10. Comparison of the legal frameworks

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10.1 Introduction

The foregoing chapters have introduced the general EU framework, the implementation of obligations of EU law into the national enforcement regimes of the Member States and a transversal report on judicial protection at the EU level. This chapter aims to combine the main findings of those chapters. In the following sections we will make a comparative analysis of how the respective investigative powers are given shape within the frameworks of the four authorities and how they are integrated into the legal regimes of the six national legal orders of this study (section 10.5: production orders and interviews; section 10.6: on-site inspections; section 10.7: access to telecommunications data; section 10.8: online monitoring of bank accounts).
For such an analysis, it is helpful to introduce an analytical grid for how the EU frameworks interact with their national counterparts. The models that are introduced in section 10.2 help us to identify at which instances national laws (and national authorities) become relevant in the investigations of the EU authorities and, therefore, what to look for in national law. They provide us with answers as to who is the lead authority, what is the precise role of the national partners (in terms of their capacity to operate autonomously or under the instructions of EU authorities), and to which legal order (EU or national) the investigative acts are ultimately to be attributed. Depending on the model chosen, there are considerable consequences for the issues that are at the core of this project, i.e.:

– the scope and content, as well as the enforceability of the investigative acts,
– the scope and content of the procedural safeguards, and
– the available remedies.

As will also become clear below, however, the relationships between the tasks and competences of the EU authorities, the models and the applicable legal rules are not always as clear-cut as one would expect, particularly not within the OLAF setting. This is why section 10.3 will consequently deal with another issue that needs to be taken into account in the comparative analysis. That issue pertains to how the applicable legal regime (national and/or EU) can be determined (particularly with respect to fundamental rights standards). This is also of great influence for our comparative analysis. After that, we will offer a comparative analysis of the organizational set-up of the partners of the four EU authorities at the national level (section 10.4).

1 The authors thank Ms. Danielle Arnold for her very valuable assistance during the writing of chapter 10.

Finally, it is already worth mentioning that the models do not only offer an empirical-analytical framework for the state of play and for identifying and explaining inconsistencies in the respective frameworks, but that they also offer a more normative perspective. What are the consequences and factors to be taken into account when choosing between them, in light of the applicable law, *et cetera*? That issue will be taken up after our comparative analysis, in chapter 11.

10.2 Models of interaction between the EU and national level

The legal frameworks of all the authorities have (at the least) two features in common. First of all, the legal regimes of ECB, ESMA, DG Comp and OLAF allow these authorities to operate on the joint territories of the participating states for the realization of common European goals (e.g. banking supervision or the fight against EU fraud). This allows them to gather information without recourse to the time-consuming procedures for mutual legal or administrative assistance. It also means that not only do national authorities exercise enforcement jurisdiction on the territories of their nation state, but EU authorities which – under different cooperation models with their national partners – are also entrusted with specific European tasks and which may have to live up to different rules than their national partners. By definition, this situation will give rise to complicated situations, particularly where these regimes are different, yet applicable simultaneously. Indeed, EU powers may be exercised in parallel with those of the national partners (OLAF, DG Comp; ECB (LSEs)), but we also see in some policy areas that the EU authority is exclusively competent (ESMA; ECB (SEs)).[2] Even in the latter case, national authorities have a certain role to fulfil.

Secondly, the legal designs of the four authorities are in constant interaction with the national legal orders involved. This interaction can refer to the national statutory framework (legislation), but also to the operational cooperation (enforcement) with national partners and to the arrangements for offering legal protection (adjudication). The links with the national legal orders help to deal with language problems and becoming acquainted with local customs, but also take away certain capacity problems at the EU level.[3] Moreover, shared enforcement can promote the sharing of knowledge and best practices in the European Union and contribute to the creation of a harmonized enforcement culture and a level playing field.[4] Finally, in all cases where EU authorities meet opposition and coercive powers are needed, national law comes into play. The use of physical force is always reserved for the national authorities. EU law, consequently, recognizes the need for nation states to retain oversight over the actions of EU authorities on their territories. This is why they are for instance allowed to be present (upon their request) during on-site visits.

All four frameworks therefore seek a balance between, on the one hand, a common level playing field for the EU authorities, yet, on the other, a strong interaction with and also integration in national law. It goes without saying that these two interests are sometimes difficult – if not

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

3 Cf. P. Schammo, 'EU day-to-day supervision or intervention based supervision: Which way forward for the European system of financial supervision', (2012) 32 *Oxford Journal of Legal Studies*, no. 4, pp. 782-783; Recital 15 CRAR (ESMA). ESMA will typically delegate tasks where they require specialist knowledge and experience with respect to local conditions, where these are available at the competent authority. This may include tasks such as carrying out specific investigatory tasks and on-site inspections.

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

impossible – to combine. Our study reveals that the different types of legal frameworks deal with this core dilemma in different ways. In light of our common goal of seeking ways to improve the legal framework of OLAF for gathering evidence, three factors are key for determining the relevant models for interaction and for the imputation of investigative acts to the legal orders of the EU or the national authorities:

1. The issue of which authority is the acting authority, i.e. the authority that performs the investigative acts. Is this the EU authority itself or its national partner?
2. The issue of whether the national partner becomes (functionally)[5] a part of the EU organization or whether assistance is provided to the EU authority by the national partner as a representative/ part of its national administration (on behalf of the EU authority or in its own name).
3. The issue of who instructs the national partners: are instructions provided by the EU authority or through the national lines/chains of command?

On the basis of the aforementioned three factors, we can discern the following types of interaction between the EU and national authorities:

– **Autonomous investigative acts (*Vor-Ort-Kontrolle*)**:[6] EU authorities perform investigative acts themselves. This means that the laws to be applied are mostly EU regulations and that the remedies are, in principle, to be found at the EU level. Although national authorities are usually allowed to be present, their assistance is not related to the performance of their own tasks. It is seen as mutual (administrative) assistance *Amtshilfe*,[7] and mostly comprises the use of coercive power in case of non-cooperation or assistance of a practical nature. Physical force remains, after all, a power which is only available to the national authorities. Beyond that, however, MS have no say over the actions performed on their territories.

  We can find examples of such acts in all legal frameworks, for instance in Regulation 2185/96 for OLAF (on-the-spot checks), Arts. 20 and 21 Regulation 1/2003 (DG Comp), and on-site inspections within the framework of ECB and ESMA. Here, we can already notice major differences between the OLAF framework and those of the others. Whereas OLAF does have the power to perform on-the-spot checks, it is highly dependent in law and practice on its national partners. The applicable regulations do not provide for autonomous powers or means to deal with a lack of cooperation by economic actors. This is different for DG Comp, ESMA and ECB.

– **Mixed investigations (inspections):** In this model, national and EU authorities work together in the performance of their respective tasks. The authorities of this research use the information for purposes of direct enforcement, i.e. for investigations into alleged infringements of the law by economic actors and individuals.[8] Without a clear legislative basis providing otherwise, the cooperating authorities will have to act within the limits of their own statutes. Provisions for

5 Not necessarily in terms of HR statutes (i.e. the legal position of staff members and civil servants).
6 See *in extenso* also A. Althaus, *Amtshilfe und Vor-Ort-Kontrolle* (2001); A. David, *Inspektionen im Europäischen Verwaltungsrecht* (2003).
7 F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (2005), , p. 154.
8 The model has existed for a longer time for indirect enforcement, i.e. the monitoring by EU institutions as to how national authorities implement, monitor and enforce obligations stemming from EU law.

mixed investigations usually determine who was has the lead and which law applies. Mostly, it is provided that investigative acts are performed on the basis of [harmonized] national law, under the lead of the national authorities. But the information obtained is consequently, in principle, available to EU authorities.

Mixed investigations are particularly important for OLAF.[9] In this setting, OLAF can join national partners in their investigations, under the latter's lead.[10] But, as the Office is also performing its own tasks, it would be odd to accept that its own regulations, particularly Reg. 83/2013, no longer apply in this setting. We therefore have a cumulative regime of applicable laws.[11] Most potential conflicts are then mitigated by the fact that OLAF regulations refer back to national law. Simultaneously, OLAF's legal regime becomes fragmented, which is particularly problematic in transnational cases.

In the absence of specific rules on cooperation with OLAF in many countries, mixed investigations can offer OLAF a useful instrument. By opening investigations at the national level, national authorities assume their role in fighting EU fraud and can cooperate with OLAF on that basis (rather than providing assistance). However, it is obvious that OLAF is thus dependent on the will of its national partners; it cannot instruct national authorities to do this. Moreover, national laws may impose hurdles to protect the national investigations. This, in fact, happens quite often.

– **Mandated investigations, or even *Organleihe*:** In this constellation, too, EU authorities direct the investigation, but national authorities also have a clear role (which exceeds the mere opening of doors). Both models (mandates and *Organleihe*) have in common that the investigative acts of the national partners are ascribed to the EU authorities; national authorities perform tasks on behalf of the EU authorities (not in their own name).[12] The law to be applied is usually (directly applicable) EU law. Where EU authorities give such instructions and retain the power of oversight and to act themselves, we speak of mandated delegations.[13] The (gradual) difference between a mandate and *Organleihe* is that, in the latter case, the (national) authority also becomes a part of the EU structure in legal terms; participating states lose control over their authorities, which act as the extended arm of the EU authority. They operate within the framework of EU laws.[14]

9 Cf. Art. 18 (4) Regulation No. 515/97 (customs).

10 Cf. Arts. 9 and 18 Regulation No. 515/97. See also Art. 6(4) of the retracted Regulation No. 595/91, stipulating: 'Where Commission officials participate in an inquiry, that inquiry shall at all times be conducted by the officials of the Member State; Commission officials may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials. Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in any event in searches of premises or the formal questioning of persons under national criminal law. They shall, however, have access to the information thus obtained.'

11 Cf. Art. 3(3) Regulation No. 883/2013, stipulating that during on-the-spot checks and inspections, the staff of the Office will act in compliance with national law and with the procedural guarantees provided in this Regulation.

12 See Wettner, supra note 7, p. 147.

13 See Wettner, supra note 7, pp. 148-149.

14 See Wettner, supra note 7, pp. 152-153; A.A.H. van Hoek & M.J.J.P. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights', (2005) *Utrecht Law Review*, p. 28.

We submit that the two models can be found in the ESMA (delegation) and ECB frameworks (JSTs, possibly also OSITs). Art. 23 (6) CRAR deals with delegation. It holds that ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in the Regulation. National partners then have the same powers as ESMA. This article is to be read in conjunction with Art. 30 CRAR. The question is to which extent Art. 23d (6) truly concerns a delegation, i.e. a transfer, of powers. The legal construction of the provision rather resembles a mandated power. The construction, after all, does not affect the responsibility of ESMA and does not limit ESMA's ability to conduct and oversee the delegated activity (Art. 30 (4) CRAR).

Organleihe appears to be the most accurate form to qualify the cooperation between ECB and NCAs for significant entities in the framework of Joint Supervisory Teams (responsible for the monitoring of significant entities), as defined in the SMM Framework Regulation. This conclusion is warranted in light of the central goals of the SSM system which transfers supervisory competences with respect to significant entities completely from the national to the EU level. Yet, at the same time, these teams are composed of ECB and national officials (from different states). The organizational intensity of this structure, however, greatly exceeds those of occasional mutual assistance.[15] Moreover, within the JST setting, NCA members follow the instructions of the ECB (JST coordinator) and the overall composition of the team is in the hands of the ECB.[16] They apply EU law. The decision to appoint staff members from NCAs to JSTs is taken by the ECB Supervisory Board. All of this is why we submit that the legal construct resembles a situation where representatives of national authorities – for the purposes of SSM (significant entities) – become a part of the ECB framework. A similar reasoning also applies to the on-site inspection teams in the SSM Framework.[17]

– **Mutual assistance (*Amtshilfe*), including instructions:** This is the oldest and most well-known form of interaction. Mutual (administrative) assistance means that, upon the request of the EU authorities, national authorities perform specific acts of investigation in their own name, but for the fulfilment of the tasks of the EU authorities (not their own tasks, therefore). In principle, they apply national laws (which may have been harmonized). *Amtshilfe* as such creates no changes in the legislative framework of the requested party (in terms of its powers

15 Incidentally, ECB regulations do provide for such acts of assistance in cases of opposition. L. Wissink et al., (2014), 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', (2014) 10 *Utrecht Law Review*, no. 5, pp. 106-107 seem to be of the opinion that the organizational set-up of JSTs is one of NCAs assisting the ECB (*Amtshilfe*).

16 Cf. Arts 4-6 SSM Framework Regulation. See also the 2016 Special report No. 29 of the European Court of Auditors, 'Special Report Single Supervisory Mechanism - Good start but further improvements needed', p. 64: 'Given their structure, the efficient functioning of the JSTs is subject to a number of challenges, particularly with regard to the allocation of tasks and communication flows within the team, for which the Coordinator is responsible. Formally, all staff comprising a JST (from both the ECB and the NCAs) report to the Coordinator (while keeping the NCAs informed). However, *the NCA members of a JST are subject to a dual functional reporting line: for JST work, which easily accounts for most of their professional duties, they report to the Coordinator*, *while for any other work they report to their NCA line managers*. Moreover, on all matters of hierarchy and human resources, they report only to the NCA management [emphasis added].'

17 Art. 144 SSM Framework Regulation states that 'the ECB shall be in charge of the establishment and the composition of on-site inspection teams with the involvement of NCAs, in accordance with Art. 12 of the SSM Regulation.' The ECB shall also designate the head of the on-site inspection team from among ECB and NCA staff members.

and rights). Hierarchically, the assisting national authorities do not take instructions from their EU partners, but via their national chains of command.

Examples of *Amtshilfe* are found in the legal frameworks of ESMA and ECB, where they mostly refer to providing assistance to the relevant authorities in cases of opposition. A similar provision is found in Art. 4 of Reg. 2185/96. Within the setting of competition law, DG Comp has the power to 'ask' national partners to collect evidence on its behalf, applying their own law (Art. 22 (2) Reg. 1/2003). The latter power is somewhat different from the other types of mutual assistance within the framework of EU authorities as the national competition authority then performs acts of investigation individually, but on behalf of DG Comp and applying EU law.[18] This provision appears to be rarely used.

A distinct category of mutual assistance is the *instructions*, available in the SSM framework.[19] Instructions allow the ECB to oblige the national partner/NCA to use powers that are not available to the ECB itself. The applicable legal regime is therefore the regime of the agent, not the principal EU authority. Likewise, the consequences of the acts are, in principle, not imputed to the EU authority.[20]

Figure 1 – Different models for interaction between EU authorities and national partners; the role of national partners

	Autonomous	Mixed	*Organleihe*	Mandate	Assistance
Acting authority is …	EU authority	both	national	National	national
Act is part of …	EU organization	both	EU	National	national
Instructions via …	EU hierarchy	both	EU	EU	national

The models illustrate the different modalities of how national authorities can assist their EU partners and how their actions are imputed to the respective national or EU legal orders. As a rule of thumb this will have consequences, particularly for the legal remedies available.[21] Actions imputed to the national authorities will as a rule end up before national courts, whereas actions by EU authorities that bring about a distinct change in the legal position come before the EU courts.[22]

18 This is why one may doubt whether this is really mutual assistance or rather a different type of assistance. Most academic writings qualify it as mutual administrative assistance; see Wettner, supra note 7; M. Böse, 'The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases' in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), vol. 1.

19 Arguably, instructions may also be regarded as a separate category, particularly where they are so specific that national partners are left without discretion. In that situation, national lines of hierarchy are less relevant. The difference between instructions and mandated investigations is that, under the latter regime, one cannot transfer more powers than one has oneself. In that respect, instructions come closer to mutual administrative assistance. In fact, some mutual assistance regimes are so specific in their terms and conditions that the differences between the two forms are sometimes very small. That is why we have placed the two forms in a single category.

20 Cf. Wissink et al., supra note 15. This may be different where discretion for national authorities is absent; cf. A. Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?', (2014) *Maastricht Journal*, pp. 89-119.

21 Questions of political accountability are another relevant issue.

22 There are some tricky areas, particularly when national authorities are left with no discretion by the EU authorities, but their actions do affect the position of individuals and undertakings; cf. A. Witte, supra note 20,

The models also show various degrees of intensity with respect to integrating the EU frameworks into the legal orders of the states concerned (from autonomous to assistance on the basis of national law). With respect to the dilemma introduced above (between the need for EU-wide powers and integration into national law), two assumptions seem to be logical.

It makes sense, first of all, to expect that there is a relationship between the model chosen and the applicable law. The more an EU authority is required to act autonomously, the more it needs a uniform set of rules that defines the powers and the corresponding safeguards. Yet such an autonomous model also has disadvantages. The more it acts autonomously, the more there is a risk of conflicts (on the territory of a single Member State) between the rules of that EU authority and the national law.

The second assumption, therefore, is that there appears to be a connection between the law enforcement *tasks* (monitoring, investigating, sanctioning of alleged offences) of the relevant authority and the models. Particularly where tasks are exclusively attributed to the EU level, the autonomous models (including the *Organleihe* and mandated investigations) are appropriate and legitimate. The risk of diverging national and EU legal regimes (problematic both in terms of effective law enforcement and legal protection) is then not a particularly relevant concern; after all, there can be no forum shopping or problems of a similar nature.

However, the reverse is not necessarily true: shared tasks in the area of law enforcement between the EU and national levels do not exclude autonomous inspections as a tool. But then, as will be explained below, differences in the applicable laws may become a problem and need an answer. Therefore, the foregoing is not to suggest that only autonomous models of interaction require EU-wide standards. Rather, the point is that the different models may require support through different legal instruments in order to function properly. The need to create a level playing field is for instance also very relevant for types of interaction in the sphere of mutual legal assistance. But then, the legal basis can also be a harmonizing instrument instead of a directly applicable regulation. Indeed, particularly where tasks at the EU level are shared with those of national partners (PIF, but also competition law), it makes sense to decrease the differences between the applicable EU and national laws through harmonization (top-down), or via a voluntary adjustment to the EU system at the national level (bottom-up). The latter has occurred in the area of competition law, but not in the PIF area. Many Member States do not appear to feel inclined to adjust their systems to accommodate OLAF investigations, as will become apparent below.

It is in light of the foregoing that we can already signal a peculiarity of the OLAF legal framework. Although one would have expected that the more 'autonomous' an authority is required to operate, the more it can avail itself of autonomous, enforceable powers of investigation and – consequently – safeguards and remedies that are defined at EU level, this is not the case for OLAF. In contrast to ECB, ESMA and DG Comp, OLAF does not have autonomous powers of enforcement. Consequently, legal protection in OLAF investigations also becomes scattered. Moreover, we must note that OLAF – while formally charged with investigative duties in the area of PIF and serious misconduct by EU officials – is not given the powers to effectively fulfil this task. To that extent, its mandate is larger than the powers to execute that mandate.

pp. 97-103; Schammo, supra note 3, pp. 785-786. This particularly holds true for mandated investigations and instructions.

10.3 The applicable law in a vertical setting; fundamental rights standards

Before we embark on our comparison of the different authorities, we must make another point of general interest to all four authorities. As all of these work in close interaction with the national legal orders and because even directly applicable regulations refer back to national law on occasion, the determination of the applicable law is another very important issue for this project. The debate on the applicable fundamental rights standards in cases of vertical interaction between EU authorities and their national partners is one of the most pertinent issues to date and is increasingly attracting attention, also outside the domain of competition law. Looking at the relevant case law of the EU courts and references in the national reports, two criteria are of particular importance to determine the applicable law:

1. The responsible authority,
2. The content of the applicable legal rules at EU level.

Potentially, therefore, there are four types of different situations and we can indeed pinpoint these situations in the analysed frameworks:

A. An EU authority has the lead in the investigation, applying (only) EU law;
B. An EU authority has the lead in the investigation, but it applies a mix of EU and national law;
C. A national authority has the lead, applying a mix of EU and national law;
D. A national authority has the lead, while (only) applying EU law.

A) With regard to the first situation, the leading case is without doubt *Akzo Nobel/Akcros*.[23] It dealt with the diverging positions of in-house lawyers and legal professional privilege under UK and EU law, but it is likely to be applicable with respect to other fundamental rights standards, too. The case concerned an investigation by the Commission, assisted by the UK Office of Fair Trading, in Manchester in 2003. The principles of legal certainty, national procedural autonomy and conferred powers were relied upon to challenge the adverse consequences of the differences in the legal regimes of the EU order and the national legal order of the UK.

In the view of the Court, the principle of legal certainty does not challenge this situation of diverging (EU and national) standards, because '[t]he Commission's powers under (…) Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it. (…) [W]hilst Arts. 101 TFEU and 102 TFEU view [restrictive practices] in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context.'[24] Undertakings can therefore determine their position in the light of the powers of those respective authorities.

23 Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:512. On this case, see also, R. Widdershoven & P. Craig in M. Scholten & M. Luchtman (eds.), supra note 2 [forthcoming]; W.P.J. Wils, 'Powers of investigation and procedural rights and guarantees in EU antitrust enforcement: The interplay between European and national legislation and case-law', (2009) 29 *World competition*, no. 1, pp. 3-24.

24 See *Akzo Nobel/Akcros*, supra note 23, paras. 102-103

Thus, the Court suggested that, as it is the leading authority that determines the applicable law,[25] there is no real issue of legal certainty, despite the differences between the applicable standards of the (EU and national) legal orders involved.[26] This appears to be no different in situations where, on the basis of Art. 20 (5) Reg. 1/2003, national authorities join the Commission; in that case, they have the same powers as the Commission. However, (particularly) where the use of physical force is concerned (a power not available to the Commission), the national authorities will be the responsible actors (cf. Art. 20 (6) Reg. 1/2003).[27] Then, however, by way of delineation, the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.[28]

The Court continued by stating that the system introduced by Regulation 1/2003 does not prejudice the principle of procedural autonomy either. It held that when the case concerns the legality of a decision by an institution of the European Union on the basis of a regulation adopted at European Union level, which, moreover, does not refer back to national law, the uniform interpretation and application of the principle of legal professional privilege at the European Union level are essential. This is to ensure that inspections by the Commission in antitrust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. Should that be different, 'the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.'[29]

From the case, we can learn that, first of all, differences between the applicable (fundamental rights) standards of the legal orders involved is not a problem as such, certainly not as long as it is clear which legal order is represented by the relevant authority. Moreover, we know that – as far as the EU legal order is concerned – the uniform application of EU law by an EU authority leaves no room for more protective standards at the national level, where EU law does not refer back to national law. As was reasoned by the Court itself, the reasons for this were explained by AG Kokott: 'Indeed, the interpretation and application of legal professional privilege in a uniform manner across the European Union is essential for the purposes of investigations conducted by the Commission in antitrust proceedings. The uniform application of EU law would be adversely affected if decisions on the lawfulness of acts adopted by the organs of the Union were made by reference to provisions or principles of national law; the lawfulness of such acts – in this case, the lawfulness of search measures carried out by the Commission as European competition authority – can be judged only in the light of EU law. The introduction of special criteria stemming from

25 See also AG Kokott, Opinion, Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:229, para. 127: 'With regard to the relationship between investigations conducted by the European Commission and investigations conducted at national level, (…) Regulation No. 1/2003, is based on a clear delimitation of the respective competences of the competition authorities. A search is ordered and carried out either by the Commission or by a national competition authority. It is always clear from the decision ordering the investigation (investigation authorisation), which must be presented to the undertaking in writing, which authority has ordered the search.'

26 See the opinion of AG Kokott, supra note 25, paras. 123-131.

27 Ibid., para. 119. The Court uses the word 'particularly', not 'solely.'

28 Ibid., para. 119.

29 Ibid., paras. 113-115.

the legislation or constitutional law of a particular Member State would damage the substantive unity and efficacy of EU law as well as of the internal market.'[30]

We submit, therefore, that it follows from *Akzo/Akros* that unless EU law explicitly allows for deviations, the scope and content of investigative powers, as well as the safeguards and defence rights, are determined by EU law (including case law), when EU authorities have the lead in the investigation. Where the investigative powers have been dealt with at the EU level, this finding is also of relevance for the applicable fundamental rights; those are then defined at the EU level, too.

B) It is also possible that EU law does make way for national law, even when investigations are conducted by EU authorities. We see examples of this in OLAF's legal framework. Art. 3(3) Reg. 883/2013 for instance stipulates that during on-the-spot checks and inspections, OLAF staff shall act, subject to the Union law applicable, in compliance with the rules and practices of the Member State concerned and with the procedural guarantees provided for in the OLAF Regulation. In those situations we can still assume that the scope and the content of the powers, and their corresponding safeguards, as well as defence rights are in principle determined by EU law, unless the applicable Regulations refer back to national law. Only in the latter types of situations will there be room for higher (not lower) national standards than those of the regulations or the EU Charter of Fundamental Rights.

C) Situations C and D also occur in the framework of investigations by EU authorities. Where a national authority conducts an investigation, the rules governing the investigation are in principle determined by national law, including the procedural safeguards.[31] We can think of, in particular, mixed investigations or cases of mutual assistance (*Amtshilfe*), as dealt with by Art. 22 (2) Reg. 1/2003 or those cases where national authorities provide physical assistance to EU authorities.[32] Without doubt, such authorities – who then act in their own name, but for the fulfilment of the tasks of their EU partners – act within the scope of EU law,[33] so that the Charter will be applicable (Art. 51 (1) CFR). This means that, first of all, the level of protection can never be lower than that offered by the Charter.[34] For instance, the observance of the rights of the defence is a fundamental principle of European Union law, which applies where the authorities are minded to adopt a measure which will adversely affect an individual (cf. Arts 41, 47 and 48 CFR).[35] These articles also protect legal privilege, at least as far as this is in the interest of the client's rights of defence. It follows from this that those legal orders which do not recognize legal privilege in administrative proceedings may have to adapt their position in cases of cooperation with EU authorities. Both the German and the Polish report make mention of such situations.

On the other hand, however, in those cases where EU law refers back to or leaves room for national law and national law provides for higher standards,[36] procedural autonomy is the rule,

30 Cf. AG Kokott, supra note 25, paras. 167-168.
31 Ibid., para. 128.
32 On Art. 20 (6) Regulation No. 1/2003, see *Akzo Nobel/Akcros*, supra note 23, para. 119.
33 Mixed investigations are after all covered by EU law, cf. Arts. 9 and 18 Regulation No. 515/97.
34 R. Widdershoven & P. Craig in M. Scholten & M. Luchtman, supra note 2 [forthcoming].
35 Cf. Case C-349/07, *Sopropé*, [2008] ECR I-10369, ECLI:EU:C:2008:746, paras. 29, 36.
36 An example is found in the regulations on prior judicial authorizations of on-site inspections; infra section 10.6.

though national procedures must meet the requirements of effectiveness and equivalence.[37] Those procedures cannot – certainly not where such standards are lacking in comparable national cases – introduce standards which may render the enforcement of EU law ineffective. In a similar vein, the EU Court has held with respect to fundamental rights that 'where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Art. 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.'[38] Situations where national fundamental rights may actually challenge the coherence of the EU legal order have not yet been put to the Courts.

Procedural autonomy is not without limits, therefore. National law may on occasion even conflict with EU law. In such cases, *Melloni* is particularly relevant. The Court held that, although national authorities and courts remain free to apply national standards of the protection of fundamental rights, the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law may thereby not be compromised.[39] Particularly when EU law achieves a level of harmonization that no longer leaves room for diverging or accompanying national law, the primacy and unity of EU law would be flawed.

D) This brings us to the fourth category of cases and the one which we have encountered the least in this project. This situation appears to come into play particularly in ESMA cases of delegation (Arts 23d (6) and 30 CRAR; Art. 60 EMIR). There we see that ESMA's national partners may be delegated with the execution of specific acts and apply EU law in doing so. In such situations there appears to be no room for deviating national standards. To date, the qualification of this type of assistance is uncharted territory; there is as yet no case law available.

On the basis of the foregoing, we can make a series of general observations:

I. The Court has thus far dismissed arguments on the basis of the principle of legal certainty (in relation to the applicable law) in dual regimes as discussed here. It connects this position to the division of tasks between national and EU authorities. Indeed, where a task is attributed (only) to a national (or an EU) body, there is no convincing legal argument as to how diverging standards can lead to uncertainty, even when the standards are diverging. Yet in competition law, national authorities not only apply national law; they are co-responsible for Arts 101 and 102 TFEU and they assist the Commission in that. The latter occurs on the basis of Art. 22 (2) Reg. 1/2003, upon the Commission's specific request.[40] According to the Regulation, national standards would then apply. National authorities act in their own name, but for the fulfilment of the tasks of the Commission. Art. 22 (2) Reg. 1/2003, as such, does not comprise a full transfer of proceedings from the EU back to the national level. The regulation therefore allows different

37 Case 33-76, *Rewe*, [1976] ECR 01989, ECLI:EU:C:1976:188. For a discussion, see R. Widdershoven & P. Craig in M. Scholten & M. Luchtman, supra note 2 [forthcoming].

38 Case C-617/10, Åkerberg *Fransson*, ECLI:EU:C:2013:105, para. 36.

39 Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para 60.

40 See also B. Vesterdorf, 'Legal Professional Privilege and the Privilege against Self-Incrimination in EC Law: Recent Developments and Current Issues', (2004) *Fordham International Law Journal*, pp. 1204-1205.

sets of proceedings to realize the same goals. The choice between those proceedings is up to the Commission. As the Court pays no attention to this,[41] it has not yet provided a complete answer as to how the existence of diverging sets of rules within a single legal framework relates to the principle of legal certainty. We therefore submit that – in order to answer and to tackle points of legal certainty in relation to the applicable law – it is necessary not only to look at who is the leading authority and at the degree of harmonization of EU law, but also to take account of the question on whose behalf the acts are performed. That position may have consequences for the degree and level of harmonization, as we will discuss further in chapter 11.

II. Even in those cases where there a watertight distinction is possible between the competences of the national and those of the EU authorities, the fact remains that EU investigations may end up before national authorities, also in competition law and even in banking law.[42] Where EU standards fall below national ones – in-house lawyers once again being the most vivid example, but also (in some jurisdictions) the privilege against self-incrimination (see infra) – it will be wise to already take into account the procedures of the relevant national authorities.[43] The question, however, is to which extent this is possible, in light of the primacy and unity of EU law. This means that either EU standards must be raised, and/or national rules on the admissibility of evidence be adapted, so that equivalent standards of fundamental rights protection (above the threshold of the Charter, of course) can be accepted by the trial state.[44] As it may not always be possible to anticipate the later trial court, a combination of both types of measures is likely to produce the most acceptable results.

III. Finally, we note that there is hardly a coherent picture with respect to the scope of the protection of fundamental rights in the frameworks of the four authorities. This holds true for legal professional privilege, as well as for the privilege against self-incrimination. The right of access to a lawyer has also received little attention thus far.[45]

The standards in competition law were developed by the Court, in the absence of legislation and under pressure from national courts, urging the former not to lose sight of fundamental rights protection. By seeking common ground among the diverging traditions of the Member States, the Court developed a framework for legal privilege in competition law. As, to date, these rights remain embedded in the case law, they have not been codified.[46] The same holds true for the frameworks of ECB and ESMA; it is generally assumed that the same standards apply for those authorities, but this has not yet been confirmed.

41 AG Kokott does, but to a limited extent, see supra note 25, paras. 128-129. Incidentally, the Akzo/Akcros case concerned the old Regulation No. 17, i.e. the situation before the decentralization brought about by Regulation No. 1/2003. However, both the Court as well as its AG explicitly took account of those changes in their reasoning.

42 See, for instance, Art. 136 of the SSM Framework Regulation.

43 Cf. R. Widdershoven& P. Craig in M. Scholten & M. Luchtman, supra note 2 [forthcoming], referring to the position of the Dutch competition authority when it does not assist the Commission but still applies EU competition law.

44 Cf. Wils, supra note 23.

45 See howeverCase C-136/79, *National Panasonic v Commission*, [1980] ECR 02033, ECLI:EU:C:1980:169, and the Explanatory note on Commission inspections pursuant to Art. 20(4) of Regulation No. 1/2003, September 2015, < http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf> (last visited 10 April 2017).

46 Or only in a very fragmented fashion, as is illustrated in chapter 2.

In competition law, the criterion with respect to the privilege against self-incrimination is that 'whilst the Commission is entitled (…) to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.'[47] This is taken to mean that, on the one hand, undertakings must communicate all facts which may be relevant in light of the law relating to restrictive agreements and practices. On the other hand, they may not be questioned on the intention, aim or purpose of particular practices or measures, given that such questions might constrain them to admit infringements.[48] It may be that this apparent restrictive[49] approach of the Court in competition law is warranted by the fact that the Commission has no real power to summon persons for questioning. Art. 19 Reg. 1/2003 is limited to situations of consent, whereas Arts 20 and 21 deal with 'explanations on facts or documents relating to the subject matter and purpose of the inspections.'

By comparison, in the OLAF setting, the legislator seems to have gone beyond the case law of the Court in competition cases.[50] Art. 9 (2) Reg. 883/2013 states that when OLAF interviews the person concerned or a witness during an investigation, any person interviewed shall have the right to avoid self-incrimination. The scope of protection of the privilege appears to be broader in the OLAF setting, as it a) applies to witnesses, b) also possibly covers 'factual questions', and c) may apply before charges are brought. We have to keep in mind that OLAF itself has no sanctioning powers. It is true, however, that Art. 9 Reg. 883/2013 may facilitate a later use of statements as evidence.[51]

10.4 Comparative oversight of organizational set-up

Before we zoom in on the specific investigative powers and the related procedural safeguards, it is necessary to have a clear picture of the general tasks (competence, mission) and the organisational structure of the relevant bodies and of their counterparts in the Member States, as they form the organisational design in which the investigative powers are embedded. As we will see the tasks of some authorities is not limited to the investigation of illicit behaviour. There are not only enforcement authorities but also general supervision authorities and sometimes even regulatory authorities.

We will first look from a top-down perspective at the selected EU enforcement authorities. What are their tasks and mission and their organisational structure? What are the requirements for opening a case and to which extent do they need to rely on national law in relation to investigative

47 Case 374/87, *Orkem*, [1989] ECR 03283, ECLI:EU:C:1989:387, paras. 34-35; Case T-112/98, *Mannesmann-röhren-Werke*, ECLI:EU:T:2001:61, para. 28.

48 Case T-112/98, *Mannesmannröhren-Werke*, [2001] ECR II-00729, ECLI:EU:T:2001:61, para. 29.

49 Restrictive, because factual questions are not covered by the principle. The Strasbourg case law appears to be broader in scope and does not seem to exclude factual questions *per se* from the right to remain silent; cf. Vesterdorf, supra note 40.

50 OLAF's GIP do not provide an unequivocal answer either.

51 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, supra note 2 [forthcoming].

powers? Second, we will look from a bottom-up perspective: do the selected Member States provide for specific statutory provisions for vertical investigative cooperation?

10.4.1 OLAF

Tasks and mission

OLAF, different from, for example, the ECB and ESMA, does not have proper supervisory tasks. It is involved, however, in regulatory and policy issues, but the unit dealing with this is separate from the investigative branches of OLAF.

OLAF is competent to exercise the powers of investigation conferred upon the Commission by the relevant Union acts, 'in order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union'. These financial interests are generally indicated as PIF (protection des intérêts financiers de l'Union). This means that OLAF investigations may 'horizontally' cover all areas of EU activity if the EU budget is allegedly affected by illegal activities, in particular all EU expenditures and most of its revenues (e.g. customs duties, agricultural duties, etc.). VAT is however a *specialis*. The ECJ has ruled on several occasions that it is part of the PIF (and thus of the regulatory scope of Art. 325 TFEU). However, it does not fall under the scope of the investigative powers of OLAF. OLAF is only able to coordinate VAT fraud cases, not to investigate them. It is also worth mentioning that the scope of OLAF's competence concerns not only the revenue and expenditure of the EU institutions, but also the budget of all EU bodies and agencies. This means that OLAF investigations can relate to private actors (economic operators), public actors in the Member States, EU institutions, bodies and agencies and thus to activities at EU level, national level or even in third states (EU representations, PIF-related operations such as, for instance, humanitarian aid). So investigatory powers may be needed for:

1. Autonomous investigations, under the leadership of OLAF. When it comes to the enforcement of investigative acts – either through the use of police powers (*manu military*) for gaining access to premises or subpoena powers (the imposition of sanctions) in cases of non-cooperation – national authorities will provide mutual administrative assistance to OLAF and, for that, Member States must provide OLAF's partners with the same powers as in comparable cases of national law.
2. Mixed investigations for the fulfilment of the national partners' and OLAF's tasks, but under the leadership of the national partners. In this setting, OLAF can join national partners in their investigations, under the latter's lead.[52] But, as the Office is also performing its own tasks a cumulative regime of applicable laws does apply.[53] Most potential conflicts are then mitigated by the fact that OLAF regulations refer back to national law.

52 Cf. Arts. 9 and 18 Regulation No. 515/97. See also Art. 6(4) of the retracted Regulation No. 595/91, stipulating: 'Where Commission officials participate in an inquiry, that inquiry shall at all times be conducted by the officials of the Member State; Commission officials may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials. Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in any event in searches of premises or the formal questioning of persons under national criminal law. They shall, however, have access to the information thus obtained.'

53 Cf. Art. 3(3) Regulation No. 883/2013, stipulating that during on-the-spot checks and inspections, the staff of the Office will act in compliance with national law and with the procedural guarantees provided in this Regulation.

3. Coordination cases as meant in Art. 1(2) Reg. 883/2013, i.e. activities with the purpose of providing the Member States with assistance in the coordination of their investigations and other PIF-related activities (cf. 8.3/10 GIP), including VAT fraud. Investigatory powers will however not be used for coordination cases (see 10.3 GIP); this situation therefore falls outside the scope of this project

Organisation
The investigative units are separate from the policy units in order to guarantee their independence. They are under the leadership of the Director General.

Opening of an investigation
According to Art. 5 Regulation 883/2013 the decision to open an investigation is made by the OLAF Director General ex officio, or following a request by a Member State or the authorities of Member States or other EU bodies. OLAF does receive complaints and information from market operators. This can also be done online. OLAF also has access to some EU databases or is managing them. Overall, OLAF does have a certain starting position when it comes to information. The 'Investigation Selection and Review Unit', seconded to the DG, analyses information which may be of possible investigative interest and provides an opinion to the Director-General on whether an investigation or coordination case should be opened or whether the case should be dismissed.[54] Such a decision takes the following into consideration:
(a) whether 'there is sufficient suspicion' of an illicit activity affecting the EU's financial interests. This is in line with the CJEU case law whereby the threshold of a sufficient suspicion is a safeguard against the disproportionate use of investigative powers.[55] This suspicion may 'also be based on information provided by any third party or anonymous information';
(b) whether the investigation falls within the policy priorities and the annual management plan established by the Director-General;[56]
(c) whether it is 'necessary and proportionate' to open an investigation at OLAF. With regard to internal investigations, Art. 5(1) specifies that the decision should consider whether disciplinary authorities within the institutions are better placed to conduct the investigation. With regard to external investigations, the Director-General should consider whether it is more appropriate to limit the role of OLAF to coordination, without conducting autonomous investigations.

Investigative powers, also in relation to the national dimension
OLAF does not operate on the basis of a uniform code of procedure. On the contrary, it uses a patchwork of horizontal and sectoral EU instruments (including customs, common agricultural policies and structural funds) which often refer to national law. As a consequence, in the majority of cases OLAF is dependent on national authorities for the performance of its tasks. This may

54 Art. 1 of the 2013 Guidelines.
55 See Case C-15/00, *Commission v European Investment Bank*, [2003] ECR I-07281, ECLI:EU:C:2003:396, in particular para. 164; Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-07147, ECLI:EU:C:2003:395, in particular para. 141. See also Report No. 3/2014 from the Supervisory Committee of OLAF to the European Parliament, the Council, the Commission and the Court of Auditors.
56 It is worth mentioning that the OLAF Supervisory Committee, in its Activity Report 2015, observed that 'OLAF refrained from defining a true "investigation policy" and only indicated undocumented criteria, without any impact assessment or evaluation of the implementation of previous Investigation Policy Priorities (IPPs), performance indicators, and no systematic linkage with EU spending priorities and EU policy priorities in fighting against financial crimes'.

lead to paradoxical situations where in certain Member States OLAF has wider powers in 'mixed inspections' than in inspections *propriu motu*.[57] For all these reasons, Art. 3(4) of Reg. 883/2013 stipulates that Member States are to designate a service ('the anti-fraud coordination service'/ AFCOS) to facilitate effective cooperation and an exchange of information with OLAF.
As said, basically three ways of conducting OLAF's tasks can be identified:

(a) OLAF can provide assistance to Member States 'in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud' (*'coordination cases'*).[58]

(b) OLAF can ask national authorities to conduct an investigation concerning suspected fraud or irregularities, and can participate in such investigations (*'mixed inspections'*). Since investigations are opened and conducted at the national level, national law applies; OLAF staff act as seconded experts or joint investigators, with the same powers as the national authorities. An example is provided by Art. 18(4) of Regulation No. 515/1997 on mutual assistance in customs and agricultural matters,[59] whereby '[w]here the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall at the earliest opportunity carry out an enquiry, at which Commission officials may be present under the conditions laid down in Arts. 9 (2) and 11 of this Regulation.' Such provisions clarify that investigative measures are adopted by national authorities. However, the Commission staff shall have access to the same premises and the same documents through the national partners.[60]

(c) OLAF conducts proper autonomous investigations. As regards external investigations, OLAF can conduct on-the-spot checks according to Regulation No. 2988/95 and Regulation No. 2185/96. These regulations do not lay down an exhaustive EU law procedure, but refer to sectoral regulations[61] and to national law.[62] This entails that the extent of OLAF's powers may vary from one country to another. According to these regulations, checks and inspections shall be prepared and conducted in close cooperation with the Member States concerned; Member States' authorities may participate therein and normally they do this, at least at the beginning of the inspection; however, on-the-spot checks are carried out under OLAF's authority. In this case, the national law dimension is relevant:

(i) as regards the investigative powers as such. The OLAF staff shall act, 'subject to the Union law applicable', in compliance with the rules and practice of the Member State concerned and with the procedural safeguards provided in the Regulation. OLAF should be

57 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, supra note 2 [forthcoming].
58 Art. 1(2) of Regulation No. 883/2013.
59 Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [1997] OJ L 82/1.
60 See Art. 9(2) of Regulation No. 515/97. This approach is different from the one adopted by Regulation No. 2185/96 on external checks and by sectoral regulations, for example by Art. 37 of Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005] OJ L 209/1, or by Art. 72 of Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 [2006] OJ L 210/25: in these cases the Commission (OLAF) conducts on-the-spot checks and informs national authorities, while personnel from the Member State concerned may take part in such checks.
61 Art. 9(2) of Regulation No. 2988/95.
62 Art. 8 of Regulation No. 2988/95.

granted access to information and documents under the same conditions as the competent authorities of the Member States concerned.[63] OLAF exercises these powers in the Member States on production of the written authorisation showing their identity and capacity. The Director-General issues such authorisation indicating the subject matter and the purpose of the investigation, the legal bases for conducting the investigation and the investigative powers stemming from the bases;[64]

(ii) as regards the assistance from Member States to use coercive powers, since OLAF cannot use force or coercion,[65] Regulation 883/2013 specifies that Member States 'shall give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively.' It is worth mentioning that OLAF has experienced difficulties in identifying the national authority which is competent to provide assistance to its staff. For this reason, Regulation 883/2013 provides that Member States shall 'designate a service ('the anti-fraud coordination service') to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office' (AFCOS).[66]

10.4.2 DG COMP

Tasks and mission

The mandate of the EU Commission (DG COMP) covers the four traditional pillars of competition law: cartels and other agreements, abuse of a dominant position, mergers, and state aid investigations.

Organisation

DG COMP is mainly an enforcement authority, although it has some policy units.

Opening of an investigation

The threshold which must be met in order for the Commission to commence a sector inquiry is relatively low: the Commission only requires a 'suggestion' that competition may be restricted or distorted. It is not specified what is the threshold to open an investigation; this is not surprising given the blurred lines between pre-investigative and investigative phases.

Investigative powers, also in relation to the national dimension

Both the EU Commission and the Member States have enforcement powers and they can exercise them on the same facts. The investigating authorities are part of the European Competition Network (ECN), a 'network of public authorities'. The ECN as such does not have investigative powers. The powers are exerted by either national authorities or the Commission, which basically may act in two ways:

(a) DG COMP may request national competition authorities to undertake inspections on its behalf using 'their powers in accordance with their national law'.[67] In this case, EU officials and other accompanying persons authorised by the Commission may assist the officials of the authority

63 Art.7(1) of Regulation No. 2186/96.
64 Art. 7(2) of Regulation No. 883/2013.
65 Art 3(3) of Regulation No. 883/2013.
66 Art. 3(4) of Regulation No. 883/2013.
67 Art. 22(2) of Regulation No. 1/2003.

concerned (this power has only been used on two occasions, because inspections carried out by national authorities are considered to be unsuitable for cases involving inspections in more than one Member State).[68]

(b) Compared with other policy areas, DG COMP also has direct enforcement powers, in the sense that it does not have to rely on the assistance of NCAs. DG COMP can directly conduct investigations on its own, and such investigative powers are defined by EU law. In some cases, depending on the investigative measure concerned, NCAs may be requested to provide assistance to DG COMP (when NCAs assist DG COMP in conducting the inspection they have the same investigative powers provided by EU law for DG COMP). On the other hand, there are obligations for DG COMP to inform NCAs and to consult with them in the execution of certain investigative measures *(i)* in order to facilitate coordination with investigations on the national level; *(ii)* in order to enable NCAs to provide for effective assistance.

10.4.3 ECB

Tasks and mission

ECB has become exclusively competent in the financial supervision of 'significant' credit institutions, representing almost 85% of total banking assets in the euro area. The following is the legal framework governing this new so-called Single Supervisory Mechanism.

Organisation

Supervision by the ECB entails daily monitoring by Joint Supervisory Teams (JSTs), appointed for each supervised group/entity, and regular/planned on-site inspections, organised by the Centralised On-site Inspections Division. JSTs consist of ECB staff and NCA staff from those MSs where the supervised entity in question is situated. If the JST suspects a violation, it requests a special unit of the ECB, i.e. the Enforcement and Sanctions Division, to conduct an investigation into that alleged breach of EU law, which may lead to the imposition of sanctions by the Governing Council (prepared by the Supervisory Board).

Opening of an investigation

The ECB can conduct investigations and on-site inspections as a matter of daily supervision by Joint Supervisory Teams or the centralised onsite inspections division. When a breach of EU law is suspected , these supervision units shall refer the matter to the Enforcement and Sanctions division.

Investigative powers, also in relation to the national dimension

The ECB has, in principle, all investigative and sanctioning powers on its own. Furthermore, the ECB has all the powers which NCAs shall have under relevant Union law (Art. 9 (1) SSM Regulation) and the ECB may also instruct NCAs to use a ´purely´ national power (Art. 9(1) SSM Regulation).

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

10.4.4 ESMA

Tasks and mission
ESMA's objectives include establishing a sound, effective and consistent level of financial regulation and supervision and preventing regulatory arbitrage and promoting equal conditions of competition. These regulations give ESMA the ultimate responsibility to deal with registration/authorization, the supervision of and enforcement vis-à-vis credit rating agencies (CRAs) and trade repositories (TRs). By the way, the latter financial entities were not previously regulated at the national level as the TRs did not exist before they became regulated by the mentioned legal acts.

Organisation
More specifically, ESMA's Supervision Department has individual persons ('supervisors') monitoring the daily operations of registered CRAs and TRs. ESMA has its own investigation and sanctioning powers. It has the power to request information (by a simple request or by a decision), to conduct general investigations by supervisors on an ongoing basis and investigations into alleged breaches of EU law by independent investigation officers (IIOs), and to impose supervisory measures and administrative fines for breaches of relevant EU laws (Arts 23(e)(5) CRAR and 64 (5) EMIR). ESMA can also withdraw authorisations.

Opening of an investigation
If the supervisory teams, as part of their investigations in a given case, find serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I or III of EMIR and the CRA Regulation respectively, this department informs the Executive Director ('ESMA' in the Regulation). The latter 'shall' appoint a person within ESMA as an independent investigation officer to further investigate the matter (Arts 23e(1) CRAR and 64(1) EMIR); thus far, the investigation officer has been a member of the Legal, Cooperation and Enforcement Department of ESMA. He/she is not involved or has not been involved directly or indirectly in the supervision or the registration process of the trade repository or credit rating agency concerned in order to ensure his/her complete independence. He/she performs his/her functions independently from ESMA's Board of Supervisors.

Investigative powers, also in relation to the national dimension
ESMA can conduct investigations as a matter of daily supervision (by its internal departments mentioned above) and when it suspects a breach of EU law (by an Independent Investigation Officer (IIO)). ESMA has, in principle, all investigative and sanctioning powers on its own. The 'sharing' of tasks with the national level authorities concerns only the possibility for ESMA to ask competent national authorities to carry out specific supervisory and investigatory tasks and on-site inspections on its behalf.[69] No conditions are prescribed as to when ESMA must or can request this. The delegation of a supervisory task in light of an investigation into an alleged breach of EU law has not happened so far.

69 In light of the focus of the project on the investigation by IIOs, the delegation of power by ESMA to an NCA is not discussed here. This possibility exists in accordance with Arts. 30 CRAR and 74 EMIR. These articles allow ESMA to delegate specific supervisory tasks where necessary for the proper performance of a *supervisory* task. In this light, we can conclude that ESMA cannot delegate an investigation task performed by the IIO to an NCA. The latter can also be supported by the fact that ESMA must appoint an IIO within ESMA (Arts. 23e (1) CRAR and 64 (1) EMIR).

10.4.5 Bottom-up perspective: national statutes for vertical cooperation and powers?

The situation differs a great deal between the countries. Some countries have no provisions at all for cooperation with EU enforcement agencies, others do have them, sometimes combining general administrative law and specific statutes relating to certain EU enforcement authorities.

In the UK law enforcement authorities have a general power to act/assume jurisdiction. In any given case a request from an EU body would be enough to allow them to act, so authorities apply the general rules which are applicable to them.

In Germany there is no general comprehensive legal framework at all. For ECB, ESMA and DG Comp the national authorities apply EU regulations. Cooperation with OLAF is not regulated by national law. This has consequences for the AFCOS, of course, as their members do not have investigative powers in this cooperation setting and their role is limited to being a facilitator.

The Italian system does not provide for comprehensive administrative law covering all the activities that are relevant for this research. It rather adopts a fragmented sectorial approach, providing specific rules for every single field in which national counterparts are operating.

In the Netherlands, the vertical cooperation between the European authorities and their Dutch counterparts is primarily regulated by generally applicable rules. In some cases, specific implementation acts have been adopted in which cooperation is regulated, but with regard to the use of investigative powers these acts often refer back to the General Administrative Law Act (*Algemene wet bestuursrecht*), hereafter referred to as GALA. The GALA lays down the generally applicable rules on the supervision of compliance with administrative law. Specific substantive statutes may contain cooperation mechanisms that complement the GALA mechanism. For cooperation with OLAF, a specific statute has been enacted: the Act on administrative assistance to the European Commission during inspections and on-the-spot checks (*Wet op de verlening van bijstand aan de Europese Commissie bij controles en verificaties ter plaatse),* hereafter referred to as the 2012 Act.

Assistance (*bijstand*) on the basis of the 2012 Act[70] comprises all cooperation obligations that national officials have on the basis of Regulation 2185/96, such as the one in Art. 7(2). When Dutch authorities offer assistance in light of the Regulation, they have the administrative powers laid down in Arts. 5:15-5:19 GALA.[71] The 2012 Act also states that the same powers are available to OLAF representatives who are present during on-the-spot check.[72] However, no criminal powers are available to either the AFCOS officers or the OLAF representatives.

It can be concluded that the powers of ACM, DCB, AFM and AFCOS when they cooperate, in one way or another, with their European counterparts mainly emanate from the General Administrative Law Act. These competences are sometimes complemented by others, such as the right to seal and the right to enter a dwelling, which follow from separate specific acts, such as the Competition Act. In some situations the national authorities derive their powers from the applicable Regulations.

In France, a clear distinction must be made between DG Comp, ESMA and ECB, at the one hand, and OLAF at the other. As for the former three, they have clear counterparts at the national

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

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

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

level, which are independent administrative authorities[73], vested with supervisory, investigative, disciplinary and administrative sanctioning powers, designed according to a common model. This also results in a clear national basis for vertical cooperation. Art. L470-6 ComC offers an explicit and general legal basis for the ADLC to apply all of its investigative powers when applying Arts 101 and 102 TFEU in general and, in particular, when it acts at the request of the Commission.[74] The same rules apply to proceedings regarding European or domestic cases. The Monetary and Financial Code was revised in 2013 in order to take account of the new powers of ESMA. However, the provisions on TRs are more explicit and detailed (Arts L621-18-1; L621-9, par. 22 MonFinC) than those related to CRs (L544-4 MonFinC). As regards cooperation with ESMA, the AMF exercises the powers of the competent national authority under EU law. The Monetary and Financial Code was revised by Ordinance No. 2014/1332 in order to facilitate cooperation with ECB within the framework of the SSM and specific provisions on cooperation with ECB were introduced (Art. L 612-1 V and Art. L612-38 MonFinC). As regards cooperation with ECB, the ACPR exercises the powers of the competent national authority under EU law.

Unlike the other three European authorities, OLAF cannot rely on a single actor which operates as its national counterpart and whose action is governed by a unitary legal framework, despite the creation of the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude, DNLF*[75]). It does not have any investigative or operational powers. In the absence of explicit and specific provisions, cooperation with OLAF relies on general rules.

In Poland, there are no general rules regarding international cooperation in administrative matters, or, more specifically, horizontal and vertical cooperation within the EU. Only recently has a draft law amending the Code of Administrative Proceedings been prepared and it includes a set of provisions providing for a general legal framework for such cooperation (the new section of the Code is entitled 'European administrative cooperation'). However, currently, due to a lack of such rules, the authorities have to refer to the provisions of particular legal acts or to general rules laid down in the Code of Administrative Procedure, combined with EU provisions. It may be concluded that even though Polish administrative law statutes generally recognize the competences and obligations of the relevant authorities to cooperate with their European counterparts, they hardly ever provide for detailed rules for such cooperation and they usually refer to applicable European acts.

73 An independent administrative authority (AAI) is an authority acting on behalf of the State autonomously, that is to say without being subordinate to the Government or Parliament but subject to the control of the courts and capable of intervening in three distinct areas: the regulation of a specific sector of the economy (which is the case for the counterparts of ECB, ESMA and DG Comp), the protection of freedoms, and the functioning of relations between the administration and the citizens; cf. among an abundant literature: 'Les autorités administratives indépendantes', *Revue Française de Droit Administratif*, 2010, special issue; *Les autorités administratives indépendantes, Rapport public du Conseil d'État*, Études et documents, La Documentation Française, 2001.

74 This text was amended by Ordinance No. 2004-1173 of 4 November 2004 in order to enable investigators to use not only the powers recognized by Book IV of the Commercial Code but also those recognized by Regulation No. 1/2003; P. Arhel, 'Adaptation du droit national au droit communautaire de la concurrence', (2004) *La Semaine Juridique Editions Entreprise*, No. 51, p. 2010; E. Claudel, 'Ordonnance 2004-1173 du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence', (2005) *Revue Trimestrielle de Droit commercial*, p. 60.

75 www.economie.gouv.fr/dnlf (last visited 10 April 2017).

10.4.6 Provisional conclusions

Overall, DG COMP, ECB and ESMA can rely on specific partners in the Member States, largely also because of the harmonizing influence of EU law (*de iure* and *de facto*). When it comes to investigative cooperation, these authorities use EU investigative powers or have specific statutes on which they can rely for domestic investigations (the gathering and sharing of information with EU authorities).

The OLAF situation is complex because of the multiplicity of substantive fields, related national authorities and applicable statutes. However, the OLAF EU regulations to a large extent refer back to national law for 1/ the existence of investigative powers; 2/ the scope of application of these powers; 3/ cooperation with OLAF and 4/ the applicable legal safeguards. One would at least then expect that general administrative law or specific acts regulate the referral to EU law. However, in many countries this is still not the case. The result is uncertainty for inspectors and economic operators. This of course triggers the question of whether there is a need for a further EU regulation of investigative powers and/or the harmonisation of equivalent investigative powers at the national level.

However, let us first concentrate on specific investigative powers, their use and their legal consequences.

10.5 Interviews and production orders

10.5.1 Introduction

This section contains an analysis of the legislative frameworks of the four authorities and their interactions with the national partners as far as production orders and interviewing persons are concerned. Production orders are widely defined: they refer to the powers of the authorities to inspect, copy or order the production of data, documents or other objects, in whatever form (oral, written, digital). The interviewing of persons then refers to the questioning of persons, whatever capacity they may have. Interviews may for instance be held with the persons concerned, but also with witnesses. It is particularly in that latter capacity that legal professional privilege and duties of professional secrecy, such as banking secrecy, become relevant.

The analysis below focusses in particular on a number of aspects dealing with a) a comparison of the scope and legal design of the powers (both between the EU authorities, but also between the different national systems), b) the enforceability of the measures, c) the scope of the applicable legal safeguards, and d) where this has not already been dealt with in the specific transversal report or for reasons of coherence, issues of judicial review and legal protection. The analysis will start with the interviewing of persons and will consequently discuss the rules on production orders.

10.5.2 OLAF

Compared to the legal frameworks of the other EU authorities, OLAF's legal framework is the most complicated, particularly in relation to external investigations, which is the area where a comparison with the other EU authorities and their national partners is most relevant.

The **interviewing of persons** is provided for as an autonomous power in Art. 9 Regulation 883/2013, which is also relevant in the framework of on-the-spot checks or sectoral regulations.[76] The power to interview persons is widely defined, including the persons concerned as well as witnesses. To that extent, OLAF's powers go beyond those of the other EU authorities. At the same time, however, explicit duties to cooperate only exist in relation to EU officials. Even where such duties to cooperate do exist, OLAF itself is not in a position to enforce them.[77] The same holds true when individuals make false or misleading statements. Such enforcement powers are in the hands of either the IBOAs or the national partners. Here, we see a significant difference with the other EU authorities.

Moreover, we must note that the procedures for interviewing contain a number of safeguards that are lacking under the frameworks of OLAF's EU counterparts:

1. There appears to be a generous recognition of the privilege against self-incrimination, both for witnesses as well as the persons in question. Whereas OLAF may interview a suspected person or a witness at any time during an investigation (a after notice has been given), any person interviewed shall have the right to avoid self-incrimination. The scope of this safeguard appears to go beyond the EU Court's case law in competition law.[78] A probable explanation for this is that OLAF's field of competence is so closely related to criminal law. But this cannot be a completely satisfactory explanation. First of all, many OLAF proceedings end up in recovery proceedings with no judicial follow-up; secondly, the investigations of the other EU authorities may also end up with the imposition of punitive administrative or criminal law sanctions. Another, more convincing explanation could therefore be that this provision also serves to facilitate later use as evidence in punitive proceedings.[79]
2. Also the right of access to a lawyer is recognized in Art. 9 (2) Reg. 883/2013. A similar provision is lacking for the other authorities, although there are no indications that this is a great practical problem.
3. Art. 9 (5) moreover states that any person interviewed shall be entitled to use any of the official languages of the institutions of the Union.

The situation therefore appears to be that, on the one hand, OLAF lacks binding powers for interviewing persons, but, on the other, it must respect a number of safeguards that are lacking for the other authorities.

As said, it is also possible that interviews are held within the setting of an on-the-spot check or in the setting of mixed investigations. In practice, the distinction between (autonomous) on-the-spot checks and mixed inspections does not make a great difference in terms of the applicable law. On-the-spot checks are led by OLAF (Art. 6 Reg. 2185/96). Yet that regulation does not itself define, unlike the regulations in the other areas of this study, the (minimum set of) powers. Instead, it stipulates that national law must be respected, whereas, at the same time, OLAF inspectors shall have access to all the information and documentation subject to the same conditions as national administrative inspectors and in compliance with national legislation. The inspectors may avail themselves of the same inspection facilities as national administrative

76 By stating that some of the procedural safeguards in that article do not apply to on-the-spot checks and inspections, it implicitly acknowledges that the other safeguards do apply to those settings.
77 EU Report, chapter 2.1.1.4.
78 See supra section 10.3.
79 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, supra note 2 [forthcoming].

inspectors and in particular copy relevant documents. The Regulation therefore does not define powers and refers back to national law on many crucial points, such as the precise scope of the powers, the possibilities to enforce them, the applicable safeguards and the available remedies. Some limitations are determined by the principles of equivalence (or non-discrimination) and effectiveness. The scope of those limitations is as yet unclear and this aspect has not yet been brought before the EU courts.

The foregoing means that even for the investigations for which OLAF is the leading authority, the office is highly dependent on its national partners and their legal systems. To that extent, there is not that big a difference with mixed investigations.

A similar picture emerges with respect to the **production orders**. The EU framework does not provide a coherent legislative framework. For external investigations, Art. 3(3) stipulates that the Member State concerned shall ensure, in accordance with Regulation 2185/96, that the staff of the Office are allowed to have access, under the same terms and conditions as its competent authorities and in compliance with its national law, to all information and documents relating to the matter under investigation which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently. OLAF officials may then avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents. Those checks may concern, *for instance*, professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and the work done, and bank statements held by economic operators, computer data, and budgetary and accounting documents (Art. 7 Reg. 2185/96). The scope of Regulation 2185/96 is limited because on-the-spot checks can only be made concerning economic operators against whom sanctions as referred to in Regulation 2988/95 may be applied (Art. 4).

Here, too, OLAF is therefore not given a set of genuine powers for its autonomous tasks. Rather, Regulation 883/2013 and the other regulations define the outer limits within which national legal systems must remain. We can deduce from this that OLAF cannot be denied any powers which have been granted to national counterparts, in comparable circumstances, but that it is unclear what the scope of these powers is. A level playing field for OLAF is absent.

The foregoing analysis reveals that the interaction between OLAF and national partners is of interest for virtually all types of operational and investigative actions by OLAF. What, then, are the relevant national provisions that guide this cooperation with OLAF? For that we need to look at national legislation which implements the obligations of, in particular, Regulation 883/2013 and Regulation 2185/96 (*autonomous investigations*), but also the national provisions on investigations by OLAF's partners and the possibilities for OLAF to join in (*mixed investigations*).

Germany

In the German system, there is no specific legal framework for cooperation with OLAF for the purpose of autonomous inspections, nor for mixed investigations.[80] That means that internal laws apply to cooperation with OLAF. Coordination with national authorities is done by the *Bundesministerium der Finanzen*, which does not have operative powers. External investigations are conducted by national authorities which are competent with respect to EU funds (mainly the national authorities of the *Länder)* and by the customs authorities in the area of traditional

80 German report, chapter 3.3.1.

own resources. In the latter case, the rules of the *Abgabenordnung* will apply. Although some of the German partners also have powers in the sphere of criminal law (including the *Ordnungswidrigkeiten*), such powers are not available for cooperation with OLAF. This cooperation is regarded as a matter of administrative law. Of particular relevance are then the rules on on-site tax inspections (*Betriebsprüfungen*).

Within the setting of such on-site inspections, the powers available are considerable. Via § 200 (1) AO powers to request information and documents (and corresponding cooperative duties) are available. Simultaneously, we must also note that the privilege against self-incrimination (as far as it concerns statements) is well protected, both for witnesses and relatives. The taxpayer himself cannot refuse to answer questions, even if criminal prosecution is possible; he/she is protected by other means.[81] Professional secrecy is also covered in a very wide sense (including counsel, solicitors, notaries, tax consultants, auditors, tax representatives), as well as – to a much more limited extent – banking information, § 30a AO.[82] Representation by counsel is possible.

Requests for information can be enforced by the authorities (where duties to cooperate exist). But in order to be able to do that, such orders must have the form of a *Verwaltungsakt*. To that extent, unlike for instance in the Netherlands, enforceable duties of cooperation and legal protection go hand in hand. The remedies, however, do not have a suspending effect.

The Netherlands

The Netherlands is the only country in this study that has implemented regulations as far as Regulation 2185/96 is concerned. These regulations state that the Minister of Finance is the competent authority in light of Art. 4 Regulation 2185/96. Here, too, we see that the AFCOS is mainly a supportive and coordinating body. With reference to the General Act on Administrative Law/GALA, it ensures that in the setting of on-site inspections GALA powers are available. This also means that further-reaching administrative powers in the area of customs and taxes are not available for OLAF. The situation is less clear in the setting of mixed investigations. There are no explicit provisions relating to mixed investigations, implying that in such a setting the regular provisions apply. Like in Germany, and different from the purely national setting, administrative and criminal law powers are strictly separated. Criminal law powers are not available in autonomous or mixed investigations.[83]

The power to conduct interviews and to issue production orders are both included in Art. 5:16 GALA; they may also be exercised during on-the-spot checks. The personal and material scope of this provision is broad, being limited mainly by the proportionality principle and the so-called involvement criterion.[84] Non-cooperation can lead to the commencement of criminal proceedings. Assistance by the police may also be requested. Neither the national inspectors nor OLAF have the power to sanction a person for not providing the information required or for providing false information.

Legal privilege is protected by law. Banking secrecy is not protected. Access to a lawyer has not caused major problems, as there appears to be a willingness to facilitate this when possible. The privilege against self-incrimination does not come into play during administrative cases. Here, Dutch law more or less follows the approach of the Strasbourg Court, differentiating between

81 Particularly via § 30 AO (*Steuergeheimnis*) and § 393 AO; German report, chapter 3.3.1.

82 On this, see M.J.J.P. Luchtman, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities*(2008), pp. 105-106.

83 Chapter 4.2.1.

84 Chapter 4.3.1, sub. b.

situations where punitive proceedings are not anticipated and those where this is the case, and between materials which have an existence which is dependant upon the person concerned and materials that exist independently. This means that, generally, the privilege offers no protection against production orders.

Unlike in German law, the enforceability of the pertinent powers (through force or the imposition of sanctions) is not connected to the legal design of the order. A request for information is not an appealable decision (*besluit*), implying that no remedies under administrative law are available except for an appeal against the final (sanctioning) decision. The civil courts, however, do offer redress via injunction orders.[85]

Italy

Unlike the situation in the Netherlands and Germany, the Italian structures for cooperation with OLAF do provide for the use of criminal law powers. The Italian Anti-fraud Committee (COLAF) of the Department for European Policies provides advice and coordination at the national level concerning fraud and irregularities, but has no direct operational authority. The mixed composition of the Committee reflects the involvement of different agencies, bodies and police corps cooperating to support OLAF at the national level. The investigative powers are conferred on a unit of the *Guardia di Finanza* (the financial police). The COLAF may also rely on the tax police and on the customs police. The distribution of competences depends mostly on the specific case and on the division of competences between the different police units in Italy. It is relevant to highlight that in Italy administrative investigations in fraud cases can rely on the powers of the judicial police in combating fraud. The same set of powers applies when assisting OLAF. This also means that the ordinary rules relating to national cases apply, including the privilege against self-incrimination, the right of access to a lawyer and professional secrecy.[86]

The financial police may invite taxpayers, company managers or any person exercising a business to attend an interview. Italian law also allows the financial police to request the disclosure of relevant data or documents. In these cases, it is not mandatory for the invited person to cooperate in the interview or to submit the documents required; if that person does not cooperate, the relevant documents or data cannot be evaluated *pro reo* in the case of an administrative fine. However, when the level of suspicion suggests that a criminal investigation should be commenced, the relevant rules of the Code of Criminal Procedure will apply and cooperation with the investigative authorities (in several cases, these are the same authorities that were in charge of the administrative investigation) becomes an obligation (Art. 371-bis Penal Code). The enforcement of investigative measures is then done via the coercive measures of criminal law.

The financial police may moreover proceed – also in the setting of OLAF investigations – with onsite inspections of premises belonging to the persons or legal entities concerned.[87] The aforementioned powers (interviews and production orders) are available in that setting, too.

United Kingdom

For the UK (England and Wales) the AFCOS is the National Police Coordinator's Office for Economic Crime. This is a police authority. It works together with the Serious Fraud Office (SFO), the National Crime Agency (NCA), the Financial Conduct Authority (FCA) and the HM

85 Chapter 4.3.1., sub d.
86 Italian report, chapter 5.2, sub a.
87 See also infra section 10.6.2.

Treasury/HM Revenue and Customs (HMRC). Depending on the case, therefore, UK authorities assisting OLAF or joining OLAF in mixed investigations will have powers under tax law as well as criminal law. Cooperation with OLAF – and their participation in inquiries – is not regulated by English law, but (at least as far as the SFO is concerned) is also not excluded.[88]

All of the national partners have the power to compel answers to questions.[89] The privilege against self-incrimination will not obviate an obligation expressed in a statute to respond to enquiries by the SFO or to a production order from a regulator. Yet unlike, for instance, the situation in German law, where communications between a lawyer and a client are not *per se* privileged in administrative law, this is the case for the UK. Access to a lawyer during questioning is considered to be intrinsically connected to one's status as a legal actor.[90] Production orders are also available, both with respect to the person under investigation, as well as other persons (except for material carrying LPP or banking confidentiality). A failure to comply is a criminal offence.

Issues pertaining to legal protection (remedies) do not hinge on the availability of force (fines/coercion), like in Germany. Actions for trespass, a breach of privacy, et cetera, are however possible, usually retrospectively. Official action beyond the scope of a warrant, or without authority, will be actionable. And at any subsequent criminal trial, the fact that the evidence has been obtained unlawfully is a reason which might trigger its exclusion from evidence.

Poland

Specific provisions regarding the vertical cooperation of the Polish administrative authorities with their EU counterparts are scarce. Cooperation usually takes place on the basis of the Code of Administrative Procedure of 1960. Recently, however, preparations for the amendment of the Code of Administrative Procedure, including a general legal framework for such cooperation (the new section of the Code is entitled 'European administrative cooperation'), have been set in motion.

The Polish national AFCOS is the Department for the Protection of EU Financial Interests (*Departament Ochrony Interesów Finansowych Unii Europejskiej*). It serves as a contact point for OLAF and operates on the basis of administrative law only. Under that heading, the Department also provides assistance to OLAF, at its request, with regard to on-the-spot controls and inspections carried on the territory of Poland, following Regulation 2185/1996. As in other areas of the law (except competition law), all actions undertaken within the framework of cooperation require proceedings to be opened on the basis of a formal decision.

In fraud cases, the interviewing of persons is possible and is provided for in the Code of Administrative Procedure and in sectoral acts. The authorities may interview witnesses or parties to the proceedings, who are entitled to rely on the privilege against self-incrimination; a witness may refuse to answer a question if such an answer could expose him or her (and close relatives) to criminal liability or could result in a breach of the obligation to maintain professional confidentiality. The interviewing of a party to the proceedings is a separate evidentiary measure; it is always facultative and may be ordered if other evidentiary measures have been exhausted and material facts in the case have not been clarified.

88 UK report, chapter 6.2.4
89 Chapter 6.3.1.
90 Chapter 6.3.2.2.

Generally, Polish public administration authorities rely heavily on documents supplied by the parties or seized during searches. Relevant provisions are found mainly in sectoral legalisation, including tax provisions that oblige undertakings to retain certain documents and to produce them on demand. Neither the Code of Administrative Procedure nor relevant substantive statutes provide for any privilege against self-incrimination which may be invoked against such a production order.

In practice, parties have recourse to professional attorneys. The attorney may take part in all actions within the proceedings, including interviews. He or she may assist the party being interviewed. He or she may also ask questions during the interview, usually after the questions asked by the interviewing official. LPP is not protected as such in administrative law.

In principle, in Polish administrative proceedings the production of any piece of evidence requires a production order to be issued, although many authorities rely on a summons. Both a summons and production orders contain compulsory measures; sanctions apply in both situations and no remedies are available against production orders and a summons as such. The addressee of the production order cannot therefore challenge such acts directly, but he or she does have the possibility to challenge a fine that has been imposed upon him or her for a failure to comply with the order.

France

The French AFCOS is the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude*/DNLF), which is a coordinating body. This Office interacts with a variety of authorities that are more or less easily identifiable according to the sector concerned. First of all, there are a number of administrative services. For revenue, the Customs Administration appears to be particularly important; expenditure control is divided between several administrations. The latter administrations may have powers to request documents and to carry out both on-site and off-site inspections, but they do not in principle have judicial police powers. Secondly, judicial investigation services may be of relevance, depending on the case. In practice, the Financial Prosecutor's Office (*Parquet National Financier*) and a special investigative department (the Central Office for the Fight against Corruption and Financial and Tax Offences (OCLCIFF)) are particularly relevant. A third potential partner is the hybrid investigative services consisting of public officers who are not *stricto sensu* part of the judicial police, but are especially authorised to act on the basis of the Code of Criminal Procedure (e.g. the National Judicial Customs Service).

What appears to hamper the cooperation with OLAF in France is the uncertainty concerning the applicable rules for cooperation with OLAF. The creation of the DNLF has not been accompanied by the explicit and specific recognition of the powers and actions of OLAF in domestic legislation. There is, for instance, no provision on the thresholds to be applied in proceedings carried out at its request. Therefore, national thresholds (if there are any) apply in these circumstances. The French report indicates that cases of fraud affecting the EU budget, including cases referred by OLAF, systematically lead to the initiation of an investigation (though not always of high priority). By consequence, the risk of nullity, which might weaken or even bring the investigative work to a halt, leads the national judicial authorities – which are bound by the secrecy of the investigation – to observe very great caution regarding the communication during the investigation with OLAF.[91]

91 Chapter 8.2.2. Interestingly, the French report notes that such communication is often foreseen as being in the public interest for, for instance, the national tax administration or administrative authorities with sanctioning powers (e.g. ADLC).

The foregoing seems to imply that, though theoretically possible, the relevance of judicial powers for OLAF investigations is limited.

Regarding the *administrative* powers (the interviewing of persons), it is possible to distinguish between the power to summon and hear a person, on the one hand, and the power to receive information and justifications within the framework of the power to access business premises, on the other hand (on-site interviews). Such powers are granted to all the counterparts of the EU authorities of this study (including OLAF), either explicitly or implicitly. These are considered non-coercive and mere administrative powers. They may be used against any person, suspected or not. A formal decision is not required.

All counterparts of the EU authorities also have the power to request and obtain records or documents (*droit de communication*), as an autonomous measure or in the setting of an on-the-spot check. This, too, is considered to be a non-coercive measure. Records and documents are submitted 'on a voluntary basis', even though a refusal to hand them over is a criminal offence. The measure does not require judicial authorisation or a formal decision, nor special grounds.

Although the right not to contribute to one's own incrimination already applies at the investigation stage in the various administrative procedures, as well as, *a fortiori*, in the framework of criminal investigations, it is narrowly conceived and resembles the approach of the Court of Justice in competition cases.[92] For this reason, the powers to have access to all sorts of documents are barely limited by this right. Moreover, within the framework of the investigating powers of the national counterparts of the EU authorities, professional secrecy is always subject to limitations: information, documents, etc. may not be withheld on grounds of professional secrecy (except for 'officers of the law', especially lawyers).

Regarding the available remedies, the French approach is that if proceedings are brought against an undertaking following an administrative inquiry or if a penalty payment or penalty is imposed on an undertaking, the legality of the requests for information may then be challenged in such proceedings. Although non-cooperation may lead to sanctions, the measures discussed in the above are not considered as coercive measures; therefore, they do not require judicial authorisation or a formal decision. In that way, coercion seems to refer to the use of physical powers to obtain the information needed.

Interestingly, the French report also makes mention of the fact that the jurisdiction of the Court of Justice under Art. 267 TFEU has not prevented the French Court of Cassation from recognizing the possibility (or even the duty) of French courts to review OLAF's action once the results of that action are included in the case file and, therefore, form part of the national criminal procedure. This is done in order to – according to the Court of Cassation – 'guarantee effective judicial protection'.[93] It follows that the courts may even, if necessary, annul these acts, in so far as they are included in the case file and are therefore subject to the rules of the CPC. This check also includes a verification that acts and reports adopted by OLAF 'do not find their necessary basis in definitively cancelled acts,'[94] in order to prevent a 'laundering' of evidence through OLAF investigations.

92 See chapter 8.3.0.
93 Chapter 8.4.
94 Ibid.

Provisional conclusions

All in all, on the basis of this comparative analysis we can draw a number of conclusions with respect to the OLAF framework in relation to interviews and production orders:

- Only the Netherlands seems to have introduced specific legislation implementing the obligation with respect to the relation between OLAF and national partners (in relation to Regulation 2185/96). Polish legislation on cooperation is on its way. This means that in all other cases the national legal bases for the availability of investigative powers for OLAF investigations (autonomous investigations), as well as the competence of OLAF to join national investigations (mixed investigations), remain tacit. This is sometimes remedied by opening national investigations and by allowing OLAF to join. But in other cases, national proceedings may also harm OLAF's interests. Several reports, particularly the French, indicate that this situation clearly affects OLAF's position (but also those of its national partners).
- We have also noticed considerable differences between the statutes and powers of the national partners, ranging from purely administrative powers to coercive powers under criminal law. The Netherlands, Germany and Poland regard OLAF as a purely administrative body and, in doing that, seem to disregard the often intrinsic connection between punitive and non-punitive investigations.[95] At the other end of the spectrum, the UK, France and Italy have made criminal law powers available, at least in theory. The German report also makes mention of the federal structure of Germany that may impose additional hurdles for smooth cooperation between OLAF and national partners (certainly when compared with competition law, banking law and CRA/TRs, which do have national partners at the federal level).[96]
- Partly (but not only) because of the foregoing, we notice differences in the scope and applicability of the privilege against self-incrimination and LPP; less so for the right to have access to a lawyer. Unlike the right of access to a lawyer, LPP is not specifically included in the EU framework for OLAF. It is recognized as a privilege in the legal orders involved in OLAF investigations. With respect to the *nemo tenetur* principle, Germany seems by far the most protective legal order; it has explicitly recognized *Auskunftverweigerungsrechte* also for witnesses, unlike, for instance, the Netherlands and the UK. It also recognizes (in some cases) the principle in relation to documents.
- The enforceability of the investigative acts depends on a number of issues, such as the availability of criminal law coercive powers, and the applicability of procedural rights or privileges (LPP for instance). In most of the legal orders involved OLAF partners can avail themselves of some form of coercive power, either through imposing fines/criminal prosecutions (for non-cooperation) or via physical force (police assistance or coercive measures). Practice does however appear to be different and is particularly problematic where the assistance of other national colleagues is needed. The German and Dutch reports make mention of the absence of sanctioning powers. In Italy, we have noticed that – under administrative law – requests for information and interviews cannot be enforced. However, the *Guardia di Finanza* can use – depending on the investigation – its own, more coercive measures.
- Finally, regarding legal protection, we can note significant differences in the availability of remedies. None of the legal orders introduces prior judicial authorizations for the measures discussed here. Germany connects the availability of a remedy to the enforceability of a

95 They do recognize this link in purely national investigations.
96 Chapter 3.5.

measure; where non-cooperation can lead to sanctions, a *Verwaltungsakt* is necessary. The United Kingdom offers remedies that are connected to the interests involved. The Netherlands, Poland and France, however, provide no remedies against specific investigative acts. Legal protection is said to be offered at the end of the proceedings, or by appealing against the fine that has been imposed for non-cooperation. Dutch civil courts have however stepped in this legal loophole and offer residual protection.

10.5.3 DG COMP

Requests for information (production orders), as well as the interviewing of persons, may take place within the setting of an on-site inspection or as a standalone measure. The **interviewing of persons** can take place on the basis of Art. 19 Reg.1/2003. This article states that any person may be interviewed for purposes of collecting information, but only on the basis of the consent of that person. If conducted at the sites of the undertaking, national authorities may join in order to provide assistance. In those cases, the interview will remain a competence for DG Comp conducting its own investigation.

Within the setting of on-site inspections, Arts 20 and 21 Reg. 1/2003 offer other possibilities for the Commission. Inspections can take place either on the premises of the undertaking (Art. 20), or somewhere else (including private homes, Art. 21). During on-site inspections, representatives of the undertaking may be asked for explanations concerning facts or documents (cf. Art. 20 (2)(e) Reg. 1/2003). In the case of an inspection of premises, powers are exercised upon the production of a written authorization, or ordered by decision. In the latter case, penalties for a lack of cooperation are possible and legal remedies at the EU Courts are available.[97] National authorities – upon their request or that of the Commission – may actively assist, using the same powers as the Commission has (Art. 20 (5) Reg. 1/2003). Legal doctrine seems to regard this provision as administrative assistance (*Amtshilfe*), implying that the actions of national partners are performed in their own name, but for the purpose of the Commission's inquiries.[98] That certainly holds true for the provision of physical assistance in cases of (expected) opposition (Art. 20 (6) Reg. 1/2003).

A third route for interviewing persons is then provided via Art. 22 Reg. 1/2003. Upon the request of the Commission, national authorities shall perform inspections under Art. 20 (apparently not Art. 21!) Reg. 1/2003 in accordance with their own law. The latter also implies that national procedural safeguards, not European ones, are applicable (within the standards of *Melloni*).[99] This means that – as was the case with OLAF – differences between the national legal systems can become relevant. In practice, however, Art. 22 is rarely used.[100]

The same set of rules is *mutatis mutandis* applicable to **production orders**, as far as on-site inspections are concerned. Arts 20 and 21 Reg. 1/2003 2 empower officials and other accompanying persons authorised by the Commission to examine the books and other records related to the business, irrespective of the medium on which they are stored, to take or obtain in any form copies of or extracts from such books or records, to seal any business premises and

97 Chapter 9.3.1.

98 Cf. M. Böse, 'The system of vertical and horizontal cooperation in administrative investigations in EU competition cases', in K. Ligeti (ed.), *Toward a prosecutor for the European Union* (2013), Vol. I, pp. 845-846; F. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (2005), p. 75, with further references.

99 Supra section 10.3.

100 This is confirmed by the Dutch and German reports, and during the second expert meeting in November 2016.

books or records for the period and to the extent necessary for the inspection. Non-cooperation in cases of an inspection decision can lead to the imposition of a fine or, with the assistance of national partners, the use of physical force.

Art. 18 provides for the power to require undertakings to produce all necessary information outside the setting of an inspection of premises. This power can take the form of a simple request or a decision. The difference is relevant for the enforceability of the request and the legal remedy available.[101] Except for a notification duty, Art. 18 Reg. 1/2003 reserves no specific role for the national authorities.

The foregoing means that European law has set its own autonomous standards in competition law. These standards also concern the applicable defence rights, including the privilege against self-incrimination, LPP and access to a lawyer during investigative acts.[102] As we will see below, these standards are also likely to be applied in ESMA and ECB regulations. Yet despite the relative autonomy of the EU framework from national law, we have noticed that particularly Art. 22 Reg. 1/2003 is a relevant provision in light of the interactions with the national partners of DG Comp. Therefore it is of relevance to OLAF. Under the regime of Art. 20 (5) national authorities moreover provide assistance to the Commission, albeit under the framework of EU law. How have these interactions been given shape by national law? Are there differences between the Member States in this regard?

Germany

Cooperation with the Commission follows the general rules; the investigative powers of the BKartA in domestic cases also apply to investigations at the request of the Commission (Art. 22(2) Reg. 1/2003). However, this option has not yet been used by the Commission. As said, it can still be of interest as a comparison for the OLAF setting.

The rules on administrative proceedings before competition authorities are laid down in the Competition Act. In practice, however, the BKartA does not make use of its administrative powers when cooperating with EU competition authorities. Rather, they usually open an investigation for regulatory offences (*Ordnungswidrigkeiten*). In those cases, the rules of criminal procedure apply, including provisions with respect to the rights of witnesses and defendants protecting the privilege against self-incrimination. Witnesses can refuse to produce documents, which means that production orders are easily rebutted in competition law cases and are therefore not of practical importance.

The application of the powers of the Competition Act (particularly Arts. 57 and 59) are thus of a theoretical nature. One important difference with the *Ordnungswidrigkeitengesetz* is that the privilege against self-incrimination does not apply to production orders. Requests for information on the basis of Art. 59 (not 57) of the Competition Act are formal decisions, implying the availability of remedies. It also means that non-cooperation is an administrative offence.

The Netherlands

Many of the findings pertaining to assistance being provided to OLAF also apply in competition law. This is because the legal framework is to a large extent the same and is based on the General Act on Administrative Law. The Dutch Competition Act does however on occasion pay explicit

101 Chapter 9.3.1.
102 Section 10.3.

attention to the vertical cooperation with DG Comp. Here, too, we can notice that the Netherlands has introduced specific legislation for vertical cooperation. If the Commission requests the ACM to act on its behalf, the appointed ACM officers have the administrative powers contained in Arts 5:15 – 5:19 GALA. These are complemented by those in the Competition Act and the Act establishing the Authority for Consumers and Markets.

The Competition Act covers both the assistance provided to investigations of DG Comp, as well as the execution of requests for assistance. In the latter (hypothetical) case, ACM officers use their national competences, including the power to conduct interviews in Art. 5:16 GALA. In that situation, the national safeguards, including the privilege against self-incrimination, also apply. The scope of this privilege has been extended in the Competition Act and applies to natural persons who work for the market organisation other than the ones that already fall under Art. 5:10a GALA.

In relation to LPP, we can notice a difference between Dutch law and EU law. The Supreme Court has decided that, in principle, both external lawyers and in-house lawyers enjoy legal professional privilege. The ACM has adopted a procedure concerning a lawyer's legal privilege, which states that if the person who needs to provide the information claims that the information in question is protected by legal privilege, this matter can be brought before a so-called legal privilege officer.

The United Kingdom

There are no specific rules on powers in the course of providing assistance to DG Comp. The national powers apply. Where the Competition Market Authority wishes to question an individual under formal powers, the CMA will provide the individual with a formal written notice. The CMA can fine any person who fails, without a reasonable excuse, to comply with a formal notice to answer the CMA's questions. The Competition Act 1998 also gives the CMA the power to require the production of information and documents when conducting a formal investigation into agreements etc. preventing, restricting or distorting competition, or abuse of a dominant position. The CMA can fine any person who fails, without a reasonable excuse, to comply with a formal information request.

With respect to the applicable safeguards – as in the assistance provided to OLAF investigations – any person being formally questioned or interviewed by the FCA or CMA may request to have a legal adviser present to represent his or her interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. And as in OLAF investigations, in English Law, communications between lawyers and clients are privileged and generally do not need to be disclosed. Of course, particularly in competition law, there is some question as to when privilege is actually available ('in-house' lawyers), because those communications are not privileged in EU competition law, but in English law they are.

Like in OLAF investigations, issues pertaining to legal protection (remedies) do not hinge upon the availability of force (fines/coercion), like in Germany. Actions for trespass, breach of privacy, et cetera, are open, usually retrospectively. Official action beyond the scope of a warrant, or without authority, will be actionable. And at any subsequent criminal trial, the fact that the evidence has been obtained unlawfully is a reason which might trigger its exclusion from evidence.

Italy

When it comes to the interaction with the European Commission, Italian law states that where the Competition Authority determines that competence should be attributed to the EU Commission, 'it shall inform the Commission of the European Communities and forward to it any relevant information at its disposal.' Also, when the AGCM receives a notification from the Commission that a formal procedure is to be commenced, it shall suspend any investigation, save for any aspects entirely of domestic relevance.

The powers available for national investigations of the AGCM are also applicable when providing assistance to the Commission. Providing information is a duty of the (legal) persons concerned and there is no exception under the right not to incriminate oneself. The AGCM can fine anyone who refuses or fails to provide the information or to produce the documents required without justification. The Authority may also orally request information and the disclosure of documents during the course of hearings or inspections. In such a case, the party concerned shall be notified thereof and a written record will be made with the same content as a written request.

The interview and production orders are therefore *de facto* measures which do not require any judicial authorization and they cannot be challenged before the courts. Their legality can only be challenged at the end of the proceedings if a fine is imposed.

Poland

The situation in competition law in any aspect thereof resembles the picture in PIF cases (regarding powers, safeguards and remedies). The President of the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów*/UOKiK) is the Polish counterpart of DG Competition. It is the competent competition authority for cooperation in proceedings of the Commission or national competition authorities of other Member States, as well as cooperation within the Network of European Competition Authorities (ECN).

The Antimonopoly Act provides for powers regarding cooperation with DG Comp through the provisions on the exchange of information and assistance during inspections. What is worthwhile mentioning is that, though LPP is not officially recognised by Polish administrative law, in competition cases both UOKiK and the Antimonopoly Court follow DG Comp's practice. Consequently, only external lawyers may invoke a LPP defence; internal lawyers are not protected by LPP.

France

Unlike in the area of PIF, the other three European authorities all have only one counterpart at the national level. For DG Comp this is the Competition Authority (*Autorité de la concurrence*/ ADLC). All of these counterparts are independent administrative authorities, vested with supervisory, investigative, disciplinary and administrative sanctioning powers. The ADLC is the competent national authority for cooperation with the Commission or the national competition authorities of other Member States. It takes part in the activities of the European Competition Network (ECN). Competition law offers an explicit and general legal basis for the application by the ADLC of all its investigative powers when applying Arts 101 and 102 TFEU in general and, in particular, when it acts at the request of the Commission.

The powers of all French national counterparts with respect to interviews and production orders are – with some exceptions in customs cases (OLAF) – very comparable and the considerations concerning OLAF in the previous section therefore apply accordingly. At the national level,

French proceedings are characterized by a separation between the exercise of supervisory or monitoring powers and the exercise of investigative powers (which is a matter of regulation, but also judicial enforcement). While the latter is closer to the powers of the judicial authorities, the former borrow more from the administrative tradition and profile of supervision. The former are also considered to be of a non-coercive nature, which means that coercive powers are not applied. Fines are however possible for non-cooperation. Interesting in this respect is the position of the Constitutional Council, holding that 'only documents voluntarily disclosed can be seized. The fact that a refusal to hand over the information or documents requested may give rise to an injunction under a compulsory penalty imposed by the Competition Authority, an administrative fine imposed by that authority or a penal sanction does not confer a different scope on the powers vested in the authorized agents.'[103]

Provisional conclusions

On the basis of the comparison bewteen the national reports, the following points must be made:

- Practitioners indicate (both DG Comp as well as the national partners) that Art. 22(2) Reg. 1/2003 is hardly used. We do notice on occasion that national authorities support the Commission for practical reasons. The powers of the European Commission are considered to be sufficient to perform the investigations on its own.
- Compared to OLAF, we can also notice much more uniformity in the statutes of the authorities concerned. A likely explanation for this is the converging influence of Reg. 1/2003. All partners are predominantly administrative bodies, with punitive powers. Where deviations occur, this seems to be connected to diverging systems of administrative punitive law. The German system of *Ordnungswidrigkeitenrecht* is, for instance, strongly based on criminal procedure and is also applied in cases of assistance to the Commission (instead of the provisions of the Competition Act). This has consequences for the scope of, e.g., the privilege against self-incrimination (production orders; documents). Dutch competition law, on the other hand (including administrative fines), is primarily still regarded as administrative law. As a result of EU competition law, however, Dutch competition law is the only area of administrative law where administrative authorities (after judicial approval) have the power of search.
- The foregoing analyses also reveal that the competition authorities (at the EU and national level) have autonomous sanctioning powers in cases of non-cooperation (financial sanctions). That, too, is different in the OLAF setting. The latter (and the AFCOS) often require cooperation by other national partners in cases of opposition by economic actors or other individuals.
- It comes as no surprise, given the information already available, that there are differences in the scope of the applicable fundamental rights standards. The issue of in-house lawyers in relation to LPP is well known. The privilege is not recognized as such in Poland and Germany in administrative law. Differences between national law and EU law consequently exist, particularly in the framework of on-site inspections. Yet in the UK and the Netherlands, the standards go beyond those of EU law, particularly with respect to in-house lawyers. The privilege against self-incrimination has received less attention. Many[104] national legal orders

103 As cited in the French report, chapter 8.3.1.

104 Not all, the UK report chapter 6.3.2.2 notes: 'For present purposes, all that is necessary to note is that the privilege against self-incrimination will not obviate an obligation expressed in a statute to respond to enquiries by the SFO.'

seem to follow the case law of Strasbourg, differentiating between materials that have an existence dependent on the will of the accused and materials that exist independently. The latter are, in principle, not covered by the principle. Regarding the scope of the privilege in relation to statements (interviews), it is not yet fully clear to what extent the Strasbourg case law differs from that of the Luxembourg Court, but there appears to be a difference.[105] On top of that, some legal orders also grant the privilege to witnesses (Germany), whereas others do not (or not explicitly; e.g. the Netherlands). Germany has acknowledged the applicability of the principle in relation to production orders in the *Ordnungwswidrigkeiten* procedure. Other countries have not done this (the UK, the Netherlands, Poland, Italy, France) and neither does EU law.

10.5.4 ECB[106]

Art. 9 (1) Reg. 1024/2013 notes that, in the cases mentioned therein, the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law. In addition to that, Arts. 10-13 Reg. 20124/2013 and the relevant provisions in the SSM Framework Regulation provide ECB with investigative powers in relation to interviews and productions orders. Those powers are exercised mostly in relation to significant entities.[107] Those articles deal, consecutively, with requests for information, general investigations and on-site inspections. Depending on the stage of the proceedings (from authorization to ongoing supervision to investigations), these powers are available to different divisions of ECB. As soon as an official investigation is started, the investigative powers are available to the Investigating Unit.[108]

Art. 10 concerns requests for information by a simple request in relation to the actors mentioned in that article. Unlike in competition law, the article seems to make no distinction between simple requests for information and requests for information by decision. It seems logical to assume that judicial review will be open if the nature of the request is obligatory. This, according to the transversal report, depends on the legal design of the request (a decision or not?). Formal decisions are rare, because it is difficult and time and cost-consuming to secure them.[109] As is obvious, professional secrecy (including banking secrecy) does not exempt the institutions from providing the information required.

Art. 11 Reg. 1024/2013 then deals with general investigations, which can be undertaken by decision. This also means that an appeal to the Court of Justice is open. A general investigation can include both oral and written explanations by the entities mentioned in Art. 10, as well as the interviewing of other persons upon consent. It also includes production orders. Both types of actions are covered by the same ECB decision. Non-cooperation is punishable with a fine. On-site inspections follow the same framework.

Like in competition law, the ECB framework contains very few references to procedural safeguards.[110] Recital 48 Reg. 1024/2013 states that LPP is a fundamental principle of Union

105 As to the EU courts' case law, see supra section 10.3.
106 The focus of this project has been on cooperation within the SSM framework.
107 The powers apply to LSEs in the cases provided for in Art. 6(5)(d) Regulation No. 1024/2013; see also Art. 138 SSM Framework regulation.
108 Arts. 123-125 SSM Framework Regulation.
109 Chapter 9.3.2.1, sub. a.
110 Art. 126 Framework Regulation is silent on the rights included in this project.

law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case law of the Court of Justice of the European Union (CJEU). The regulation is silent on the privilege against self-incrimination. However, there appears to be consensus among the persons interviewed for this project that the Court's standards in competition law also apply here.

The role of the national authorities in these investigations is partly different from that in competition law. NCAs can, after all, be included within the SSM structures of JSTs and OSITs. When applying the provisions of the regulations this construction resembles a form of *Organleihe*;[111] the power is granted to the ECB and the applicable law is EU law. The national authorities would then act as agents of the ECB,[112] and because the actions are attributable to the ECB, the remedies would have to be offered at the EU level.[113] Yet like in competition law, mention is also made of assistance (*Amtshilfe*) by the national authorities to the ECB (Arts 11 (2) and 12 (5) & 13 Reg. 1024/2013). Those articles resemble the provisions of competition law and include the use of physical force (the opening of doors, so to speak) in cases of obstruction.

It therefore appears that national authorities can be involved in ECB on-site inspections in a threefold capacity: either they are part of the ECB structure (JST/OSIT; *Organleihe*), or they provide assistance (*Amtshilfe*) on the basis of either EU law, or national law (the use of force). Additionally, ECB may instruct national partners to use national powers that go beyond the powers of the ECB (Art. 9 (3) Reg. 1024/2013). Such instructions could for instance cover those situations where national laws (investigative powers) have a wider scope *ratione personae* or *materiae* than EU law.

As there is some overlap with the sections on OLAF and DG Comp in the above, the following will focus mainly on those national features (powers, safeguards, enforceability, remedies) that are specific for banking law (SSM). It must be noted at the outset that the UK and Poland are not part of the SSM. These legal systems are therefore discussed only briefly.

Germany

Banking supervision is a shared task of the BaFin and the German Federal Bank (*Deutsche Bundesbank*). The German Federal Bank is responsible for ongoing supervision, i.e. the evaluation of documentation submitted by banks, inspection reports and annual financial statements and performing on-site inspections, yet the main responsibility lies with the BaFin that issues guidelines regarding the ongoing supervision by the German Federal Bank and is exclusively competent to order inspections and to adopt regulatory measures. Both authorities take part in the activities of the ECB following the rules contained in the *Kreditwesengesetz*/KWG.

The usual inspection powers are available to BaFin and the Bundesbank; they can request information about business activities, documents and, if necessary, copies of relevant documents from institutions or others. The privilege against self-incrimination is taken into account. A person obliged to furnish information may refuse to do so in respect of any questions the answers to which would place him/her or one of his/her relatives at risk of criminal prosecution or proceedings for regulatory offences. Different from competition law, apparently, a request for documents has to

111 See also Arts. 144-146 Framework Regulation on the composition of OSITs.

112 Art. 144 (2) Framework Regulation. The fact that the head can be an NCA staff member does not necessarily make a difference, because (s)he is appointed by the ECB.

113 It is after all an ECB decision. See further supra chapter 9.3.2.1.b.

be complied with, even if the content is incriminating. There is some controversy as to whether this constitutes to a breach of *nemo tenetur*. Recent case law seems to be leaning towards the idea of not using these documents as evidence in criminal proceedings.

As the relevant provisions apply to all types of undertakings that may have provided financial services, the undertaking in question may be a firm of lawyers or tax accountants or it may employ such persons. These persons have a confidentiality obligation, which would be breached if the lawyer or accountant were obliged to disclose information on their clients' conduct. In 2011, the Federal Supreme Administrative Court (*Bundesverwaltungsgericht*) held that the confidentiality obligation does not apply if a separate law demands the disclosure of information. Accordingly, professional secrecy does not hinder the interviewing of persons under the *Kreditwesengesetz*.

The provisions on the available remedies and legal protection further resemble the findings already introduced in the above.

The Netherlands

Assistance by the Dutch Central Bank includes enforcing the cooperation by those subjected to a general investigation or on-site inspection as referred to in Arts 11 and 12 of the SSM Regulation and the sealing of places, books and records. DCB officers exercise their national competences on the basis of Art. 1:71 AFS when the ECB meets resistance to an investigation or an on-site inspection. DCB officials also have the competence to seal.

During supervision by JSTs and inspections by the centralised on-site inspections division, lawyers do not have a very important role. The supervision and inspections take place in consultation and usually without resistance. Since there is no experience as yet with cooperation during investigations by the Enforcement and Sanctions Division, it is not possible to elaborate on the role that a lawyer has in those investigations.

The United Kingdom

The UK is not a participating Member State. The competent authority, the Prudential Regulation Authority (PRA), is a wholly-owned subsidiary of the Bank of England, and is a not an arm of government. When it investigates it uses its powers to investigate a matter under the Financial Services and Markets Act.

There is no explicit reference in the statute to interviews, and the procedure will frequently start informally, but the production power includes the authority to require answers to written questions. The FCA and PRA can require authorised persons to provide information or documents that are 'reasonably required' in connection with the exercise by either regulator of its statutory powers. 'Information' is not defined, but the FSA has relied on this provision to include replies to oral and written questions.

Italy

The Consolidated Law on Finance (TUF) gives the Bank of Italy the task of supervision for risk containment, stability and sound and prudent management, while CONSOB is responsible for the transparency and fairness of these entities' behaviour concerning investment products. The Bank of Italy is the designated NCA under the Single Supervisory Mechanism.

There is no specific rule at the national level in order to regulate cooperation with the SSM when it comes to the supervision of significant banks. National rules with respect to interviews and production orders also apply when Banca d'Italia is required to cooperate with the ECB. The interviewing of bank managers, auditors and executives by Banca d'Italia is meant to simplify

the exchange of information between the supervisor and the supervised entity. Production orders may be issued in order to fulfil its functions as the banking supervisor. The inspectors may ask the bank to disclose and produce certain documents and the bank cannot refuse to do so.

There is no specific protection for the right not to incriminate oneself and professional privileges are never mentioned. In fact, any refusal to answer or to disclose documents is a criminal offence. The presence of a lawyer is not explicitly mentioned. In principle this is not forbidden but it occurs very rarely.

Investigatory measures are not autonomously subject to judicial review. They may be challenged only by lodging an appeal against the main decision. In this respect, there are two different avenues: when the final decision by Banca d'Italia is an administrative measure, the judicial review is carried out by the Regional Administrative Tribunal in Rome and the appeal is sent to the Council of State. When the final decision is an administrative sanction, it will be subject to the authority of the civil courts.

Poland

Poland does not have the euro as its currency. It is not a participating member of the SSM System. Moreover, as yet, Poland has not concluded a close cooperation agreement with the ECB.

France

For the ECB, the Prudential Supervision Authority (*Autorité de contrôle prudentiel et de resolution*/ ACPR) is the relevant national partner; it is the national supervision authority for France for the purpose of the single supervisory mechanism (SSM). Besides its supervisory powers, it has the power to impose administrative enforcement measures and disciplinary sanctions. The Monetary and Financial Code was revised in 2013 in order to facilitate cooperation with ECB within the framework of the SSM. The powers of the ACPR are similar to those already analyzed in the preceding sections.

Provisional conclusions

- There are a few differences when the ECB framework is compared to that of OLAF or DG Comp (and ESMA). The most striking is, of course, the way national authorities are integrated into the ECB structure. Within the setting of JSTs, but also OSITs, national authorities operate as a part of the ECB structure (*Organleihe*) and this construction appears to have important consequences for the applicable law and the legal remedies. We have also noticed a slight difference (when compared to DG Comp) in the legal design of requests for information (Art. 10 SSM Regulation); it is not entirely clear to which extent such requests need a formal decision (as is the case in competition law and for ESMA) to produce binding effects for individuals.[114] Remedies will be open at any rate against a fine for non-cooperation on the basis of Art. 18(7) Reg. 1024/2013.
- In light of this, it comes as no surprise that ECB has a high level of autonomy. This is not only due to its strong information position in the stages of licensing and monitoring. Its powers and its means to enforce its requests for information (including interviews) have also been defined *in extenso* at EU level. There are hardly any references to national law. Quite surprisingly, little information has been provided on the scope and substance of the applicable safeguards. Mention is made of LPP at the EU level, but not of the privilege against self-incrimination or

114 This is why a remedy may be open on the basis of Art. 263 (4) TFEU; see supra chapter 9.3.2.1, sub a.

access to a lawyer. There seems to be consensus on the fact that these are defined at the EU level and follow those applicable in competition law.
– The foregoing also means that, theoretically, the assistance by national authorities is of most relevance in cases of opposition (but there is not yet much experience in that respect) or when ECB uses its powers to instruct NCAs. National reports do not make specific mention of the latter situation. Certainly, however, ECB can instruct NCAs to use national powers that are not available at EU level.[115]

10.5.5 ESMA

Many provisions from the ESMA framework seem to be derived from Regulation 1/2003, but also resemble the framework of the ECB under the SSM mechanism. Arts 23b, 23c and 23d deal respectively with requests for information (by simple request or decision), general investigations and on-site inspections. The latter two types of investigative action may take the form of decisions; in such cases, non-cooperation can lead to the imposition of penalty payments.[116] The powers during an on-site inspection are the same as those of a general investigation. They include: the examination of any records, data, procedures and other materials, the taking of certified copies of or extracts from such materials, the summoning of/ asking for oral or written explanations concerning facts or documents related to the subject matter and purpose of the inspection and to record the answers, the interviewing of any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation, and – this power is provided only to ESMA (not ECB, DG Comp, OLAF) – requesting records of telephone and data traffic.[117] These powers are also available to the Independent Investigating Officer (Art. 23e (2) CRAR).

References to safeguards are (only) found in Art. 23a CRAR, stipulating that the powers conferred on ESMA shall not be used to require the disclosure of information or documents which are subject to legal privilege. The article provides no further guidance on the scope and content thereof. Other fundamental rights – such as the privilege against self-incrimination – are not mentioned in the Regulation either.[118]

Regarding the interaction with national law, both the articles on general investigations and on-site inspections provide for the possibility that national partners provide assistance to ESMA (upon ESMA's request or on their own initiative; Art. 23e (4) and 23d (5) CRAR). Art. 23d (7-9) CRAR obliges NCAs to provide assistance in cases of opposition.

Art. 23 (6) CRAR deals with delegation. It states that ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in that article and in Art. 23c(1) CRAR on its behalf. National partners then have the same powers as ESMA. This article is to be read in conjunction with Art. 30 CRAR. The ESMA Guidelines and Recommendations on Cooperation including delegation between ESMA, the competent authorities and the sectoral competent authorities under Regulation (EU) No. 513/2011 on credit rating agencies provide for additional rules.[119] On the basis of those Guidelines, it becomes

115 This could be done, for instance, by requesting or instructing NCAs to refer a matter to the national criminal prosecution authorities.
116 Chapter 9.3.3.1, sub. a.
117 See also section 10.7.5.
118 Art. 22 CRAR provides that each Member State designates a competent authority for purposes of the Regulation.
119 See: <https://www.esma.europa.eu/sites/default/files/library/2015/11/2011-188.pdf> (last visited 10 April 2017).

clear that national authorities provide assistance either on the basis of the provisions for mutual assistance or via delegation; other means are not allowed.[120]

As indicated earlier,[121] the question is to which extent Art. 23d (6) truly concerns a delegation, i.e. a transfer of powers. The legal construction of the provision rather resembles a mandated power. This construction does not, after all, affect the responsibility of ESMA and does not limit ESMA's ability to conduct and oversee the delegated activity (Art. 30 (4) CRAR). As this construction seems to reduce the degree of discretion of national partners considerably (if compared to, for instance, mutual assistance), the pertinent question – that has not been answered to date – is to which extent it has consequences for the legal remedies available (at the EU or national level?).

What is also unclear is whether such orders to assist ('delegation') on the basis of Art. 23d (6) CRAR are in themselves (appealable) decisions.[122] The wording of the provision makes no mention of this; it states that ESMA may 'require' a national partner to conduct investigations.[123] Such an action by ESMA does not in itself seem to bring about a change in the legal position of the persons referred to in Art. 23b (1) CRAR. On the other hand, however, such a request means that the competent national authorities shall have the same powers as ESMA (and require an ESMA decision). Moreover, as national authorities appear to be under an obligation to respond to such a request,[124] there is much to be said for establishing a possible remedy at the EU level. Otherwise, the scope of legal protection to be offered in ESMA investigations would escape judicial control at EU level and become dependent on (diverging) national laws.[125]

Be this as it may, the foregoing implies that we will, once again, compare the national investigative powers, but also how they have been made available to ESMA investigations. Many practitioners indicate, incidentally, that they do not always use those national powers. This seems to be in line with the foregoing analysis, in which there appears to be a role for national authorities only in cases of so-called delegation (which is hardly – if ever – used and even then they would apply EU law) or assistance in cases of physical opposition.

Germany

The BaFin is the competent authority for the supervision of credit rating agencies and trade repositories. As a consequence, it is also the competent authority for cooperation with ESMA. The German report indicates that ESMA may ask the BaFin to investigate a case and to exercise the powers available according to national law; up to now, this has occurred in only a few cases. In its cooperation with ESMA, the BaFin exercises the powers of the competent national authority under EU law (§§ 17 and 18 *Wertpapierhandelsgesetz*). In addition, the general rules on domestic investigations apply.

120 Guidelines, para .36: 'ESMA is not however entitled to request a competent authority to perform an inspection or other supervisory task on its behalf except by means of a delegation pursuant to Art. 30 of the Regulation.' The German report however indicates that there have been cases where ESMA has asked BaFin to inspect business premises according to national law; chapter 3.3.3.

121 Section 10.2.

122 See also Schammo, supra note 3.

123 The Guidelines, para. 21, make mention of an ESMA decision, but it is unclear what this means precisely.

124 There is a consultation procedure (between ESMA and the national partners) in the Guidelines, but the decision to delegate appears to be ultimately in the hands of ESMA.

125 Cf. Witte, supra note 23, with respect to an instructions by the ECB.

Accordingly, the BaFin has the power to request information and documents from anyone. However, the duties of confidentiality (e.g. legal professional privilege) and provisions granting a right to remain silent must be fully respected. Unlike the corresponding provision in banking supervision, the relevant provisions require the BaFin to inform the person concerned of this right and the right to consult with defence counsel. Yet like in banking law (*Kreditwesengesetz*), the privilege against self-incrimination only applies to the disclosure of information, not to the production of documents. Legal professional privilege, however, has not become relevant in practice.

With respect to the enforceability of the measures and the remedies available, the situation more or less resembles our previous observations. The request for information or documents is an administrative act (*Verwaltungsakt*). As a consequence, according to German law, it may be enforced through coercive measures.

The Netherlands

The relevant authority is the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*/AFM). To date, no Dutch credit rating agency (CRA) has been registered with ESMA and there are no Dutch trade repositories (TR) either. Practical experience is therefore absent. Dutch law does provide for an explicit legal basis for cooperation with ESMA for CRAs, but not for TRs. The legal basis for providing assistance to ESMA is found in Art. 5:89 AFS. It only concerns CRAs; there is no similar provision for TRs.[126] This article also provides for the types of assistance mentioned in the Regulation (particularly the use of force). Those powers have been discussed above.[127]

Italy

The *Commissione Nazionale per le Società e la Borsa* (CONSOB) is the public authority responsible for regulating the Italian financial markets, in cooperation with Banca d'Italia. When it comes to European Cooperation, CONSOB carries out the tasks of cooperation with ESMA. The Italian report notes that when ESMA requires cooperation under Art. 23c of Regulation 1060/2009, Consob applies the existing rules on internal investigations. As a consequence, there is no special threshold to open an investigation because there is no such requirement even when it comes to ordinary Consob proceedings.

According to Italian law, (the Bank of Italy and) Consob may require authorised intermediaries to communicate data and information and to transmit documents and records in the manner and within the time limits that they establish. Consob may also request information from the staff of such entities. Such persons cannot refuse to cooperate or to answer questions because cooperating with the supervisor amounts to an obligation. In case of a breach of this duty, the persons in question might be prosecuted for the criminal offence of 'obstructing supervisory functions.'

There is formally no protection for the right not to incriminate oneself but usually the Consob staff, if they realise that the person being interviewed is making a self-incriminating statement, will interrupt the questioning. The rationale is to facilitate the exchange of information with criminal law enforcement.

The presence of a defence lawyer is not required by law nor is it contemplated, but it is tolerated in order to ease the use of the interview as evidence in a criminal trial (in Italy that

126 See chapter 4.2.1.
127 Section 10.5.4..

implies that the defendant should always have the right to request the presence of a lawyer). In practice, leading managers are usually accompanied by lawyers whose presence is allowed by Consob inspectors. They may assist but they usually do not intervene during the interview. Their presence is a means of ensuring the right not to incriminate oneself.

Administrative measures or decisions are subject to judicial review. An appeal can be brought against the decision to apply a sanction.

The United Kingdom

The Financial Conduct Authority (FCA) and the Competition and Markets Authority (CMA) have 'concurrent powers' in the area of financial services. As the FCA derives its powers from the Financial Services and Markets Act 2000 the provisions that were discussed for the ECB framework also apply here.[128]

Poland

The Polish counterpart of ESMA is the Financial Supervision Authority (*Komisja Nadzoru Finansowego*/KNF), which has been established to exercise supervision – inter alia – over credit rating agencies and trade repositories. As indicated in the above, there is no general framework (as yet) for cooperation with EU authorities. The Act on Financial Market Supervision however provides KNF with the powers to do so. It has been appointed as the competent Polish authority in the ESMA framework and it provides ESMA with all the information necessary for the exercise of its duties.

The content and scope of the framework very much resemble the applicable rules already discussed above. The interviewing of persons is possible and provided for in the Code of Administrative Procedure and in sectoral acts. The authorities may interview witnesses or parties to the proceedings, who are entitled to rely on the privilege against self-incrimination; a witness may refuse to answer a question if such an answer could expose him or her (and close relatives) to criminal liability or could result in a breach of the obligation to maintain professional confidentiality. The interviewing of a party to the proceedings is a separate evidentiary measure; it is always facultative and may be ordered if other evidentiary measures have been exhausted and material facts in the case have not been clarified.

Generally, therefore, Polish public administration authorities rely heavily on documents supplied by parties or seized during searches. Relevant provisions are found mainly in sectoral legalisation, including the Financial Supervision Act that obliges undertakings to retain certain documents and to produce them on demand. Neither the Code of Administrative Procedure nor relevant substantive statutes provide for any privilege against self-incrimination which may be invoked against production orders.

In practice, parties have recourse to professional attorneys. The attorney may take part in all actions within the proceedings, including an interview. He/she may assist the party being interviewed. He/she may also ask questions during the interview, usually after the questions asked by the interviewing official. KNF strictly follows the Code of Administrative Proceeding which is silent on LPP. Therefore, KNF does not recognise LPP as a legitimate and justified defence against a production order. The Polish report makes mention of two decisions by KNF where undertakings were fined for refusing to submit documents, claiming that the documents in question were covered by LPP.

128 Section 10.5.4.

In principle, in Polish administrative proceedings, the production of any piece of evidence requires a production order to be issued, though many authorities rely on a summons. Both summonses and production orders contain compulsory measures; sanctions apply in both situations and no remedies are available against production orders and summonses as such. The addressee of the production order cannot challenge it directly, but does have the possibility to challenge a fine that has been levied against him or her for a failure to comply with the order.

France

The *Autorité des marchés financiers*/AMF is an independent administrative authority with its seat in Paris; it has been granted administrative enforcement powers. The power to impose sanctions is given to the Enforcement Committee which enjoys full decision-making autonomy. The AMF is the competent CRAR authority (and also for EMIR). In 2013, the specific provisions on the power of the AMF to carry out investigations concerning CRA were repealed in order to take account of the new powers of ESMA. Since then, the Authority may apply its powers to comply with the requests of the ESMA on the basis of a general provision in the Monetary and Financial Code. Similar arrangements to those mentioned before in competition law would then apply to the AMF. According to the French report, ESMA has not delegated a supervisory mission to the AMF concerning a credit rating agency and has not requested the assistance of the AMF to carry out its mission. As yet, therefore, there are no precedents in this respect.

10.5.6 Conclusions

What can we learn in respect of the comparative analysis of the legal frameworks of the different authorities and their interactions with the national legal orders?

Organizational issues

- We have already identified different models for such cooperation. It is without doubt that these models have great consequences for a) the designation/appointment of the responsible officials and the modalities for instructing them, b) the applicable law (powers and safeguards), c) the available remedies, and d) possibly – though outside the scope of this project – issues of (civil/criminal) liability for enforcement actions. There appears to be a certain pattern to the extent that ECB and ESMA have more possibilities to influence the actions of national authorities. All the models have in common, however, that they explicitly recognize the need to involve national authorities in enforcement efforts. This helps to deal with language problems and becoming acquainted with local customs, but also removes certain capacity problems at EU level. EU law, in turn, recognizes the need for nation states to retain oversight over the actions of EU authorities on their territories. This is why they are mostly allowed to be present (upon their request) during on-site visits.
- We can clearly notice that the degree of harmonization in the area of PIF is considerably lower than elsewhere. While banking law and CRA/TR supervision have designated the EU authority as the main responsible authority (or as the *primus inter pares* – competition law), they do pay a lot of attention to the set-up and powers of their national partners. That level of harmonization is lacking in the OLAF setting. OLAF partners at the national level can be subject to a criminal law statute, but also to an administrative law statute. We also see a clear difference between cooperation with partners on the revenue side (mostly customs or tax authorities) and expenditure. Particularly the latter appears to be problematic.

– Finally, on occasion, we have noticed that the primary point of reference for the national authorities is still national law, even when EU law is fully harmonized (ECB, ESMA, DG Comp).

Investigatory powers & enforcement (interviews and production orders)

– Specific national rules for providing assistance are mainly found – and this comes as no surprise – in the areas of banking law, ESMA and competition.[129] Those statutes generally make the corresponding national powers also available to assistance to EU authorities and explicitly allow for the sharing of information. The Netherlands has also introduced such rules for OLAF. But in most other countries national regulations hardly offer any guidance, and the same can be said for the OLAF regulations themselves, referring back to national law on many occasions.
– If compared to the other areas, the framework for OLAF is fragmented. In relation to OLAF's investigative powers, the applicable Regulations mainly define the type of data and information that must be made available, not the powers themselves (cf. Art. 7 Reg. 2185/96). Those are left to national law. We have noticed on occasion that OLAF partners at the national level have no possibility to enforce requests for information (interviews/production orders) by means of imposing sanctions for non-cooperation. They must rely on other actors at the national level for that. This is the situation, for instance, in the Netherlands. The German report also mentions that German authorities have the power to enforce cooperation, but that the sanctioning system does not apply to OLAF investigations.[130] Both are countries where cooperation with OLAF is seen as a purely administrative matter. Both countries, however, also take a different approach towards tax fraud at the national level, where the tax administration is involved also in criminal proceedings (with intrusive powers).[131]

Safeguards

– As regards the applicable safeguards, two main points must be made. First of all, despite the level of harmonization regarding the powers available, the regulations for DG Comp, ECB and ESMA hardly contain references to the applicable safeguards. These have been developed in competition law by the courts. The general assumption is that they also apply to ECB and ESMA. On the other hand, we notice that the OLAF framework does contain quite a number of references to the applicable safeguards, see for instance Art. 9 Reg. 883/2013.
– Moreover, we have noticed differences in the applicable standards, both at the EU and national levels. Those differences exist between the policy areas (differences between the standards for OLAF, ECB, ESMA and DG Comp) and between the different Member States. Those differences are most clearly discernible with respect to LPP, which is for instance not recognized as such in the OLAF framework, but does exist in in the case law on competition law and, presumably, also for ECB and ESMA. At the national level, the privilege is not recognized as such in Germany and Poland in administrative proceedings and thereby results in problems during on-site inspections. Differences also appear to exist in relation to the privilege against self-incrimination. Access to a lawyer seems to be recognized, implicitly or explicitly, in all cases. These differences highlight how important it is to clearly delineate the

129 See also supra section 10.4.6.
130 See chapter 3.5.
131 Cf. Luchtman, supra note 82.

different models of cooperation between EU authorities and their national partners (including the choice of the model).

Remedies

– Regarding the availability of remedies at the EU level, there is a connection between the legal design of a specific type of action and the duty to cooperate.[132] The main rule is that – if taken as a decision – cooperation is mandatory (enforced through punitive sanctions), but, at the same time, remedies are available.[133] These decisions, incidentally, usually do not concern specific acts of investigations but a decision to start a general investigation or an on-the-spot check. This regime applies to ECB, ESMA and DG Comp, but not to OLAF. As said, OLAF is highly dependent on the cooperation of other authorities (internal and external investigations).
– Finally, at the national level, regarding legal protection, we must note significant differences in the availability of remedies. None of the legal orders has introduced prior judicial authorization for the measures discussed here. Yet Germany appears to follow (or perhaps: has inspired) the EU approach. (Enforceable) duties to cooperate have been consequently introduced (only) by *Verwaltungsakt*. The United Kingdom offers remedies that are connected to the interests involved. However, remedies against specific investigative acts are not available in the Netherlands, Poland, France, or Italy. In the Netherlands, this is because such duties are said to follow directly from statutes (and therefore do not, by themselves, bring changes to a position); in France, the reasoning seems to be that a duty to cooperate does not amount to true coercive powers, i.e. the use of force. In these countries, remedies are available if a fine for non-cooperation is imposed or against a later decision in the main proceedings. On occasion, the civil courts do offer interim relief (the Netherlands).

10.6 On-site inspections

10.6.1 Introduction

This section contains an analysis of the legislative frameworks of the four authorities and their interactions with the national partners as far as on-site inspections are concerned. One-site inspections are defined broadly; they refer to the powers of the authorities to enter premises and inspect. The inspection can include access to places, digital systems and data, etc. The term on-site inspection is not used as a legal term in all fields. Alternative terms are the right to enter premises (*droit de visite*) or just inquiries. It is however limited to administrative site visits and inspections and does not include judicial search and seizure. When the legislative framework provides for the possible conversion of administrative on-site inspections into a judicial search, we will deal with this.

The analysis below focusses in particular on a number of aspects dealing with a) a comparison of the scope and legal design of the powers (both between the EU authorities, but also between the different national systems), b) the enforceability of the measures, c) the scope of the applicable legal safeguards, and d) to the extent that this has not been dealt with already in the specific transversal report or for reasons of coherence, issues of judicial review and legal protection.

132 See, in more detail, chapter 9.
133 The exception to this is found in Art. 10 SSM Regulation (a request for information), see section 10.4.4.

According to both European courts not only private persons, but also legal persons, such as undertakings, enjoy the right of respect for the home, as guaranteed in Art. 8 ECtHR and the corresponding Art. 7 CFR. This right is at stake when an European enforcement authority, with the assistance of a national authority, conducts an on-site inspection of professional and commercial premises. The former power is foreseen in the regulatory frameworks of the ECB, ESMA, COM and may play a role in OLAF autonomous investigations as well. To realize the required level of judicial scrutiny the regulatory frameworks of COM, ECB, ESMA foresee a system of a division of tasks between the Union and the national courts, as inspired by the CJEU case of *Roquette Frères*.[134] In this system, examining the necessity of an on-site inspection by an European enforcement authority is the exclusive competence of the Union courts, while the authenticity of the investigation decision and of the excessiveness and arbitrariness of the means employed is to be assessed by the national courts, *at least if national law requires prior judicial authorization*. There is however no possibility to contest OLAF autonomous investigations in the Member States before the Union courts, as the CJEU has considered in its *Violetti* decision that the OLAF report does not directly affect the rights of the persons concerned.[135] This is different when OLAF is inspecting within EU premises as civil servants have access to the EU courts.

10.6.2 OLAF/ internal inspections and on-the-spot checks

As we already know, OLAF's legal framework is the most complicated, particularly in relation to external investigations, which is the area where a comparison with the other EU authorities and their national partners is most relevant.

OLAF has broad powers of inspection as regards internal investigations. Regulation 883/2013 provides that the Office has the right of immediate and unannounced access 'to any relevant information, including information in databases, held by institutions, bodies, offices and agencies, and to their premises'. This information, according to OLAF's internal guidelines, includes also 'private documents (including medical records) where they may be relevant to the investigation'. Furthermore, OLAF can inspect the accounts of the institutions, bodies, offices and agencies in question. OLAF can take a copy of any document held by EU bodies and, in addition, it has a power of seizure of sorts: if necessary, it may 'assume custody of such documents or data to ensure that there is no danger of their disappearance'. At the end of the inspection, a report is drawn up and is countersigned by the participants to the inspections.

As regards external investigations, the legal framework is much more complex. Art. 3 of Reg. 883/2013 makes a references to Art. 9 of Reg. 2988/95 (which makes a further reference to sectoral rules) and to Reg. 2185/96. From these regulations, it emerges that on-the-spot checks and inspections of economic operators must be conducted 'in compliance with the rules and practices of the Member States concerned'. In other words, both EU law and national law define the type and reach of the powers available to OLAF staff. This often makes the scope of the available powers uncertain, like for example in the case of forensic investigations. As for the scope of the investigation, Art. 7 of Regulation 2185/96 provides that on-the-spot checks and inspections may concern, in particular: '- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators, - computer data, - production, packaging and dispatching

134 Case C-94/00, *Roquette Frères SA*, [2002] ECR I-09011 ECLI:EU:C:2002:603.
135 Cf. chapter 9.3.4.1, sub b, with further references.

systems and methods, - physical checks as to the nature and quantity of goods or completed operations, - the taking and checking of samples, - the progress of works and investments for which financing has been provided, and the use made of completed investments, - budgetary and accounting documents, - the financial and technical implementation of subsidized projects.' On the other hand, EU law does not provide for the power of sealing premises: '[w]here necessary, it shall be for the Member States, at the Commission's request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.' Neither does EU law provide for the powers to search and seize.

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

Under Regulation 595/91, inquires can be executed by national enforcement authorities at the request of OLAF and with the participation of OLAF inspectors. In that case OLAF inspectors may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials. Insofar as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, Commission officials shall not take part in such acts. In any event, they shall not participate in particular in searches of premises under national criminal law. They shall, however, have access to the information thus obtained. This clearly shows that the inspection powers of OLAF do not include coercive judicial powers such as search and seizure.

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

Germany

There is no general German legal framework for this power. The German AFCOS does not have operative competences. The operative part of on-the-spot checks and inspections is carried out by the revenue authorities in the case of revenue fraud. In the case of investigations by OLAF, the revenue authorities typically make use of an external audit. By ordering an external audit, the revenue authorities make sure that they can make use of their rights to enforce an inspection under the general tax law statute. This is especially important as OLAF lacks the power to enforce inspections.

Searches and seizures are not permitted in administrative taxation proceedings. However, in purely national cases, these proceedings are often combined with criminal proceedings where the revenue authorities have further coercive powers, but these are however not available for

OLAF inspections. The auditors may enter and inspect sites and business premises during office and working hours. During inspections, taxpayers have to submit documents to the employees or auditors, unless it would violate confidentiality obligations with their clients. Whether they are obliged to present documents that have been rendered anonymous is a point of controversy. Lawyers can be present during inspections. Ex ante judicial authorisation is not required for inspections. In case of non-cooperation, requests for information are enforced by the tax offices, the main customs offices or the revenue authorities of the Länder.

The Netherlands

In the Netherlands, separate legal provisions exist for the right to enter (see below for further details), the inspection of documents and copies, the right to enter a dwelling, the search of a dwelling, the power to seal, the inspection of property including taking samples and the specific inspection of property (a more specific version of the previous inspection). All the relevant national authorities have the right to enter and the right to inspect documents and copies. However, OLAF and DIC (the counterpart of OLAF) cannot enforce their powers autonomously in case of non-cooperation. Neither can they seal the premises. OLAF and DIC do not have powers to enter private dwellings or to search them.

The right to enter and the right to inspect documents and copies will now be explained , as all relevant NCAs have these rights. Below, the other rights will be discussed for the relevant authorities.

The right to enter**:**

A supervisory officer, taking with him/her the requisite equipment, may enter any place, except for a dwelling, without the consent of the occupant. The term 'place' includes vehicles, business premises and business sites, which may be entered without the permission of the person in question. The competence to enter does not include the competence to search, only to look around. This power is connected to the duty to cooperate[136], which has already been mentioned above, with regard to the power to interview persons and issue production orders. The same limitations apply here. Prior judicial authorization is not necessary, and this power may be used without a concrete suspicion of a violation.

The right to inspect documents and copies**:**

Supervisors may inspect business documents and records. This includes documents containing the administration of an undertaking as well as digital information on, for instance, a computer or hard drive. Only business information may be demanded, not documents or records of a personal nature. In addition, the supervisor may copy and print all documents and records, including digital information, and if the copies cannot be made on the spot, he/she may remove the documents and records for a short period of time. This information has to be returned as soon as possible and therefore Art. 5:17 Awb does not include the competence to seize documents and records.

The privilege against self-incrimination can provide exceptions to this power, as does legal professional privilege. Prior judicial authorization is not necessary, and this power may be used without a concrete suspicion of a violation.

136 Art. 5:20 (1) Awb.

In case OLAF wants to conduct an on-the-spot check it has the powers laid down in Art. 5:18 Awb, i.e. to inspect property and take samples which it needs to exercise in compliance with Dutch law. This means that they are competent to inspect, measure, weigh and take samples of property. For the purposes of exercising these powers the inspector may open packages. If any of the competences cannot be performed on the spot, the inspector may remove the goods for a short period of time.[137] If possible, the samples will be returned and the interested party may request to be informed of the results. Art. 5:18 Awb does not include the competence to search objects, but merely to investigate them. In addition, when assisting the Commission during an on-the-spot check the officials of the Dutch Customs and Information Centre (DIC) have the powers laid down in Art. 5:19 Awb, i.e. the inspection of property. Art. 5:19 Awb is a more specific version of Art. 5:18 Awb. A separate and specific provision was deemed necessary, because it concerns relative interfering powers which demand explicit safeguards. On the basis of Art. 5:19 Awb a supervisor may inspect means of transport, including vehicles, vessels and aircraft, which fall under the scope of his/her supervision (tasks). This is for instance the case when an inspector checks whether a vehicle fulfils the set conditions for transporting dangerous materials. Inspecting does not include the power to search. If a supervisor may reasonably assume that a means of transport carries cargo which falls under the scope of his/her supervision, he/she may inspect the cargo.

Italy

Unlike the situation in the Netherlands and Germany, the Italian structures for cooperation with OLAF do provide for the use of criminal law powers. The investigative powers are conferred on a unit of the *Guardia di Finanza* (financial police). This Financial Police unit may proceed to on-site inspections on the premises of the persons or legal entities concerned upon authorization of the judicial authority. This authorization is usually a decision of the public prosecutor and might be decided even in derogation of the rules of the criminal procedural code. Judicial authorization is only required when the business premises include a private dwelling, not when it is limited to business usage. Access to private homes is precluded without serious grounds to suspect a VAT breach and only with the aim of collecting business records, commercial registries or other documents that might prove the breach. Judicial authorization is also required to open closed mailboxes, locked boxes or safes. Professional secrecy and specific protection for law firms apply. In any case, a member of the management should be present during an on-site inspection. Seizures are only admitted when it is not possible to copy documents or when the persons concerned refuse to undersign the report contesting the execution of the on-site inspection.

The United Kingdom

For the UK (England and Wales) the AFCOS is the National Police Coordinators Office for Economic Crime. This is a police authority. Depending on the case, UK authorities assisting OLAF or joining OLAF in mixed investigations will have powers under tax law as well as criminal law. In the UK, the power to enter and seize documents is granted to the Serious Fraud Office. This requires a warrant from a Justice of the Peace, certifying that there are reasonable grounds for the appropriate suspicions. Where a search warrant is refused by a court, this can be appealed by the relevant authorities.

137 Art. 5:18(4) Awb.

Poland

The Polish national AFCOS is the Department for the Protection of EU Financial Interests (*Departament Ochrony Interesów Finansowych Unii Europejskiej*). It serves as a contact point for OLAF and operates on the basis of administrative law only. Under that heading, the Department also provides assistance to OLAF, at its request, with regard to on-the-spot controls and inspections carried on the territory of Poland, following Regulation 2185/1996.

The Polish public administration authorities do not usually have the authority to directly search the premises of the parties concerned or to directly seize documents or seal offices. These powers typically belong the police or the public prosecutor who conduct criminal investigations. However, the tax authorities and UOKiK are rare exceptions to this situation. Nether the Ministry of Finance nor KNF has this authority; it is only UOKiK which is competent to search premises and natural persons. KNF may only conduct simple inspections which do not include the competence to directly search premises. Therefore two scenarios must be distinguished. First, a simple inspection may be carried out by UOKiK or KNF. During such an inspection the authority is entitled to enter premises and buildings, to request accessible files, books and all kinds of documents to be made available or to request oral explanations which are relevant for the inspection. Second, an inspection connected with the searching of premises or natural persons may be ordered. This is an extraordinary measure and therefore only the Antimonopoly Court may issue an order to conduct a search upon a motion by UOKiK. KNF is not empowered to conduct searches.

France

The French AFCOS is the National Anti-Fraud Unit (*Délégation nationale de lutte contre la fraude*/DNLF), which is a coordinating body. As indicated previously, this Office faces a variety of authorities that are more or less easily identifiable according to the sector concerned.[138]

Except for the ACPR (see below), all EU counterparts have the power to 'search' professional and private premises and to seize documents. With regard to entering business premises, customs officers are vested with extended powers: they may access all public premises at any moment and without requiring consent. They may control persons, goods and means of transport. They may access business premises as well, after informing the competent public prosecutor beforehand, who may oppose the performance of the measure between 8am and 8pm. Goods or samples may be retained. Where they exercise their power to obtain the communication of documents, they may seize any documents (books, invoices, copies of letters, chequebooks, bank accounts, etc.) which are likely to facilitate the performance of their mission.

Provisional conclusions

All in all, on the basis of this comparative analysis we can draw a number of conclusions with respect to the OLAF framework in relation to on-site inspections:

– OLAF's powers are in reality quite clear for internal inspections, but very unclear as far as external inspections are concerned. This is mainly due to the fact that EU legislation substantially refers back to similar national powers under administrative law. As far as all countries have introduced specific legislation implementing the obligations and providing for a clear legal set of powers, OLAF is confronted with a legal puzzle that can vary from

138 Chapter 8.2.1.

one substantive area (customs, structural funds, agriculture, etc.) to another. This gap is only partially filled in by provisions, in some member states, of general administrative law.

– OLAF's powers, although still very dependent upon national powers, seem to be somewhat more explicitly regulated for mixed inspections, such as for instance in Art. 6 of Regulation 595/91, than for autonomous investigations in Art. 7 of Regulation 2185/96. In fact, for a definition of the relevant powers Art. 7 of Regulation 2185/96merely refers back to national law by stating that Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents. Art. 4 of Regulation 595/91 at least indicates the minimum powers (also by reference to national similar powers) in the case of mixed inspections and it deals with the minimum powers for Commission inspectors when the mixed inspection turns into a judicial investigation.
– The network structure with the AFCOs does not solve this problem, as they have very different statuses under national law. Many AFCOs have no operational powers at all and are purely coordination units.
– The operational investigative bodies under national law that can be triggered by requests for opening administrative investigations and that can execute, together with OLAF inspectors, one-site inspections have considerably different statutes and powers in the member states, ranging from purely administrative powers to coercive powers under criminal law. The Netherlands, Germany and Poland consider OLAF to be a purely administrative body and, by doing that, seem to disregard the often intrinsic connection between punitive and non-punitive investigations.
– This results in considerable problems when it comes to the design of the power to inspect premises. Just to mention a couple: EU law does not provide for the power of sealing premises during an one-site inspection. If and when this can be done thus completely depends on national law. Now that the EU Regulation deals with the gathering of computer data by referring back to national law, in which forensic inspections of documents (including digital images of hard disks) are not always explicitly regulated, it becomes unclear if and to which extent this power can be used.
– In case of non-cooperation by economic operators, OLAF cannot enforce its inspection powers by using police powers or by imposing daily penalty payments; it depends fully on national enforcement mechanisms. In some countries OLAF national counterparts do not have this power either.

10.6.3 DG COMP

Regulation No. 1/2003 provides for the Commission's powers to conduct 'all necessary' inspections of undertakings or associations of undertakings (Art. 20), or even of 'other premises, land and means of transport, including the homes of directors, managers and other members of the staff of the undertakings and associations of undertakings concerned' (Art. 21). The latter is a real novelty introduced by Regulation 1/2003 compared to its predecessor, Regulation 17/62. However, so far it has rarely been exercised in practice. During the inspection of undertakings Commission officials can:

- enter any premises, land, means of transport;
- examine books and other records (irrespective of the medium where they are stored);
- make a copy of them;
- seal business premises and books or records 'for the period and to the extent necessary for the inspection'; if the seals are broken, Art. 23(1) provides for the possibility to fine the undertaking.
- ask any representative or member of staff questions in order to explain 'facts or documents relating to the subject-matter and purpose of the inspection', and record the answers (see above under interviews conducted during inspections).

According to Art. 21(4) of Regulation 1/2003, during the inspection of private homes/dwellings, the Commission – as in the inspection of undertakings – has the power to enter, examine books and other records and take a copy thereof; on the other hand, the Commission does not have the power to seal premises or to ask for explanations concerning facts and documents.

Regulation 1/2003 does not provide for *ex-ante* judicial authorisation for the inspection of undertakings (by decision). This ex-ante judicial authorisation only comes into play when there is opposition or non-cooperation by an undertaking. In that case the Member State concerned shall afford the necessary assistance, where appropriate by the assistance of the police or of an equivalent enforcement authority, so as to enable the inspection to take place. If the assistance requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. This authorisation may also be applied for as a precautionary measure. On several occasions the ECJ had to assess inspections of undertakings without prior judicial authority – in line with national law - in the light of Art. 8 ECHR. The CJEU, although recognising that such measures have an impact on the right to private life, has held that prior judicial authorisation is not necessary, since it is not the only element considered by the ECtHR to assess a violation of Art. 8 ECHR. According to the CJEU, other defence rights – including the possibility to have a post-inspection judicial review – suffice in order not to violate the right to private life.[139]

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

Germany

There is no general German legal framework for this power. The German rules on the right to enter premises are thus especially important in the context of cases when the undertaking opposes an inspection. As it is not possible to know in advance whether an undertaking will oppose an inspection, the practice of the BKartA is to prepare for this scenario by asking for a judicial order that can be shown if necessary. The competition authorities have the right to inspect and examine the business documents of undertakings and associations of undertakings on their premises during normal business hours. In order to do so, persons entrusted by the competition authority to carry out an examination may enter the offices of such undertakings. Searches are permitted if there are sufficient grounds to assume that the premises contain documents that could be requested by the competition authorities. This shows that searches are not limited to business premises. § 58 GWB also allows the seizure of objects that may be important as evidence. However, it should be

139 See, for instance, joined cases T289/11, T290/11 and T521/11 *Deutsche Bahn e.a. v. Commission*, ECLI:EU:T:2013:404.

noted that searches under § 59 para. 4 GWB and thus under administrative law, albeit admissible in law, do not occur in practice. If the BKartA wants to search the premises of an undertaking, there is usually sufficient ground to suspect a regulatory offence. This means that the rules on criminal proceedings apply.[140] § 59 para. 4 GWB is therefore only important for supporting the Commission under Art. 20 of Regulation No. 1/2003. The right to enter premises can be applied vis-à-vis undertakings that are participants in the proceedings and thus defendants. There is no right to refuse a search or seizure in cases of possible self-incrimination.

German administrative law does not generally protect professional privilege. Accordingly, there is no rule that prohibits, for instance, the seizure of lawyer-client correspondence. However, when national competition authorities are providing assistance under Art. 20 of Reg. No. 1/2003, EU law applies in the manner that has been recognized by the Court of Justice. Yet if the competition authorities act at the request of the Commission, they will use the legal framework provided by national law (cf. Art. 22 (2) Reg. 1/2003). This will mean that there is no protection of lawyer-client confidentiality. Nonetheless, the authorities can be seen as implementing EU law and are thus bound by EU fundamental rights (Art. 51 CFR).[141] Therefore, it has been argued that the protection of legal professional privilege under EU law should also apply to national investigations in these cases, even if national law offers a lower degree of protection. Whether German jurisprudence will accept this reasoning in the future, remains to be seen.

There are no special rules for having access to a lawyer. § 14 VwVfG applies. According to this provision, the authorised person can participate in any act during the proceedings. This means that lawyers can be present at any time if they are duly authorised.

The search requires an *ex ante* authorisation by the Local Court (*Amtsgericht*) of the district where the competition authority has its seat, except for cases in which an imminent danger exists. The test is simple: there must be sufficient grounds to assume that documents will be found on the premises to be searched. Moreover, the search must be necessary, so other methods of investigation must be less promising. In practice, a judicial order is usually granted. The decision by the local judge can be appealed against following the complaint procedure in the Code of Criminal Procedure (§ 59 para. 4, 4th sentence GWB and §§ 306 ff. StPO).

There are several additional procedural safeguards. In case of a search, a record of the search and its essential results must be prepared on the spot (§ 59 para. 4, 6th sentence GWB). Moreover, there are specific requirements for a seizure. If neither the person affected nor any adult relative was present during the seizure or if the person affected or, in his/her absence, an adult relative explicitly objected to the seizure, the competition authority must seek judicial confirmation by the Local Court in the district in which the competition authority has its seat within three days of the seizure (§ 58 para. 2 GWB). The person concerned can always ask for judicial confirmation (§ 58 para. 3 GWB). In cases of non-cooperation, the national authorities may enforce investigative powers. They use their own employees, but can also use third parties (e.g. accountants) for the inspection.

The Netherlands

In the Netherlands, separate legal provisions exist for the right to enter, the inspection of documents and copies, the right to enter a dwelling, the search of a dwelling, the power to seal, the inspection of property including taking samples and the specific inspection of property (a more specific

140 § 81 GWB, §§ 2, 46 para. 1 OWiG.
141 Supra section 10.3.

version of the previous inspection). All the relevant national authorities have the right to enter and the right to inspect documents and copies. Only the ACM, the counterpart of DG Comp, has the right to enter a dwelling and to search it. It also has the power to seal and to inspect property, including taking samples and the power to inspect a property (the more specific version).

It is important to note that with respect to the rights/powers mentioned in this section, the ACM – like the DNB and the AFM – has the possibility to enforce its power, autonomously or with the help of the police, in case of non-cooperation. As said, the DIC and OLAF do not have such powers.

The ACM has the power to enter premises and to inspect documents as provided for under general administrative law (see OLAF above). As regards the privilege against self-incrimination with regard to the power to inspect documents and to take copies, Art. 12g Iw ACM extends the scope of a lawyer's legal privilege to correspondence between a lawyer and the market organization that is in possession of the market organization or its *de facto* director. Also, external lawyers and in-house lawyers fall under the scope of Art. 12g Iw ACM, except in the situation in which EU competition law is applied, i.e. when ACM officers assist the Commission with the enforcement of EU competition law. The parliamentary records on Art. 12g Iw ACM do not specify which information falls under the scope of this article.

Furthermore, the ACM is the only national competent authority that has the power to enter a dwelling without the permission of the occupant. It may be used when the Commission asks the ACM to conduct an on-site inspection under Art. 20 Regulation 1/2003, although, contrary to Art. 21 Regulation 1/2003, Art. 20 does not explicitly include the possibility to enter dwellings. The power to enter a dwelling without permission includes the authority to investigate objects that officials encounter and discover by chance. It does not include the right to specifically search a place. Before entering a dwelling without the consent of the occupant ACM officers need to attain authorization from the investigative judge at the District Court of Rotterdam. If the Commission conducts an inspection as referred to in Art. 21 (1) Regulation 1/2003, it needs to gain prior authorization from the investigative judge at the District Court of Rotterdam as well.
Moreover, the ACM has the power to search a dwelling when it conducts an on-site inspection on behalf of the Commission. The searching of a dwelling without the permission of the occupant is allowed in so far as the use of this power is reasonably necessary for the exercise of the powers in Art. 5:17 Awb. Before the ACM officers can search a dwelling they also need to obtain authorization from the investigative judge at the District Court of Rotterdam. The ACM also has the power to seal when it conducts an on-site inspection for the Commission.

Lastly, the ACM has the right to inspect property including taking samples. ACM supervisors are competent to inspect, measure, weigh and take samples of property. For the purposes of exercising these powers the supervisor may open packages. If any of the competences cannot be performed on the spot, the supervisor may remove the goods away for a short period of time. Art. 5:18 Awb does not include the competence to search objects, but merely to investigate them. The difference is that in the case of an investigation, the supervisor knows where the desired objects are located. In the case of a search, the investigator looks for something whose precise location is still unknown.

United Kingdom
The most formal links with the EU are in respect of competition law, and here the distinction between the Art. 101/102 investigation of a corporation and the investigation of personal liability

for cartel offences is significant. The CMA directly applies EU competition law (Arts 101 and 102 TFEU) and investigates autonomously, but with the active assistance of national authorities. The CMA has joint responsibility with the Serious Fraud Office (SFO) for the investigation and prosecution of offences involving cartels under the Enterprise Act 2002. The default position in English law is that entry to private premises or land requires a warrant from a Justice of the Peace. The Competition and Markets Authority (CMA) has the power to search, using such force as is reasonably necessary.

What if there is a search of premises and material is seized, or electronic material is accessed, some of which is subject to legal professional privilege and some not? In *R (on the application of Colin McKenzie) v Director of the Serious Fraud Office*, the procedure set out in the SFO's Handbook for isolating material potentially subject to LPP, for the purpose of making it available to an independent lawyer for review, was held to be lawful. The purpose is to ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer to establish whether privilege exists. The court ruled that the SFO may use in-house technical experts to isolate privileged files, rather than external contractors. The use of the SFO's in-house lawyers as 'independent' lawyers to determine whether material was subject to LPP would be unlawful. However, using them to determine whether material may or may not be subject to LPP at the preliminary stage before sending them out to be assessed independently was not.

Italy

Dawn raids relating to the application of EU and Italian competition rules are carried out by the Italian Competition Authority (AGCM), but only when it has sufficient evidence of the existence of an infringement. These elements are set out in the AGCM's decision to open an investigation, which is usually served on the parties at the outset of an on-site inspection. The main goal is to gather evidence, in particular documents. The term 'document' refers to graphic, photographic or cinematographic, electro-magnetic or any other kind of representation of content, including internal and unofficial documents which have been produced and are used for the purposes of the undertaking's operations, as well as any other document that is produced by or is stored on a computer medium.

The AGCM does not have the power to search residential premises.[142] However, where the AGCM accompanies DG Comp on an inspection of residential premises, it can search residential premises, provided that a specific Court order has been issued. The search is limited to the presumed facts indicated in the decision to open formal proceedings. The AGCM can also order the production of specific documents and information during the inspection.

The company is under a duty to cooperate and to provide documents and information that are not misleading. The AGCM may impose fines against companies that refuse or fail, without objective justification, to provide the information or produce the documents requested. The same applies to companies refusing to submit themselves to on-site inspections. The AGCM does not have coercive power to force parties to cooperate, but it can carry out searches of business premises without previous notice with the assistance of the Tax Police. The police do have the power to search for evidence without the consent or cooperation of the undertaking. Only in some specific circumstances (e.g. the searching of a person, locked doors, documents covered by legal privilege) is a prior court order necessary.

142 Law 287/90 and Art. 10§5 of Decree 217/98.

In national cases, the AGCM board shall authorize inspections proposed by the offices on the premises of any party deemed to be in possession of company documents that are of relevance to the investigation.

Confidentiality and professional secrecy are strictly limited; they only provide exceptions if the AGCM 'acknowledges particular requirements of this kind that have already been brought to its attention'. The undertaking concerned has the right to receive a copy of the AGCM's decision to open the investigation, within which the purpose of the dawn raid is set out. It also may have the assistance of legal advisers during a raid, but the inspection cannot be delayed by this.

Poland

Polish public administration authorities do not usually enjoy the power to make on-the-spot visits to the parties concerned or to directly seize documents or seal offices. The rare exceptions to this situation are the *UOKiK* and the FSA (financial services). Both authorities have the right to enter, but only the Office of Competition and Consumer Protection (*UOKiK*)) has the right to search.

Two types of searches must be distinguished in Polish competition law. Firstly, with regard to vertical cooperation the law provides for a possibility to conduct a search at the request of the European Commission in the cases described in Art. 22 of Regulation No. 1/2003/EC and in Art. 12 of Regulation No. 139/2004/EC, without instituting separate proceedings (Art. 105i of the Act on Competition and Consumer Protection). There is no need to formally open national administrative proceedings, as such a search is conducted as part of the proceedings opened by the European Commission. In this scenario it is the Commission which conducts the search and the national competition authority assists the EC in this respect. It should be understood that although the undertaking may object to the inspection, the role of the assisting employees of UOKiK will be to overcome this objection by producing authorization from the Polish courts to make the search. It is important to note that the role of the employees of the UOKiK will be simply to allow the European Commission to continue its search and not to replace the EC during this search.

The second type of search are searches conducted within the framework of national administrative proceedings. In this scenario it is the national competition authority which conducts the search and it will share evidence with the European Commission if required. Such a search may be conducted by the police (Art. 91 of the Act on Competition and Consumer Protection) or by officials from UOKiK (Art. 105n of the Act on Competition and Consumer Protection). The results of such a search may be communicated to the Commission. In this event, the Competition Act enables the UOKiK to authorize representatives of the European Commission to take part in such a search as assistants.

A search of dwellings may be conducted by the police, but only when this is allowed by the courts at the request of the President of the UOKiK. Such a search may only take place if there are reasonable grounds to presume that any objects, files, records, documents and data carriers within the meaning of the regulations on the computerisation of operations of entities performing public tasks are stored in residential premises or any other premises, real property or means of transport, and such objects may affect the determination of facts which are material to pending proceedings. An authorized employee of the Office may participate in such a search.

A search of the premises of an undertaking may be conducted by the President of the UOKiK, with the consent of the courts, in cases of competition-restricting practices, in the course of preliminary proceedings and antitrust proceedings, in order to find and obtain information from files, records, official letters, any kind of document or information technology data carriers,

systems and devices, and other items that might amount to evidence in the case, if there are grounds for assuming that the information or items concerned are located in those places. Regarding the material scope of a search, the party conducting the inspection shall be authorised to:

1. enter land and buildings, units within premises, or other areas within premises and means of transport held by the inspected party;
2. request access to files, records, all kinds of official letters and documents and copies and extracts thereof, electronic correspondence, information technology data carriers within the meaning of the regulations on the computerisation of operations of entities performing public tasks, other devices containing information technology data, or of information technology systems, including access to information technology systems owned by another party containing data belonging to the inspected party, related to the subject matter of the inspection, to the extent that the inspected party has access thereto;
3. make notes concerning the materials and correspondence referred to in subparagraph 2;
4. request the inspected party to make copies or printouts of materials, correspondence referred to in subparagraph 2, as well as information collected on the carriers and in devices or systems referred to in subparagraph 2;
5. request the persons concerned to provide oral explanations concerning the subject matter of the inspection;
6. request the persons concerned to provide access to and hand over other items that may be evidence in the case**.**

The obligation to cooperate during inspections and searches is enforced through an administrative sanctioning mechanism.

France

All the counterparts of the EU authorities have the power to access business premises. This power entails the possibility to enter the premises and to gather explanations on the spot from any person (by means of an interview). As a non-coercive measure, it does not require judicial authorisation or a formal decision (subject to the inspection mission order), nor specific grounds. The scope of the measure is not always explicitly regulated. With respect to the powers of the administrative authorities, be it competition (ADLC), financial markets (AMF) or banking (ACPR), it should be limited to the premises of the legal persons falling within the remit of the Authority.

This power to inspect does not (in principle, see below under the extended powers of customs officials) authorise inspectors and investigators to search the premises or seize documents. The gathering of information and documents cannot be forced. This is why access to business premises does not require judicial authorisation.

Assistance by a lawyer is possible, but this right is rarely explicitly regulated: as regards access to premises by customs officers, ACPR and ADLC investigators, no special provision on legal assistance is foreseen; by contrast, the right to be assisted by a lawyer (and informed of the said right) is set out in Art. L621-11 MonFinC. In any case, the exercise of such a right does not have the effect of postponing the performance of the measure.

In comparison, customs officers are vested with extended powers: they may access all public premises at any moment and without requiring consent. They may control persons, goods and means of transport. With respect to business premises, they may access them after giving prior

information to the competent public prosecutor who may oppose the performance of the measure. Where they exercise their power to obtain the communication of documents, pursuant to Art. 65 CUstC, they may seize any documents (books, invoices, copies of letters, chequebooks, bank accounts, etc.) likely to facilitate the performance of their mission.

Except for the ACPR (see below), all EU counterparts have the power to 'search' professional and private premises and seize documents. To exercise this power, common requirements must be met. The overall philosophy lies in the fact that, in order to counterbalance the increased powers given to the investigative officers in the framework of searches and seizures, enhanced judicial scrutiny is organized upstream and downstream of the implementation of the measure. Indeed, prior judicial authorisation in the form of a reasoned ordinance handed down by the liberty and custody judge is first required. An appeal may be lodged against this decision (by the public prosecutor's office or the person against whom the search was ordered) before the first presiding judge of the Court of Appeal. The appeal is non-suspensive and may be subject to a further appeal on a point of law before the *Cour de cassation*. The judge verifies that the application for authorisation is well founded. The applicant must provide all elements of the information which would justify an inspection. The authorization procedure may be carried out without the prior notification of the undertakings concerned, in particular in order to retain the 'surprise effect', as in the case of ADLC investigations.

Searches and seizures take place under the authority and supervision of the authorising judge who may visit the premises during the inspection or decide to suspend or terminate it. He/she appoints police officers required to be present to provide assistance (by performing any requisition necessary) and to inform the judge on the progress of the inspection and make sure that professional secrecy and defence rights (in accordance with Art. 56 of the Criminal Procedure Code) are guaranteed. Where the inspection takes place at the office of a lawyer, the specific procedural safeguards set out in Art. 56-1 of the Criminal Procedure Code will apply. The degree of suspicion required refers to mere suspicions (i.e. information and documents of interest are likely to be found). The power entails hearings, the gathering of relevant information or explanations, the taking of inventories, the placing of seals, and a search and seizure. It concerns both professional and private premises as well as vehicles belonging to the occupant and located within the premises of the enterprise, as far as ADLC and customs officers are concerned. Investigators may seize documents and any information regardless on the medium relating to the prohibited conduct referred to in the judicial authorization. Diaries found on the premises visited may also be seized, as well as documents that are only 'in part useful' to the establishment of the conduct in question, the documents thus forming 'an indivisible and unique whole'.

In any event, investigators are in principle obliged to initiate, prior to a seizure, any measures necessary to ensure the observance of professional secrecy and the rights of the defence. Indeed, communications protected on this basis cannot in principle be seized. They must be returned or destroyed if they have been seized by virtue of an overall measure covering other documents falling within the scope of the investigation. E-mail accounts can therefore be seized, even in their entirety. Thus, for a period of time, the undifferentiated seizure of all of these communications was allowed as long as the mailbox contained documents which were useful for finding the conduct in question. Thus, this practice (global seizure, then restitution, on a case-by-case basis, of those communications that could not be legally seized) had become almost systematic. This situation has been the subject of abundant litigation which has led the Court of Cassation to review this system. Five decisions from 24 April 2013 have led to a change in the case law: 'The power

conferred on agents of the Autorité de la concurrence (...) to seize documents and information is limited by the principle of defence rights, which requires confidentiality of correspondence between a lawyer and his client'. It follows that it is for the First President of the Court of Appeal to find that the seized documents are subject to the protection of professional secrecy between a lawyer and his/her client and to annul the seizure of such correspondence.

Provisional conclusions
On the basis of the comparison of the national reports, the following points must be made:

- Compared to OLAF, we see substantive differences at the European and at the national level;
- At the EU level, Reg. 1/2003 contains an autonomous set of rules to inspect premises and even private dwellings in some specific circumstances. The 'referral back' to national law construction is not applied.
- At the domestic level we can notice much more uniformity in the statutes of the authorities concerned. A likely explanation for that is the converging influence of Reg. 1/2003. All partners are predominantly administrative bodies, with punitive powers.
- Both at the EU level and the national level there is a clear possibility to use even search powers in an administrative setting, sometimes subject to the condition that judicial authorities authorize it.
- The foregoing analyses also reveal that the competition authorities (at the EU and the national level) have autonomous sanctioning powers in cases of non-cooperation (financial sanctions). That, too, is different in the OLAF setting. The latter (and the AFCOS) often require the cooperation of other national partners in cases of opposition by economic actors or other individuals.

10.6.4 ECB

The ECB does not seem to have been denied any powers in this respect, at least compared to other EU enforcement authorities. The ECB (including its Enforcement and Sanctions Division) may undertake an on-site inspection at the business premises of the legal persons referred to in Art. 10 SSM (Art. 12 SSM). If necessary, the onsite inspection can be undertaken without informing the supervised entity (note: the obligation to notify the NCA is there in any case). The ECB inspectors can enter any business premises and land and have the investigative powers under Art. 11 (1) SSM, such as to require the submission of documents, to examine books and records and to take copies of such documents and obtain explanations (Art. 12 (2) SSM Regulation). Where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Judicial authorization is necessary if national law requires this (Art. 13(2) SSM). Unlike in competition law (Art. 20 Reg. 1/2003), it is not made dependent on (expected) opposition by the undertaking.

Germany
The *Bundesbank* and the *Bundesanstalt für Finanzdienstleistungsafusicht* (BaFin) may carry out inspections on the premises of the undertaking in the context of ongoing supervision. Powers

of search and seizure are not foreseen in the framework of ongoing supervision (§ 44 KWG). Furthermore, German law does not provide for a power to seal premises. There is no protection against self-incrimination, nor are forms of professional privilege mentioned in the law.

The BaFin also has the right to enter and inspect the business premises of those that have to comply with a request for information during business hours.[143] In order to prevent imminent risks to public order and safety, employees of the BaFin are allowed to enter private homes and business premises outside of general office hours, but only if there are sufficient grounds to suspect an infringement of the WpHG by the person who has to disclose information.

Again, there are no explicit rules for taking into account professional privilege or protection against self-incrimination. However, the right to enter these premises does not apply if someone can completely refuse to disclose information. This is true for private homes that belong to a person with a right to disclose information. In these cases, the rights to refuse information thus have an impact on the right of entry to business premises.

In the case of § 4 WpHG, prior authorisation is not necessary and, in general, ongoing supervision does not require a specific threshold. Accordingly, § 4 para. 4 WpHG allows for entry to premises if this is necessary for the performance of the functions of the BaFin.

In the case of non-cooperation, the BaFin enforces its decisions itself. It uses the measures available for the enforcement of administrative acts under the Administrative Enforcement Act (*VwVG*). These are acting in representation, imposing a coercive fine and the use of force. The BaFin can also use other persons or institutions for fulfilling its tasks.

Netherlands

The Dutch National Bank (DNB) has the powers derived from general administrative law (see above, under OLAF). Furthermore, the DNB has the power to seal, which it may use to assist the ECB when it faces opposition to an inspection.

United Kingdom

Both the Prudential Regulation Authority, the BoE (PRA), and the Financial Conduct Authority (FCA) have the power to search, using such force as is reasonably necessary. A magistrate's warrant is still necessary. The courts have emphasised on many occasions that the issue of a search warrant is never a routine operation.

Italy

The Banca d'Italia (BI) has the power to carry out inspections on the premises of supervised entities or the premises of external providers of the supervised entities. The BI may sometimes ask supervisors in other Member States to carry out an inspection on its behalf. Upon request, BI may carry out inspections on the premises of companies having their parent company in another Member State. BI may also allow foreign supervisors to participate in inspections at a supervised parent company in Italy which has branches subject to the foreign banking supervisor. There are no provisions provided for the case of ECB inspectors, but the last provision may offer a possible solution to allow ECB inspectors to participate as well.

There are two types of inspections: general inspections (the inspection of a whole bank) and sector-based inspections (focused on a bank's specific field of activity). The BI has two independent departments for off-site and on-site inspections. On-site inspections are based on

143 § 17 para. 3 WpHG in conjunction with § 4 para. 4 WpHG.

an annual plan for inspections and on confidential banking information and documents collected during supervision, and can consist of: 1) the investigation of a wide spectrum, 2) a targeted/thematic inspection, 3) a follow-up inspection.

A lack of cooperation concerning a dawn raid might lead to a criminal offence. When the supervised entity does not cooperate, BI may request the cooperation of the Italian Financial Police. Upon request, the Special Monetary Police Unit of the Financial Police may proceed to conduct financial investigations and on-site inspections.

Poland

Poland is not part of SSM/euro; on Polish national law, see also our comments in the previous section.

France

The Prudential Supervision Authority (ACPR) does have the general power to access business premises, see above under DG COMP. The ACPR does not have the power to inspect professional and private premises and seize documents. The SG or ACPR issues a letter of assignment specifying the purpose of the inspection and appointing the officials in charge (Art. L. 612-23 and R. 612-22 MonFinC). The mission statement must be brought to the knowledge of the controlled establishment, if it so requests. The SG thus decides to carry out missions of a general scope concerning all the activities of a supervised institution, or thematic missions, targeted at certain activities or lines of business. These missions may take place after prior notification but also unexpectedly. Within the framework of these missions, large-scale powers are conferred on investigators. In addition to the power to request information and documents, investigators may also access the computer equipment and data of the person being checked (Art. R. 612-26 MonFinC). Finally, the SG may, as in the case of permanent controls on documents, have recourse to external services. In practice, supervisors can stay for up to one year on the premises of the audited entity in order to verify, obtain a copy and hear the persons whose hearing is useful for the proper execution of the control.

Provisional conclusions

- There are a few differences when the ECB framework is compared to that of OLAF or DG Comp (and ESMA). The most striking is, of course, the way national authorities are integrated into the ECB structure. Within the setting of JSTs, but also OSITs, national authorities operate as a part of the ECB structure (*Organleihe*) and this construction appears to have important consequences for the applicable law and the legal remedies available.
- In light of this, it comes as no surprise that ECB has a high level of autonomy. There are hardly any references to national law.
- However, there seems to be some contradiction between EU law and domestic regimes when it comes to the sealing of business premises. Although EU law does provide for this, it is not always available at the domestic level.
- Also the need for judicial authorization for the inspection/search is not completely clear and depends to a large extent on the applicable national law.

10.6.5 ESMA

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

As is the case for ECB, judicial authorisation is necessary where national law requires this. Such authorisation may also be applied for as a precautionary measure (Art. 23d (8) CRAR and Art. 63 (8) EMIR). The national judicial authority shall check whether the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. When it controls the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds that ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement as well as the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall only be subject to review by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No. 1095/2010 (Art. 23d (9) CRAR and Art. 63 (9) EMIR).

Germany
See above, BaFin under ECB.

Netherlands
The Authority for the Financial Markets (AFM) has the powers mentioned above, under OLAF. Furthermore, the AFM has the power to seal when it assists ESMA. However, it exercises this competence on the basis of Regulation 513/2011.

United Kingdom
The Financial Conduct Authority (FCA) has the power to apply to a Justice of the Peace for a warrant to enter premises where documents or information are held.[144] The circumstances under which the FCA may apply for a search warrant include: 1) where a person upon whom an information requirement has been imposed fails (wholly or in part) to comply therewith; or 2) where there are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with, or that the documents or information to which the information requirement relates would be removed, tampered with or destroyed. A warrant authorizes (an FCA investigator under the supervision of) a police officer to: enter and search the premises specified in the warrant and take possession of any documents or information appearing to be of a kind in respect of which the warrant was issued or to require, in relation to any such documents or information, any person on the premises to provide an explanation of any document or information that appears to be relevant or to state where it might be found. A firm must allow the FCA to enter its premises with or without notice during business hours.

144 FSMA s.176.

Italy
The *Commissione Nazionale per le Società e la Borsa* (Consob) may conduct inspections as a supervisory measure. Consob (and BI) may carry out inspections of authorized intermediaries and require the display of documents and the completion of acts deemed necessary, also with regard to those to whom the intermediaries have outsourced important business functions. Each authority shall notify the other of inspections it undertakes. Consob (and BI) may request the competent authorities of other Member States to execute on-the-spot verifications with regard to branches of Italian investment companies, asset management companies and banks established on the territory of that Member State. The competent authorities of other Member States may also inspect branches of EU investment companies, asset management companies and banks that are established in Italy and EU AIFMS which they have authorized, but only after notifying BI and Consob. The competent authorities of other Member States may also ask BI and Consob to carry out these inspections on their behalf.

With regard to market abuse and insider trading, Consob may carry out on-site inspections in relation to any person who could be acquainted with the facts. When authorized by the Public Prosecutor, Consob may seize property that may be confiscated or conduct searches using coercive powers conferred upon the Financial Police. Consob may also ask the Financial Police to cooperate in this regard. If, in specific cases, Consob wants to investigate a person other than authorized intermediaries, judicial authorization is required to proceed to inspections.[145]

Poland
In financial cases, the Financial Supervision Authority (FSA), when conducting preliminary 'investigative' proceedings, is authorized to enter the premises of a business entity. The right of entry refers to the main headquarters of the undertaking, its branches or representatives on working days and during working hours, but in urgent cases also on non-working days and during non-working hours. The FSA has the right to access any documents, books and information carriers and the business entity is obliged to produce them at the demand of the FSA. They may also request to make photocopies, as well as to provide oral or written explanations. The (Vice-)President of the FSA may issue an order seizing a document or other information carrier if necessary for further proceedings. In the case of non-obedience, the police may be called to assist. An order to seize may be subject to an appeal to the acting authority, but this appeal has no suspending effect.

France
The Financial Market Authority (AMF) has the power to enter business premises and to search professional and private premises and seize documents. See above under DGCOMP.

10.6.6 Conclusions

What can we learn in respect of the comparative analysis of the legal frameworks of the different authorities and their interactions with the national legal orders?

145 Art. 187-octies §3 TUF.

Organizational issues

– We have already identified different models for such cooperation. It is without doubt that these models have great consequences for a) the designation/appointment of the responsible officials and the modalities for instructing them, b) the applicable law (powers and safeguards) and c) the available remedies. There appears to be a certain pattern to the extent that ECB and ESMA have more possibilities to influence the actions of national authorities. All the models do have in common, however, that they explicitly recognize the need to involve national authorities in enforcement efforts. During on-site visits national authorities are mostly present. Even in the case of autonomous inspections, including the ones of OLAF under Regulation 2185/96, national authorities will be needed to assist and eventually enforce.
– We can clearly notice that the degree of harmonization in the area of PIF is considerably lower than elsewhere. While banking law and CRA/TR supervision have designated the EU authority as the main responsible authority (or the *primus inter pares* – competition law), they do pay a great deal of attention to the set-up and powers of their national partners. That level of harmonization is lacking in the OLAF setting. OLAF partners at the national level can be subject to a criminal law statute, but also to an administrative law statute. We also see a clear difference between cooperation with partners on the side of revenue (mostly customs or tax authorities) and expenditure. Particularly the latter appears to be problematic. AFCOS partners do not really solve the problem, as their statute and powers are very different from one country to another.
– Finally, on occasion we have noticed that the primary point of reference for the national authorities is still national law, even when EU law is fully harmonized (ECB, ESMA, DG Comp).

Investigatory powers & enforcement (interviews and production orders)

– Specific rules for providing assistance are mainly found – and this comes as no surprise – in the areas of banking law, ESMA and competition. Those statutes generally make the corresponding national powers also available to assist EU authorities and explicitly allow for the sharing of information. The Netherlands has also introduced such rules for OLAF. But in most of the other countries national regulations hardly offer any guidance, and the same can be said for the OLAF regulations themselves as they refer back to national law on many occasions.
– Compared to the other areas, the framework for OLAF is fragmented. In relation to OLAF's investigative powers, the applicable Regulations mainly define the type of data and information that must be made available, not the powers themselves (cf. Art. 7 Reg. 2185/96). Those are left to national law. This referral is even stronger for autonomous investigations under Regulation 2185/96 than in the setting of mixed inspections under, for instance, Regulation 595/91. We have also noticed on occasion that OLAF partners at the national level have no possibility to enforce cooperation in the case of on-site visits by means of imposing sanctions for non-cooperation. They must rely on other actors at the national level for that.
– What, exactly, can be done during one-site inspections (the powers and the reach of these powers) is also problematic for OLAF, certainly in the light of lacking enforcement powers. Most of our EU agencies have sealing powers. OLAF does not and it is also unclear in many member states if OLAF's counterparts can apply these sealing powers. It is also unclear to which extent OLAF can apply forensic investigation techniques in the domestic legal orders.

– Finally, the borderline between coercive (inspection) and non-coercive (searching) powers is not always very clear. Even EU Regulations (e.g., Art. 6 of Reg. 595/91) take into account the fact that an administrative inspection can be converted into a judicial search. At the national level much depends on who is the counterpart and what is its legal framework.

Safeguards

– As regards the applicable safeguards, two main points must be made. First of all, despite the level of harmonization regarding the powers and regulations of DG Comp, ECB and ESMA hardly contain any references to the applicable safeguards. These have been developed in competition law by the courts. The general assumption is that they also apply to ECB and ESMA. On the other hand, we notice that the OLAF framework does contain quite a number of references to the applicable safeguards, see for instance Art. 9 Reg. 883/2013. These safeguards are, however, very much related to the interviewing of persons and do not deal specifically with one-site inspections.
– Judicial authorization for one-site inspections remains largely dependent upon national provisions, with the exception of an inspection and a search of private dwellings by DG COMP as provided for in Regulation 1/2003. Referring back to national law results in a very diverging picture in the member states.

Remedies

– Regarding the availability of remedies at the EU level, there is a clear distinction between ECB, ESMA and DG Comp, on the one hand, and OLAF on the other. In the Violetti case, the ECJ considered that the final investigation report by OLAF did not change the legal position of the persons concerned and could not therefore trigger action before the ECJ. As the other authorities also take final administrative enforcement decisions, their legal situation is completely different and is subject to control by the ECJ.
– At the national level, regarding legal protection, there is of course the possibility to challenge OLAF inspections if the evidence obtained is to be used in civil, administrative or criminal proceedings. Before the proceedings on the merits of the case, we note that there are significant differences in the availability of remedies. The United Kingdom offers remedies that are connected to the interests involved. However, remedies against specific investigative acts are not available in the Netherlands, Poland, France, or Italy.

10.7 Access to traffic data and recordings of telecommunications

10.7.1 Introduction

The interception of telecommunications is one of the most intrusive investigative powers. It is usually reserved for purposes of criminal law enforcement. The intrusiveness of the measures (in terms of their impact on the right to privacy and related safeguards at the national level)[146] then corresponds to the importance of the interests involved. Practice has however shown that it is very difficult in a large number of areas of socio-economic law to establish misconduct without such

146 See for instance Art. 10 of the German Basic Law (*Post- und Fernmeldegeheimnis*); supra 3.3.4. The Dutch report also mentions that, because of their intrusiveness, these measures are only available to the police and prosecution services; supra 4.3.4.

measures. This is probably why regulations in the area of market abuse for instance require that the competent authorities shall have, in accordance with national law, at least the power to require the production of existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions and to require, insofar as is permitted by national law, the production of existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to the investigation of certain infringements of market abuse regulations.[147] The importance of such powers increases when EU or national law consequently oblige undertakings or individuals to keep track of their communications (data retention).

This project also seeks to establish to what extent measures like these are also available to the EU authorities involved. We make a distinction between measures involving the content of telecommunications and measures to establish whether there has been contact, between whom and on which date and, possibly, at which place (traffic data). Real-time interception of telecommunications is outside the scope of this study; we have focussed on powers with respect to telecommunications that have occurred in the past.

It turned out that – with the exception of ESMA (see below) – none of the other authorities can explicitly avail itself of powers that relate to the interception of telecommunications. In some cases, data may however be made available through a production order (mostly traffic data).[148] Moreover, we did consider to which extent this also means that the EU authorities are prohibited from asking their national partners to use these powers (where available). Once again, such a possibility is highly dependent on the way the interaction between the EU authority and its national partner has been given shape.

10.7.2 OLAF

The EU report mentions that OLAF itself does not explicitly have this power.[149] Yet Regulation 2185/96 (on-the-spot checks) does not seem to exclude it either. Art. 7 after all stipulates that OLAF shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents.

Where national authorities have such powers for national purposes, the results must also be made available to OLAF in the setting of mixed investigations.[150] Of particular relevance in that setting is the provision of Art. 9 (2) Reg. 515/97 that in so far as national provisions on criminal proceedings reserve certain acts to officials specifically designated by national law, [OLAF staff] shall not take part in such acts. They shall, however, have access to the information thus obtained subject to the conditions laid down in Art. 3.

Most of the national reports mention that powers in the area of telecommunications (traffic data and recordings of communications) are not available for OLAF investigations. This appears to be different (only) in the UK (the police)[151] and France (the customs authorities). For the latter

147 Art. 23 of Regulation No. 596/2014 on market abuse (the market abuse regulation), OJ [2014] EU L 173/1.
148 Supra section 10.5.
149 Supra chapter 2.2.4.
150 Cf. Art. 9 (2) Regulation No. 515/97.
151 Supra chapter 6.6.3.

country, however, as was said before, there is controversy as to whether these powers can also be made available for the specific purpose of OLAF investigations. This is due to the absence of a specific national legal framework that sets out the conditions for cooperation between OLAF and its national partners.[152]

10.7.3 DG COMP

The foregoing considerations apply *mutatis mutandis* to DG Comp. Whereas such powers may be useful for discovering the relationships between undertakings and/or individuals, there are no specific powers with respect to telecommunications in Regulation 1/2003. Production orders fill this gap, at least to a certain extent (particularly traffic data, where available). It might still be the case, moreover, that these powers are made available to the national competent authorities. In that case, upon a request by the Commission on the basis of Art. 22 (2) Reg. 1/2003, they could also be used when assisting the Commission. It seems, however, as is the case with OLAF, that such powers are only available in the UK. The French report notes that the legislator did not extend this power to the competition authority (ADLC) in 2014. Consequently, the Constitutional Council decided in 2015 that the possibility for ADLC investigators to require telecommunications operators to provide access to traffic data was unconstitutional because the safeguards foreseen were incapable of sufficiently protecting the right to privacy.[153] If and when they exist in other countries, this is mostly in systems that provide for the criminal law enforcement of competition law.

10.7.4 ECB

The foregoing considerations apply *mutatis mutandis* to the ECB. In the setting of the SSM, the ECB can use its power to instruct NCAs to use such powers, when available under national law. However, this is not the case. Unlike in the area of business supervision,[154] EU directives on prudential supervision (CRD IV,[155] for instance) contain no such provisions. The UK report mentions specifically that powers with respect to telecommunications are not available to the PRA.

10.7.5 ESMA

It appears, therefore, that only ESMA has explicit powers in relation to telecommunications. Arts 23c (1)(e) and 23d CRAR[156] provide that ESMA shall have the power to request records of telephone and data traffic. The power is thus limited to traffic and does not cover the substance of conversations, *et cetera*. Despite its limited scope (as indicated, other areas seem to regard this power as a production order), Art. 23c CRAR provides that if the use of this power requires authorisation from a judicial authority according to national rules, such authorisation must be applied for (Art. 23 (5) CRAR). In that case, the national judicial authority shall only check

152 Chapter 8.3.
153 Supra 8.3.4.
154 See the aforementioned market abuse regulation and Art. 69 (2)(d) and (r) of Directive 2014/65/EU, OJ [2014] EU l 173/349 (MiFID II).
155 OJ [2013] EU L 176/338.
156 See also Art. 62(1)(e) EMIR.

whether the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the investigations.[157]

The question is to which extent national law may supplement these powers, in which case ESMA partners at the national level may use such powers – if available – for the purpose of assisting ESMA investigations. That does not appear to be possible, however. This is because ESMA itself has stipulated that it only cooperates with national powers through delegation, or within the framework of mutual assistance as provided for in the Regulations.[158] But then national authorities use the powers provided for in the Regulations. The only exception to this seems to be Art. 23c (7) CRAR, which provides that national law may still require judicial authorization for requests for records of telephone or data traffic.

In this light, the national reports have looked into the availability of such powers to the national partners of ESMA. The German report mentions in this regard that the provisions of the relevant Regulations have not been transposed into German law and, consequently, there are also no provisions on judicial authorization. The Dutch report also mentions that there are no such powers under Dutch law (at least not for CRAs or TRs).[159] In the United Kingdom, as has been mentioned above, the FCA does have access to such data.

In Italy, the Consob may also require existing telephone records to be produced. Yet when Consob requires that persons other than authorised intermediaries be investigated, then judicial authorization is required in order to obtain existing telephone records. Consob also has the power, with the authorization of the Public Prosecutor's Office, to require the telephone provider to furnish it with traffic records.

In Poland, traffic data and recordings of telecommunications are classified and protected under telecommunication secrecy. The Financial Supervision Authority does have access thereto, at least to some extent, on the basis of the Act on Capital Market Supervision, referring to the supervision of trading repositories. When conducting controlling activities with regard to supervised entities, KNF may request, and the entity is obliged to provide, copies of electronic mail and traffic data in the form of registers of telephone calls and registers of data transmissions. Also in the course of preliminary proceedings instituted by KNF on the basis of the Act on Capital Market Supervision to establish whether there is a need to submit a notification of a suspected crime to the competent authorities, or to open regular administrative proceedings, when necessary, KNF may request the telecommunications service provider to provide information which is protected under telecommunications secrecy regarding traffic data. These measures may be imposed on the persons concerned, which are legal persons. They may not refuse to provide the necessary information. Judicial authorization is not necessary.[160]

In France, the situation is not entirely clear, because of apparent conflicting decisions of the Constitutional Council. As mentioned in the previous section, competition authorities have been denied the power to require telecommunications operators to provide access to traffic data. That same power, however, is available to AMF agents. The French report notes that the decision in competition law could in the future challenge the possibility for AMF investigators to require access to traffic data. At any rate, judicial authorization is not required.

157 On this judicial authorization, see also M.P.M. van Rijsbergen & M. Scholten, 'ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement', (2016) 7 *European Journal of Risk Regulation*, no. 3, pp. 569-579; Wissink et al., supra note 15.

158 Supra section 10.5.5.

159 In Germany and the Netherlands such powers are available for cases of market abuse, for instance.

160 Supra chapter 7.3.4.

10.8 On-line monitoring of bank or Financial accounts

10.8.1 Introduction

The on-line monitoring of bank or financial accounts has to be distinguished from (1) production orders concerning the existence of bank accounts (or similar financial accounts) and (2) production orders on specific banking or financial operations. The latter relate to operations in the past. The on-line monitoring of bank or financial accounts addresses future operations with the eventual freezing thereof related to this. It is thus a real time monitoring of operations during a certain period of time. For a legal example, see Art. 28 of the European Investigation Order (Directive 2014/41).

10.8.2 EU level

At the EU level we can be very brief. Neither DG Comp, ESMA nor OLAF have this power under EU regulations. The ECB also does not have this power under EU law, but could obtain it through the NCAs as the ECB can have additional powers through the NCAs.

10.8.3 At the domestic level

Germany
The German national counterparts do not have this power. However, the authorities can exercise their investigative powers to request documents in order to obtain information on banking accounts.

Netherlands
The Dutch national counterparts do not have this power. However, the authorities can exercise their investigative powers to request documents in order to obtain information on banking accounts.

United Kingdom
A 'targeted equipment interference warrant'[161] may be issued by a senior member of the Executive (usually the Home Secretary) and approved, unless the circumstances point to urgency, by the Judicial Commissioner. The practical constraint is that they all need to be approved personally by the Secretary of State.

Italy
In Italy, only the counterpart of the ECB, the Bank of Italy (BI), has this power in its role of combating money laundering (not for ordinary supervision). In such cases, the BI may rely on its Financial Intelligence Unit (FIU) that has the power to monitor bank transactions. The FIU is an independent and autonomous body set up within the BI, and is charged with combating money laundering. The FIU examines the compulsory suspicious transaction reports files by banks and financial institutions, as well as the monthly aggregate reports transmitted by financial intermediaries.[162] It may request additional information from reporting banks. The Unit can also

161 Investigatory Powers Act 2016 Part 5.
162 Arts. 6 and 40-41 of Legislative Decree 231/2007.

inspect entities subject to anti-money-laundering obligations to examine reported and unreported transactions[163] and verify compliance with 'active cooperation requirements'[164]. The FIU can freeze transactions for up to five working days. The FIU works closely together with other investigative authorities, both nationally as well as internationally.

Poland

The monitoring of bank accounts in real time is not provided for in the Polish legal system. Therefore, according to Polish law, the administrative authorities do not have this power. It should be mentioned here that Polish law does provide for an obligation to protect information covered by banking secrecy. However, such information covered by banking secrecy may be made available to the Financial Supervision Authority (KNF) and the President of the UOKiK in relation to administrative proceedings that these authorities are conducting. Those authorities may oblige undertakings or banks to directly supply information which is necessary for the purpose of the investigation.

Provided that data covered by banking secrecy is included in a document which forms a part of the administrative files it may be transferred to EU counterparts under the general rules. The transmitting national authority is obliged to indicate which information is covered by statutory protection and the recipient EU authority is under the same obligation not to disclose this information. According to interviews with UOKiK staff the authority hardly ever asks for bank statements but there are no legal obstacles against transmitting such information to DG Comp.

France

Banking secrecy may not be opposed to national counterparts of EU authorities when they exercise their powers to access business premises, obtain information and, where applicable, search and seize documents. However, the power to monitor banking accounts is only granted to tax and customs authorities[165]. Tax officers (Art. L96 of the tax procedure book) and customs officers (Arts 65, 1° j, and 455 CustC) may obtain information on bank accounts and banking transactions from banking institutions. It seems that such information may be given in real time. Although it is not an explicit power, according to case law[166], those provisions grant customs officers the same powers as tax officers. They do not require any judicial authorisation. The judges do verify, however, that the information requested concerns transactions and operations within the remit of this administration.

Besides, police officers exercising their general power to order the production of documents and information (within the framework of a flagrant or preliminary investigation) as well as judicial customs officers may also monitor bank accounts. The Public Prosecutor's Office must be informed of this measure. In practice, on the basis of the CPC (Art. 60-1, 77-1-1 or 99-3 CPC), the officer will have to issue regularly, in order to update the banking transactions, a production order either to the bank or to the Economic Interest Group 'Credit Card'.

163 Art. 47.1.a of Legislative Decree 231/2007.

164 Art. 53.4 of Legislative Decree 231/2007.

165 They also have access to the FICOBA (the national central database on bank accounts).

166 J. Pannier, 'Le droit de communication de l'administration des douanes', (1989) *Revue de droit bancaire et Bourse*, p. 101.

10.8.4 Conclusions regarding the monitoring of banking and financial accounts

- Neither the European authorities, nor almost all of the national counterparts have the power to monitor banking accounts in real time. However, most of the European and national authorities can use their power to request documents in order to obtain information on banking accounts.
- The exceptions to this rule are the UK and, to some extent, France and Italy. In the UK, a senior member of the Executive can issue a 'targeted equipment interference warrant', which can consist of the real time monitoring of specified banking accounts. Such a warrant does need to be approved by the Secretary of State. In France, tax and customs authorities can monitor bank accounts and banking transactions. It seems that they can do so in real time.
- From the Italian report it becomes clear that that the Italian Financial Intelligence Unit (FIU) of the Bank of Italy has, in the case of money laundering indications, the power to monitor banking transactions by way of compulsory transactions reports and monthly aggregate reports. Although this is not real time monitoring in a strict sense, it is close to real time monitoring. In Italy the FIU is established within the Bank of Italy; in other states the FIU is however established within the police, the judicial authorities or just an independent authority, which is the reason why it does not appear in our national reports.
- However, it raises an interesting point as OLAF also deals with administrative investigations into money laundering related to PIF offences. If preventive FIUs (of an administrative nature) in the member states can monitor bank and financial accounts in order to detect suspicious transactions, why should OLAF then be deprived of this power?