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';[1] *(c)* during the investigation, following OLAF's request or by spontaneous initiative;[2] *(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),[3] 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).[4] 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.[5] 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).[6]

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).[7] 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 (…)'.[8]
  Art. 24 identifies the categories of data that need to be included. Implementing acts specify the items requested for each category (Art. 25).[9] 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)'.[10]

7 Art. 3(4) Reg. 883/2013.

8 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] *Eucrim* 52.

9 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.

10 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.[11]

– 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'.[12] 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.[13]
– 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.[14] 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.[15]

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).[16] 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'.

16 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,[17] 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.'[18]

2.1.4.3 Consequence of the official opening of an OLAF investigation

See 2.1.3.3.

17 OJ L 198/29, 28.07.2017.

18 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.[19] 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

19 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.[20] Other important sources include the ECN Notice[21] and the notice on cooperation between the Commission and the national courts.[22]

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.[23] Such designated authorities may thus also include courts.[24]

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.[25] These powers include the performance of sectoral investigations,[26] requests for information,[27] the power to take oral statements[28] and the power to carry out on-the-spot inspections of both business[29] and private premises.[30] 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,[31] 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.[32] The type of information can range from documents and statements to digital information.[33]

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.[34]

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.[35]
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.[36] 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.[37]
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.[38] 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.[39]

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.[40]

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,[41] 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.[42] 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.[43] 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.[44] 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,[45] 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[46] that this arrangement is not in line with a previous judgment of the CJEU in the *Spanish Banks* case[47] 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.[48]

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 *Commissio*n [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.[49]

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. [50] 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.[51]

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.[52] 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 do 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 [53] (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…'[54] 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.[55]

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.[56] 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[57] or make a request electronically by sending an e-mail to DG COMP.[58] 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.[59] 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.[60]

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.[61] In addition, the Commission can require such an authorization from a national court as a precautionary measure.[62]

The aforementioned suggests that these obligations are triggered on request.

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.'[63]

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. [64] 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.[65]

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.[66] In addition, DG COMP can use transmitted information so that it can remain informed concerning cases for which it may need to submit observations.[67]

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.[68]

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.[69] 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. [70] 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.[71]

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.[72] 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[73] 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.[74]

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.[75] 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.[76]

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).[77] 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,[78] which is the Regulation conferring enforcement tasks and powers upon the ECB in the area of banking supervision and, second, the SSM Framework Regulation,[79] which establishes the framework for cooperation between the ECB and national authorities. Another important piece of legislation is the Capital Requirements Directive,[80] which has to be transposed into national law. The ECB applies the national legislation transposing the Capital Requirements Directive.[81]

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'.[82]

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.[83] 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,[84] 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.[85] In addition, they must transmit information stemming from their verification and on-site activities.[86] 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.[87] At the same time, NCAs must transmit information to the ECB regarding less significant banks in the form of an annual report.[88]

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.[89] The same holds true when an NCA is of the opinion that an authorization must be withdrawn.[90]

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),[91] which is responsible for handling matters referred to it by the ECB whenever the latter suspects one or more breaches.[92] The IIU may exercise any power afforded to the ECB by the SSM Regulation.[93] In addition, the IIU has access to all documents and information collected by the ECB and by the NCAs.[94] 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.[95]

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,[96] 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.

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.[97] Also information that is necessary so that the NCAs are able to carry out their tasks related to prudential supervision.[98] 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.[99]

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

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.[100]

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.[101]

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.

100 From an informal telephone conversation with an ECB official (October 2017).

101 Art. 2(2), Decision(EU) 2016/1162 of the European Central Bankof 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,[102]
- 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). [103] 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.[104]

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.'[105] 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., Allegrezza, 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.[106]

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.[107] The emerging academic research on ESMA's supervisory powers indeed discusses ESMA's cooperation with the authorities listed on that list.[108] 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

106 ESMA's Annual Supervision Report 2016, p. 7

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

108 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, on 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.[109]

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.[110]

109 An informal telephone conversation with an official from ESMA (June 2017).
110 Ibid.