# 10. Comparative analysis

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## 10.1 Introduction

Enforcement is a public action 'with the objective of preventing or responding to the violation of a norm'.[1] It can be defined, in simple terms, as the process through which violations of substantive regulation are detected (monitored), investigated, and sanctioned.[2] 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.[3] 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',[4] 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,[5] 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* (Chelthenam, 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,[6] 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.[7] The text of the CFREU is less formally structured, while explicitly mentioning the principle of proportionality.[8]

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.[9] 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.[10] 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.[11]
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'.[12]

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.[13]

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.[14] 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

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 Martinez 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*,[15] 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').[16]

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*, 3rd 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.';[17]

*(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.[18]

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[19] ruled, against the opinion of the Advocate General in this case,[20] 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[21] 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.[22] 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.[23] 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[24] 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,[25] 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'.[26]

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

25 Art. 3(4) of Regulation No. 883/2013.
26 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.

*Luxemburg*

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[27] (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.[28]

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.[29]

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'.[30] 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.[31]

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.[32] Second, it does not distinguish between a spontaneous exchange of information and a transfer of information following a request from

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 (20047C 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).[33] 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.[34]

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 lenience regimes',[35] which are not fully harmonised in the EU.[36] According to the Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03),[37] information will only be transmitted pursuant to Article 12 Regulation 1/2003 if the leniency applicant consents to its transmission.[38] 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.[39]

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 [40] – 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'.[41] 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[42] and the Dutch[43] 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.[44]

*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'Eerdt, 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 completion 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).[45]

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[46] – 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.[47] 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.[48]

### 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).[49] Cooperation between the Commission and the administrative authorities has only been reported in the field of state aid in Hungary.[50]

### 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.[51] 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'Eerdt, 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,[52] is it highly dependent on cooperation with national partners.[53] 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.[54] 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,[55] 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.[56]

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,[57] 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 defendable; *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.[58]

The relevant provisions thus create a closed system of information exchange, in which partners are enumerated exclusively and are bound by purpose limitations.[59] 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.[60] The relationship between that decision and Article 53 CRD IV is unclear.[61] 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

58 M. Luchtman 2008, p. 21-22.

59 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.'

60 OJ EU [2016] L 192/73; it is discussed briefly in the EU report.

61 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,[62] 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.[63] 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.'[64] 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.[65] 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'Eerdt, 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)[66] or in pursuance of a Community obligation.[67] 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 MNB 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.[68] 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.[69] 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.[70] 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.[71] 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.[72] 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.[73] These parties *shall* therefore share information on the basis of Article 27 CRAR,[74] 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.[75] 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.[76] 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.[77] 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 .

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.[78] 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 BafFn 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

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 CCSF 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 i 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.[79] 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'.[80] 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[81] – 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.[82] 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.[83] 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].' It refers back to national law.

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.[84] 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.[85] *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,[86] 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.,

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.[87] 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.[88] 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.[89] 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.[90]

89 See section 10.4.1.
90 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.[91] 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

91 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.[92] 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.[93] 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.

92 Recital 76 of Regulation 596/2014 of 16 April 2014 on market abuse (market abuse regulation) *OJ EU* 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.