymous</i>	National Tax and Customs Administration	Hungary	
<i>Anonymous</i>	Hungarian AFCOS	Hungary	
<i>Anonymous</i>	Hungarian Prosecution Service	Hungary	
<i>Anonymous</i>	Hungarian Competition Authority ( <i>Gazdasági Versenyhivatal</i> )	Hungary	
<i>Anonymous</i>	State Aid Monitoring Office ( <i>Támogatásokat Vizsgáló Iroda</i> )	Hungary	
<i>Anonymous</i>	HNB ( <i>Magyar Nemzeti Bank</i> )	Hungary	
<i>Anonymous</i>	EU Commission, DG TAXUD - C4		
<i>Anonymous</i>	EU Commission, DG TAXUD - B2		
<i>Anonymous</i>	EU Commission, DG COMP		
<i>Anonymous</i>	ESMA		
<i>Anonymous</i>	ECB		



### ANNEX III: AUTHORS OF THIS STUDY

<i>Author (ordered alphabetically)</i>	<i>Position</i>	<i>Organisation</i>	<i>Role within the project</i>
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
Suzanne Bloks	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
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)
Koen Bovend'Eerdt	PhD candidate	Utrecht University, the Netherlands  Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Responsible for the Dutch national report
Dr Valentina Covolo	Post-doctoral researcher	University of Luxembourg, Luxembourg	Responsible for the Luxembourgish report

Dr Andras Csúri	Post-doctoral researcher	Utrecht University, the Netherlands  Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Responsible for the Hungarian report
Argyro Karagianni	PhD candidate	Utrecht University, the Netherlands  Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Responsible for the EU vertical report (together with Mira Scholten and Michele Simonato)
Prof. dr Katalin Ligeti	Professor of European and International Criminal Law	University of Luxembourg, Luxembourg	Responsible for the EU horizontal report (together with Angelo Marletta)
Prof. dr Michiel Luchtman	Professor of transnational law enforcement and fundamental rights	Utrecht University, the Netherlands  Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Responsible for the final comparative analysis and the recommendations for the OLAF framework and the supervision of the quality of the EU and national reports (together with Michele Simonato and John Vervaele)
Dr Angelo Marletta	Post-doctoral researcher	University of Luxembourg, Luxembourg	Responsible for the EU horizontal report (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	Associate Professor of EU law	Utrecht University, the Netherlands  Department of International and European Law and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Responsible for the EU vertical report (together with Argyro Karagianni and Michele Simonato)
Dr Michele Simonato	Post-doctoral researcher	Utrecht University, the Netherlands  The Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE)	Supervisor of the organization of the overall project. Responsible for the final comparative analysis and the recommendations for the OLAF framework (together with Michiel Luchtman and John Vervaele). Responsible for the EU vertical report (together with Argyro Karagianni and Mira Scholten)
Prof. dr John Vervaele	Professor in economic and European criminal law	Utrecht University, the Netherlands - Willem Pompe Institute for Criminal Law and Criminology, the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) – and College of Europe, Bruges	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 and Michele Simonato)

