2. EU ADMINISTRATIVE INVESTIGATIONS AND THE USE OF THEIR RESULTS AS EVIDENCE IN NATIONAL PUNITIVE PROCEEDINGS

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1. INTRODUCTION

In cases of combination of punitive and non-punitive investigations, the respective procedural frameworks and safeguards for individuals and economic actors will often vary, sometimes considerably. This situation is problematic, because these individuals are then confronted with multiple proceedings – conducted in parallel or consecutively – in which their legal position is different (and, consequently, so is the protection offered by fundamental rights), but the information that they are requested or ordered to provide is the same and likely to be transferred from one set of proceedings to another, and back again. Sometimes, the same authorities may be involved. In the specific context of the European Union, where procedures are a composite of national and EU elements and the legal systems are far from aligned, the determination of one's legal position and effectuation of his or her rights brings yet another significant complication to one's legal position.

This chapter deals with the role and place of the relevant fundamental rights at the interface of the EU procedures and their follow-up as evidence in punitive proceedings at the national level. We do not aim to provide yet another analysis of the case law of the Luxembourg and Strasbourg Courts on all of the aforementioned safeguards, but will focus mainly on how this case law is to be applied in the vertical setting where materials that have been gathered or processed by EU authorities are consequently used as, for instance, intelligence, starting information or evidence in national punitive proceedings of an administrative or criminal law nature. Our focus in this chapter will be on how the EU legal order guides these processes of vertical interaction between the EU and the national level. Note, moreover, that these processes are certainly not only vertical interactions. The EU-wide mandate of the authorities easily 'covers up' the fact that information may be obtained under the procedural rules of other Member States. How to deal with such diverging standards, with the interface from non-punitive to punitive, and with the assessment of 'foreign' or 'alien' evidence in national punitive proceedings then become issues which are very difficult, if not impossible to separate.

We will start our analysis with an overview of the main problems and the dominant principles for dealing with the use of evidence in a composite, vertical setting (sections 2 and 3). The relevant legal provisions will subsequently be introduced in the

relevant sections on, particularly, the European Commission's Directorate General for Competition (DG COMP) (section 4), the European Central Bank (ECB) and the Single Supervisory Mechanism (SSM) framework (section 5), and OLAF (section 6). As no relevant materials on the European Securities and Markets Authority (ESMA) framework could be found, we have disregarded this authority for this report.

2. EUROPE'S SHARED LEGAL ORDER AND THE ADMISSIBILITY OF EVIDENCE: THREE TYPES OF PROBLEMS

In the previous two Hercule III studies, we have repeatedly noted that the EU-wide mandate of authorities such as OLAF, ECB, DG Comp or ESMA does not automatically imply that there is also a common European legislative framework with regard to the gathering, transferring or use as evidence of information, nor does this mandate bring it about that EU authorities operate without the help of their national partners. On the contrary; at some stage, the European and national legal frameworks need to connect again, particularly where investigations conducted at EU level end up in criminal proceedings at national level. While this necessity is particularly important for OLAF, it is also relevant for ECB or DG Comp.

This complicated legal framework raises a number of questions. Can we for instance use as evidence materials which have been lawfully obtained in one jurisdiction as evidence in another, even when those materials could not have been (lawfully) obtained in the latter jurisdiction? Or are national courts allowed to disregard such materials under EU law? And to what extent do punitive proceedings at the national level 'forecast their shadow' over non-punitive investigative acts at the EU level, or vice versa? By which (fundamental right) standards are national courts to assess (if at all) materials that have been gathered and transferred by the EU level under a different framework and that are now introduced as evidence in national punitive proceedings?

The potential problems for the use of materials obtained by or under the auspices of EU authorities, in punitive proceedings at the national level are hard to overlook. We have identified at the least three categories of problems.

2.1 Diverging standards I: From the non-punitive to the punitive

It is well-known that the punitive limb of Article 6 of the European Convention on Human Rights (ECHR) – and its corresponding provisions in Articles 47 and 48 of the Charter of Fundamental Rights (CFR) – can affect preceding or parallel proceedings of a non-punitive nature. Conversely, the use of results from non-punitive administrative proceedings can render later punitive proceedings unfair.[1] In the famous *Saunders* judgment, the European Court of Human Rights (ECtHR) recognised on the one hand, that complex modern-day societies are in need of mechanisms that occasionally force individuals to keep or produce documents or information for law enforcement purposes. It would unduly hamper the effective regulation in the public interest of complex financial and commercial activities to stipulate that such preparatory investigations

[1] *Imbrioscia v Switzerland* App no 13972/88 (ECtHR, 24 November 1993), para 36.

should be subject to all the guarantees of Article 6 ECHR, such as the right to silence or access to a lawyer. On the other hand, however, such investigations should never render later trial proceedings unfair. The key issue, according to the Court, is to assess the use to which evidence obtained under compulsion is put in the course of the criminal trial.[2] This has to be done on a case-by-case basis, taking account of all circumstances of the case.[3] In the *Saunders* case, the ECtHR consequently established that extensive use was made of (7 out of 9 lengthy) interviews of Mr Saunders in the criminal case against him by the prosecution. In consequence, Mr Saunders may have felt compelled to make statements at trial, despite his right to remain silent. Consequently, there was a breach of Article 6 ECHR.

Other famous cases deal with non-punitive and punitive proceedings running in parallel. The Strasbourg Court accepted that the possibility of a punitive sanction may have an impact on administrative proceedings which are not in and of themselves of a punitive nature. Both the cases of *Marttinen* and *Chambaz* show that the Court, for the application of the criminal limb of Article 6 ECHR in non-punitive proceedings, attaches great importance to the (material, personal, temporal and, we might add, territorial) links that exist between the different types of proceedings. Essentially, this means that where these proceedings are linked, legislators (or, where these remain silent, courts) essentially have two choices: to avoid a violation of the principle, they must either take away the element of (significant) compulsion in the non-punitive proceedings, which is what happened in Switzerland,[4] and is more or less also what we see in OLAF investigations (Article 9 of Regulation 883/2013). Or, as an alternative, they restrict the use of the materials obtained under compulsion for punitive purposes. There are signs that the ECtHR does also accept the latter construction,[5] though there remain many questions to be answered in that regard.

In *Chambaz*, these findings follow upon the Court's observation that, in Switzerland, the non-punitive and punitive tax proceedings were 'closely interlinked' ('*suffisamment liées*') – in fact almost identical – due to the applicable procedural frameworks, the authorities involved and the nature of the information sought. In these circumstances, the Court may consider comprehensively, from the point of view of Article 6 of the Convention, a set of proceedings if they are sufficiently interlinked for reasons relating either to the facts of the case, or to the manner in which they are conducted by the national authorities. Then, Article 6 of the Convention will thus be applicable where one of the proceedings at issue concerns a criminal charge and the others are sufficiently related to it.[6]

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[2] *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996), para 71.
[3] ibid, para 69.
[4] See Art 183 of the Bundesgesetz über die direkte Bundessteuer (Federal Act on Direct Federal Taxation); Art 57a of the Bundesgesetz vom 14. Dezember 1990 über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (Federal Act of 14 December 1990 on the Harmonisation of Direct Taxation at Cantonal and Communal Levels).
[5] See the references in *Marttinen v Finland* App no 19235/03 (ECtHR, 21 April 2009), paras 34 and 75, as well as *Van Weerelt v the Netherlands* App no 784/14 (ECtHR, 16 June 2015) (admissibility).
[6] *Chambaz v Switzerland* App no 11663/04 (ECtHR, 5 April 2012), para 43.

Obviously, the criterion of being sufficiently interlinked also raises all sorts of interesting questions in the many interplays between EU and national proceedings, as has become apparent from the 2017 and 2018 Hercule reports. One of the challenges for any EU system intervening with the national laws of evidence will be to offer guidance on this complicated issue. As will become apparent below, this issue is far from fully addressed yet. Because there are so many legal orders involved, a common European approach is particularly difficult to achieve. Nevertheless, it would appear to be vital for any system of law enforcement at the interface of punitive and non-punitive law enforcement.

2.2 Diverging standards II: From one legal order to another

In addition to the challenge just mentioned, a complication arises where EU law and national laws set different standards with respect to the protection of defence rights and procedural safeguards. One example follows again from the privilege against self-incrimination, as the Strasbourg Court seems to accord that principle a wider scope than the Luxembourg Court.[7] The latter court recognized in *Orkem* only a limited privilege against self-incrimination whose rationale should be sought in the general principle of Union law of respecting the rights of defence and the presumption of innocence.[8] Former Regulation 17/62 did not accord an undertaking under investigation any

> right to evade the investigation on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, it imposes on the undertaking an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation.[9]

The CJEU held that the Commission may compel an undertaking to provide all the necessary information, but may not compel an undertaking to provide it with information that involves the admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.[10] It is generally assumed that both Courts apply different standards and that the reason for this is that the narrower scope of the privilege in competition law relates to the fact that the entities under investigation are legal persons, and/or to the fact that DG COMP has no real power to summon persons for questioning.[11] This is generally different for the cases dealt with by the Strasbourg Court.

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[7] cf Bo Vesterdorf, 'Legal Professional Privilege and the Privilege against Self- Incrimination in EC Law: Recent Developments and Current Issues' (2004) 28 *Fordham International Law Journal* 1179; Stijn Lamberigts, *The Privilege against Self-Incrimination of Corporations* (dissertation, University of Luxembourg 2017).

[8] Case 374/87 *Orkem v Commission*, EU:C:1989:387, para 33.

[9] ibid, para 27.

[10] ibid, para 35.

[11] Michiel Luchtman and John Vervaele, 'Comparison of the Legal Frameworks' in Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017) 245–259. We wrote: 'Art. 19 Reg. 1/2003 is limited to

Be this as it may, the foregoing may bring about systemic flaws in the protection of the principle at the interface of legal orders. First of all, it is likely – particularly for cases that end up before the criminal courts – that these courts will apply the Strasbourg standards, certainly after the coming into effect of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.[12] Article 7 of that Directive stipulates that Member States shall – in line with the Strasbourg case law[13] – not only ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed, but also that suspects and accused persons have the right not to incriminate themselves. This stands in contrast to the protection offered under the OLAF legal framework, which applies the *Orkem*-rule. Secondly, national standards may be higher than the Strasbourg or EU standards, for instance where they provide for the additional protection of certain categories of documents.

We therefore face the complication of how to deal with safeguards that are designed to protect the same or equivalent legal interests, yet are constructed and interpreted differently in various legal orders. As we have said, this is not only a 'vertical' issue (EU-national). Because of the EU-wide mandate of the four authorities of this study, horizontal divergences automatically become a part of the problem. The rationale for such a wide territorial mandate is after all to overcome the difficulties that territorial boundaries cause for law enforcement. Their design inherently brings to the fore the question of the extent to which materials that have been lawfully gathered in one jurisdiction can be used as evidence in another.

Similar issues arise, incidentally, with respect to the legal professional privilege and, most likely, other defence rights. In our previous study we have repeatedly pointed to the differences between the many legal orders involved on the treatment of in-house lawyers.[14] The right to privacy provides another illustration of the problem. Whereas some jurisdictions require a judicial authorisation to conduct an investigative measure – an on-site inspection, for instance – this requirement may not have to be met in

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situations of consent, whereas Arts 20 and 21 deal with "explanations of facts or documents relating to the subject matter and purpose of the inspections"' (ibid 259).

[12] Directive (EU) 2016/343 of the European Parliament and the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1; Art 9(2) of Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 [2013] OJ L 248/1 (hereinafter: 'Regulation 883/2013/EU, Euratom').

[13] cf recitals 11 and 27 of Directive (EU) 2016/343. The latter recital reads:

> The right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. In order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the European Court of Human Rights of the right to a fair trial under the ECHR should be taken into account.

[14] Luchtman and Vervaele, 'Comparison of the Legal Frameworks' (n 11); Rob Widdershoven and Paul Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement' in Mira Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities* (Edward Elgar 2017) 338–339.

another.[15] Procedural safeguards protecting arbitrary interferences with the right to privacy therefore are another example of the problems defined in the above.

2.3 Diverging standards III: From the administrative law sphere to the criminal

A third complication that can arise in the complex setting of OLAF investigations relates to the differences that exist between 'criminal' vs 'administrative' types of investigative measures. It will usually be the case that the use of compulsion is available only for non-punitive, mostly administrative investigations.[16] Conversely, the more severe types of investigative measures are usually available only for criminal investigations. This applies, for instance, to the interception of telecommunications or powers of search and seizure. In the OLAF setting, some of its partners at the national level can indeed use powers of criminal investigation for OLAF related purposes. To what extent, then, can the results of such investigations – channelled through OLAF – be used as evidence in another jurisdiction? Again, this problem becomes very difficult to isolate from the issue that was discussed in the preceding sub-section. It does, however, merit some additional reflection, as we will repeatedly come back to the relevant cases in the following sections.

Cooperation between administrative and criminal law authorities involves almost by definition cooperation between authorities with different tasks and sets of competences. This induces a certain risk of forum shopping and U-turns. The issue was put on the table before the EU Court of Justice in *WebMindLicenses*.[17] The facts of the aforementioned case of *WebMindLicences*[18] involved an alleged VAT fraud scheme, investigated in parallel by both the Hungarian tax, as well as the judicial authorities. The question arose as to whether the tax authorities could make use of the recordings of telecommunications and seized emails in the criminal proceedings. They did not have comparable investigative powers themselves; the materials were gathered by judicial authorities. The Court of Justice of the European Union (CJEU) established that both types of proceedings fall within the scope of EU law. EU law, however, does not preclude administrative procedures from using evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, provided that the rights guaranteed by EU law, especially by the Charter, are observed.

The Court consequently recognises that the gathering, transferring[19] and subsequent use of the data all constitute separate interferences with Article 7 CFR and need justifications. Should questions arise as to the legality of the gathering or transmission of the materials, then there are some specific duties and responsibilities of

[15] Luchtman and Vervaele, 'Comparison of the Legal Frameworks' (previous n); Widdershoven and Craig (previous n) 341–344.
[16] In that case, the problem more or less coincides with the situation we discussed in section 2.1.
[17] Case C‑ 419/14 *WebMindLicences*, EU:C:2015:832.
[18] ibid.
[19] Interestingly, the Court held that there was no need to 'examine whether transmission of the evidence by the department responsible for the criminal investigation and the gathering thereof by the department conducting the administrative procedure with a view to its use interfere with the right, guaranteed by Article 8 of the Charter, to the protection of personal data' (ibid, para 78).

the courts in the administrative VAT-proceedings. The national court which reviews the legality of the decision founded on such evidence must verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law, and was necessary. Furthermore, that court must verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. Finally, if the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter, it *must* [!] disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law. These standards appear to be (much) higher than the standards of the Strasbourg Court, which holds that breaches of the right to privacy (Article 8 ECHR) do not necessarily render a trial unfair. We come back to this below (section 3.3).

3. THE EU FRAMEWORK FOR THE ADMISSIBILITY OF EVIDENCE

3.1 An overview of the general EU principles

The foregoing illustrates that the transfer from the non-punitive to the punitive and/or from the criminal to the administrative in a composite setting like that of OLAF, DG COMP, ECB is a complicated issue, even when there are no indications of irregularities that may have taken place in the process of the gathering or the transfer of materials from the EU to the national level. Before we delve into the specific provisions – found in the respective regulations of DG COMP, ECB (SSM) and OLAF – this section aims to provide an oversight of the constitutional framework within which these provisions were established. We will not limit ourselves to the vertical interactions from the EU to the national level, but also pay attention to the reverse situation, as well as, briefly and where relevant, the mutual horizontal relationships between the EU Member States and their authorities. The goal is to establish which principles guarantee the respect for fundamental rights, as interpreted by the ECtHR and the CJEU, at the interface of different legal orders.

The law on evidence will, when EU law is silent, fall under the general rule/principle of national procedural autonomy. Where specific rules of EU law – indicating what to do with evidence from other jurisdictions in punitive proceedings – are absent, the matter is left to the national law, with only a limited number of limitations following from the case law of the CJEU. First of all, the *Rewe* requirements

apply.[20] Procedural conditions governing the action with an EU dimension may certainly not be less favourable than those relating to similar actions of a domestic nature (equivalence), nor may they render such actions ineffective, ie virtually impossible or excessively difficult (effectiveness).

In addition to the *Rewe* requirements, the Charter imposes limitations on the use and assessment of materials that were obtained and transferred by DG COMP, ECB or OLAF. The Court of Justice, in its seminal *Melloni* decision, has interpreted Article 53 CFR as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.[21]

Moreover, a number of EU rules and principles govern the horizontal and vertical relationships between the different legal orders. The CJEU stated in its advice on the accession of the EU to the ECHR that 'the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals'.[22] As a new kind of legal order, the EU has its own constitutional framework and founding principles, consisting of, particularly, the principle of conferral of powers, the primacy and the direct effect of EU law, the principles of sincere cooperation and of mutual trust, and a judicial system intended to ensure consistency and uniformity in the interpretation of EU law, in which national courts and the Court of Justice jointly ensure the full application of EU law in all Member States.[23]

This legal structure is based, according to the CJEU in its Opinion 2/13, on the fundamental premise that each Member State shares with all the other Member States, and recognizes that it does so, a set of common values on which the EU is founded, as stated in Article 2 TEU. These values include the respect for fundamental rights, as guaranteed by the Charter. However, the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU. Among these objectives (Article 3 TEU) are the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself.[24]

On this basis, the Court held that:

[20] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188. See also Case C‑310/16 *Dzivev*, EU:C:2019:30, para 30.
[21] Case C‑399/11 *Melloni v Ministerio Fiscal*, EU:C:2013:107, para 60.
[22] Opinion 2/13 *Accession of the Union to the ECHR*, EU:C:2014:2454, para 157.
[23] ibid, para 176. See also Case C-216/18 PPU *LM*, EU:C:2018:586.
[24] Opinion 2/13 *Accession of the Union to the ECHR*, para 171.

> [T]he principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, *particularly* [but, apparently, not exclusively] with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law …[25]

That implies that,

> [W]hen implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[26]

In essence, the Court has thus paved the way for a twofold legal rule, ie a rule of recognition of equivalence and a (horizontal) rule of non-inquiry, defining – save for exceptional circumstances – the division of labour between the national courts, while ensuring the full judicial protection in the implementation of EU law. In that setting, the EU Charter guarantees a minimum level of protection whenever national authorities implement EU law (cf *Melloni*).

The question is to what extent this twofold rule functions without specific rules implementing the framework for cooperation. The rule has clearly been implemented in the framework for the European Arrest Warrant and, presumably, other instruments implementing the principle of mutual recognition of judicial decisions in the Area of Freedom, Security and Justice. Yet it is doubtful that it can also exist in a vertical setting without such a legislative supporting framework. Legal acts appear necessary to ensure that the cooperating parties both act in the implementation of EU law and, by consequence, under the application of the Charter, as well as to define the precise scope of the duties of cooperation. The foregoing suggests that, as a principle, mutual trust – based on the common standards of the CFR – will likewise define the vertical relationships between the EU and its Member States, particularly when fundamental right standards diverge, but also that mutual trust does not automatically take the shape of a legal rule. That point is relevant when the question comes up as to how to deal with diverging standards, but also as to how to assess materials that have been obtained in and transferred by another jurisdiction and are now used as evidence in national punitive proceedings.

How do the aforementioned principles of mutual trust, equivalence and effectiveness and the *Melloni* standard relate to each other in the framework of the laws of evidence? There can be no doubt that, in principle, the origin of materials that are used as evidence in punitive proceedings can never do away with the obligation of the

[25] ibid, para 191 (emphasis added).
[26] ibid, para 192; Case C-216/18 PPU *LM*, para 58.

forum state to guard the fairness of the proceedings as a whole.[27] But what does that mean precisely, particularly when related to materials coming from other jurisdictions? For one, courts (or other authorities) may be called upon to respond to allegations of irregularities or unfairness, which is the subject of another transversal report to this study. More relevant for this chapter is that courts may also be confronted with the issue of diverging standards with respect to procedural safeguards or defence rights – ie standards from other jurisdictions that are higher or lower – or with the question of how to deal with the interface from the non-punitive to the punitive.

Whereas the *Rewe* requirements are particularly relevant in cases where EU law is silent and national laws must be referred to and, by consequence, appear to be relevant particularly where the law of evidence is subjected to strict legal rules of national procedure (section 3.5), the other rights and principles – the Charter, the (recognition of) equivalence, mutual trust and non-inquiry – are particularly relevant for systems that are, in principle, open to EU materials as evidence in punitive proceedings. In such cases, further conditions to the use of those materials may still follow from EU rules or from the principles that were just discussed, as well as from the Charter, as we will see below (sections 3.2–3.4). In the following, we aim to identify those conditions and we will try to establish the added value of specific EU rules on the admissibility of evidence.

3.2 The added value of specific EU rules I: Defence rights, procedural safeguards and the recognition of equivalence

Where EU law regulates the transfer of information from the EU to the national level, or its use at the national level, the principle of procedural autonomy plays a smaller role. Such provisions are found, first of all, in the area of competition, in particular in the applicable rules on the exchange of information, duties of secrecy and purpose limitation. There is case law from the ECJ, under the regime of Regulation 17/62, connecting the duties of secrecy and purpose limitation to the rights of defence of the undertakings. Those rights, which must be respected in the preliminary investigation procedure, require, on the one hand, that, when the request for information is made by the EU Commission, undertakings be informed of the purposes pursued and of the legal basis of the request and, on the other, that the information thus obtained should not subsequently be used *as evidence* outside the legal context in which the request was

[27] See already *Echeverri Rodriguez v the Netherlands* App no 43286/98 (ECtHR, 27 June 2000):

> Insofar as the applicant complains that the Court of Appeal refused to take oral evidence from the USA Assistant Attorney Ms D. as she could have clarified issues in relation to the investigation carried out in the USA, the Court considers that the Convention does not preclude reliance, at the investigating stage, on information obtained by the investigating authorities from sources such as foreign criminal investigations. Nevertheless, the subsequent use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed in the Convention have been disrespected. However, the applicant has not substantiated in any way that such reasons existed in the instant case.

A similar position is taken by AG Kokott in Case C-469/15 P *FSL and Others v Commission*, Opinion of AG Kokott, EU:C:2016:884.

made (at the national level, by its national partners or others).[28] Nor can the Commission use information for purposes other than those indicated in the decision of the EU Commission ordering the investigation.[29] Otherwise, the rights of the defence of the undertakings would be seriously endangered.[30]

This case law thus connects the gathering of information to its later use. The obtained information is not readily available for other purposes. The Court explicitly held that the foregoing is not at odds with the principle of loyal cooperation, but protects the rights of the defence. However, the information can provide circumstantial evidence which may, if necessary, be taken into account to justify the *initiation* of a national procedure.[31] Such information must then remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a subsequent national procedure.[32] It may be deduced from the foregoing that the requirement of purpose limitation does not protect the privilege against self-incrimination (as it deals with information that can be obtained by the Commission), but rather the duty to state reasons, so that undertakings know for what purposes the information they provide may be used.[33]

The combined principles of purpose limitation and the respect for a common, minimum set of defence rights (as currently defined by the Charter) paved the way for the later Article 12 of Regulation 1/2003, introducing a 'hard and fast rule' of mutual admissibility of *evidence*, regardless of the differences between legal systems.[34] It is based on the principles of mutual trust and (recognition of) equivalence. Not only does this provision do away with the issue of diverging standards,[35] but it also 'breaks open' any national evidentiary system; 'foreign' materials need to be accepted, under the conditions provided for in the article. In the third place, provisions such as Article 12 of Regulation 1/2003 ensure that evidentiary laws come within the scope of the Charter and the jurisdiction of the CJEU. As a matter of fact, the existence of EU legislation provides the latter court with the arguments to limit the principle of procedural autonomy.

We also find such provisions in the OLAF legal framework. Article 11(2) of Regulation 883/2013 also introduces such a rule of recognition of equivalence, yet it does so – unlike Article 12 of Regulation 1/2003 – under a twofold condition: (lawfully) obtained materials must be accepted, no matter where they were obtained, but only if

[28] cf Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others (Spanish Banks)*, EU:C:1992:330, paras 35–36.
[29] Case 85/87 *Dow Benelux v Commission*, EU:C:1989:379, para 17.
[30] ibid, para 18.
[31] Case C-469/15 P *FSL and Others v Commission*, Opinion of AG Kokott, para 39. See also Case 85/87 *Dow Benelux v Commission*, paras 18 and 19.
[32] Case C-469/15 P *FSL and Others v Commission*, Opinion of AG Kokott, paras 39 and 42.
[33] cf Renato Nazzini, *Concurrent Proceedings in Competition Law. Procedure, Evidence and Remedies* (Oxford University Press 2004) 212–213.
[34] See infra section 4.3.1. Cf Nazzini (previous n) 209.
[35] cf Wouter Wils, 'Power of Investigation, Procedural Rights and Guarantees' in Abel Mateus and Teresa Moreira (eds), *Competition Law and Economics* (Edward Elgar 2007).

national law recognises that the same goes for the reports of a comparable, 'benchmark' authority at the national level and only with respect to OLAF *reports*.

Though the added value of rules on the admissibility of evidence is thus clear, it is important to point out that such rules basically tackle only one of the three problems identified in the above, ie the transfer of evidence from one jurisdiction to another. In order to work on the basis of equivalence, the proceedings in the involved jurisdictions need to be more or less comparable in terms of goals, powers, procedures, safeguards and remedies. That is why Article 12 of Regulation 1/2003 adds that information exchanged can only be used in evidence 'in respect of the subject-matter for which it was collected by the transmitting authority'[36] or why Article 11(2) of Regulation 883/2013 introduces the national administrative inspector as 'benchmark'.[37] This also explains why such limitations are lacking in the EPPO regulation (Article 37 of Regulation 2017/1939). EPPO gathered evidence is, by its very definition, considered to be gathered in accordance with equivalent (criminal law) standards. This inherent limitation of the admissibility rules has to be kept in mind and a caveat follows from it: working on the assumption that materials have been gathered in jurisdictions with equivalent standards does not necessarily tackle the other problems we have identified. These are the transfer from the non-punitive to the punitive and from the administrative to the criminal. Working on the basis of equivalence may even prevent the clear perception of those problems, thereby aggravating them. We come back to this in section 3.6 and in our conclusions.

3.3 The added value of specific EU rules II: Towards a legal rule of non-inquiry?

Admissibility rules provide for an adequate method of dealing with evidence from other jurisdictions, provided they are based on a sufficiently level playing field and take due account of the transfer from the non-punitive to the punitive, as well as from the administrative law sphere to the criminal. But there seems to be yet another condition for the proper application of admissibility rules: such rules seem to build upon the assumption that the materials were transferred and obtained *lawfully* by the other jurisdiction.[38] Here, we touch upon the issue of mutual trust and its relationship to the admissibility rules. Obviously, admissibility rules can only function on the premise of a high level of mutual trust. But do such rules also entail a legal rule of non-inquiry, in which national courts are no longer required or even prevented from assessing the lawfulness of investigative actions that took place in other jurisdictions? Or does the principle of mutual trust, in turn, set bars to the full application of the admissibility rules, particularly where the lawfulness of the respective investigative measures has not (yet) been ascertained?

There is currently no clear and coherent answer to these questions, implying that all relevant national and EU legal orders must find their own way. Specific case law is not yet available. Some indications of an answer may nonetheless be found in *FSL*

[36] infra section 4.3.
[37] infra section 6.3
[38] cf infra section 4.3.2.

Holdings,[39] a case which reflects a situation more or less the reverse of the one at hand in this report (ie transfers from the national to the EU level). In *FSL*, the Commission received information from the Italian *Guardia di Finanza*. The information – personal notes from an employee of the undertaking under investigation, found during a search in his home – was obtained during criminal investigations for tax fraud and subsequently transferred to the Commission on account of suspected violations of Articles 101/102 TFEU. The undertakings under investigations argued before the EU Courts, after having been sanctioned by the Commission, that the use of the materials by the Commission violated their defence rights, however, without being very specific as to which rights and why precisely. They moreover argued that Article 12 of Regulation 1/2003 prohibited such an exchange of information.

In her Opinion, Advocate General (AG) Kokott starts by explaining that in EU competition law, the prevailing principle as regards the probative value of given items of evidence is that of the unfettered evaluation of evidence. Therefore, the only relevant criterion for the purpose of assessing evidence is its credibility.[40] However, that principled position does not amount to a hard rule of mutual trust and blind acceptance of materials. A reliance on particular items of evidence to demonstrate infringements of Articles 101/102 TFEU can still be precluded by prohibitions on the use of evidence, yet only in exceptional cases. Such prohibitions may be based on the fact that evidence was obtained in breach of essential procedural requirements, intended to protect the individuals concerned, or on the fact that evidence is to be used for an unlawful purpose.[41]

As regards the first situation, according to the AG, in cases where the evidence comes from the national authorities, the lawfulness of the *gathering* of evidence by national authorities and the *transmission* to the Commission of information is in principle governed by national law. The EU judicature has no jurisdiction to rule on the lawfulness, as a matter of national law, of a measure adopted by a national authority.[42] However, the Commission or the EU Courts may not knowingly rely on evidence which was quite clearly obtained in breach of essential procedural requirements at the national level.

According to the AG, fundamental principles of EU law such as, in particular, the right to good administration and the right to a fair trial require that the EU institutions undertake at least a summary examination in the light of all the circumstances of the particular case that are known to them. That is why the Commission must ensure that, according to all the indications available to it, the evidence in question was neither unlawfully gathered by the national authorities nor unlawfully forwarded to it. Also, the General Court must check the evidence against those criteria where complaints that the latter were not satisfied are raised in the

[39] Case C-469/15 P *FSL and Others v Commission*, EU:C:2017:308.
[40] Case C-469/15 P *FSL and Others v Commission*, Opinion of AG Kokott, para 33.
[41] ibid, para 34.
[42] ibid, para 36.

proceedings at first instance.[43] The Court itself is less clear in its reasoning, but does eventually seem to support the approach taken by its Advocate-General.[44]

Eventually, both the Court and its AG found in *FSL Holdings* that the Italian courts did not establish any problems with respect to the gathering and the transfer of the materials to the EU level. Hence, there was no reason to deal with the issue any further. The interesting issues to be resolved, however, are what would happen in cases where remedies at the national level were not available, not used, or used and violations had been established, but the information had nonetheless been transferred to the EU level. Under a full rule of mutual trust, as in the EU mutual recognition instruments, the EU Courts would not even have been allowed – save in exceptional cases, to be specified further – to even check whether the relevant national jurisdiction did actually, in a specific case, observe the fundamental rights guaranteed by the EU.[45] Yet under the line of reasoning proposed by AG Kokott, such a check is not precluded; to the contrary, to protect Articles 41 and 47 CFR, such a test is required, although it is a marginal one. It is to be done on the basis of the indications already available to the Commission/Court and in subsidiarity to the competent courts of the transferring jurisdiction.

The facts of the FSL case took place outside the scope of the European Competition Network (ECN); the case dealt with a transfer by the Italian financial police to DG COMP. Would the outcome have been different, had the transfer taken place within the ECN, for instance by a national competition authority (NCA) to DG COMP? This may be so, though it is not certain. The argument would then be that the specific EU rules not only entail a rule of (recognition of) equivalence, but also a rule of non-inquiry. That implies that the marginal test as advocated by AG Kokott may not be necessary or even allowed. It could even be argued that the mere existence of a remedy in the state of gathering or transfer – a mandatory requirement on the basis of Article 47 CFR – already prevents the forum state from applying such a test.

In fact, the latter is the position of the Dutch Supreme Court in cases of international criminal law cooperation. This court has effectively introduced the rule that Dutch criminal courts do not have to be concerned with questions relating to Article 8 ECHR or the application of foreign laws, when these issues cannot be related to actions that have been executed under the responsibility of Dutch authorities, yet have been conducted on the territory of other ECHR Signatory States.[46] The latter circumstance guarantees a minimum standard of fundamental rights protection and the availability of remedies in those states (as does the Charter, of course). The Supreme Court added to this that it follows from the case law of the ECtHR that a breach of Article 8 ECHR (including the related procedural safeguards) does not require that legal consequences are given to such a breach in the criminal proceedings, provided that the

[43] ibid, paras 37–38.
[44] Case C-469/15 P *FSL and Others v Commission*, paras 33–34.
[45] Opinion 2/13 *Accession of the Union to the ECHR*, discussed in section 3.1.
[46] HR 5 October 2010, NL:HR:2010:BL5629.

fairness of such proceedings is guaranteed. There is some – though not yet conclusive – evidence that Dutch courts use the same approach in the vertical OLAF setting.[47]

Therefore, in answer to the questions raised at the beginning of this section, we argue that admissibility rules are indeed capable of bringing about a rule of non-inquiry, but it is a conditional one. It can only apply to situations where no substantiated indications of irregularities exist. Such a rule entails that forum courts need not – in fact, may not, save for exceptional circumstances – test the lawfulness of the gathering and transfer of materials, used as evidence in punitive proceedings, when the available remedies were used but the gathering/transfer of the materials were considered to be lawful by the appropriate courts. It may even imply a further step, ie that the same holds for a situation where the remedies in the transferring jurisdiction were available, but were not used. However, such a rule of non-inquiry cannot, in our opinion, be construed in cases where irregularities were in fact established by the courts of the transmitting jurisdiction, or where remedies were not available. Such a rule could then, for instance, prevent the courts of the adjudicating forum from giving a proper answer to the question of how to deal with the consequences of such irregularities.

In light of the foregoing, two final observations need to be made. First of all, both the cases of *WebMindLicences* and the *FSL Holdings* suggest that the Luxembourg approach towards the appreciation of unlawfully obtained evidence in criminal proceedings is different from that of 'Strasbourg' (and, in its wake, the Dutch Supreme Court). The latter court has held that violations of the right to privacy do not necessarily render a trial unfair, not even when these violations concern the use of intrusive techniques, such as covert listening devices without a legal basis,[48] the unlawful surveillance of telecommunications, or a search without a legal basis.[49] After all, a violation of Article 8 ECHR does not necessarily amount to a violation of Article 6 ECHR. Yet for 'Luxembourg', serious violations of procedural safeguards do seem to have an impact on, particularly, Articles 41 CFR (good administration) and 47 CFR (fair trial). If correct, the argument is, presumably, that proceedings in which the investigative or prosecutorial bodies can afford *not* to follow the 'rules of the game' cannot be considered 'fair', nor can one maintain that such a situation is in line with the principles of a good administration. At any rate, there seems to exist a difference of opinion between the Courts as to the interpretation of what constitute violations of 'essential procedural requirements', related to the right to privacy, and their impact on a later use as evidence. That also suggests that the courts of the forum state may have a bigger responsibility for dealing with unlawfully obtained evidence from other jurisdictions than follows from the Strasbourg case law.

In the second place, it needs to be remembered that national courts are not competent to review the actions of EU authorities, whereas EU remedies – actions for

[47] Michiel Luchtman and Martin Wasmeier, 'The Political and Judicial Accountability of OLAF' in Scholten and Luchtman (eds) (n 14) 241–243.
[48] See *Khan v the United Kingdom* App no 35394/97 (ECtHR, 12 May 2000); *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009).
[49] cf *Kalnénienė v Belgium* App no 40233/07 (ECtHR, 31 January 2017).

annulment, at least[50] – may not be available against EU investigative acts and transfers of information. Does that affect the functioning of any rule of non-inquiry? That is the subject matter of the next section.

3.4 *Foto-Frost* and the validity of EU investigative actions

To our knowledge, there has been very little debate so far on what standards national courts should use when taking into account the materials of EU authorities in punitive procedures and, by consequence, potentially assessing the actions of EU authorities in light of for instance Articles 41, 47 or 48 CFR. Here, we touch upon the doctrine of *Foto-Frost* and the EU system of legal protection. In the vertical relationships between the EU and its Member States, national courts have no jurisdiction themselves to declare that acts of Community (now, Union) institutions are invalid.[51] This case law does not prevent national courts from assessing the actions of EU authorities, as does the rule of non-inquiry, but it prevents national courts from invalidating those actions. This is because diverging or even conflicting national rulings as to the validity of Community (Union) acts may not put in jeopardy the very unity of the Community (Union) legal order and may not detract from the fundamental requirement of legal certainty. *Foto-Frost* thus protects the necessary coherence of the system of judicial protection established by the Treaty.[52]

How does this case law relate to the admissibility of EU evidence in national proceedings? Can national courts use such materials, when there are indications of irregularities? Indeed, that conclusion does not appear to be at odds with *Foto-Frost*, in which a court does consider the actions of an EU authority – the gathering or transfer of materials – valid and in accordance with EU rules.[53] The Court held in *Foto-Frost*, after all, that

> nothing, however, prevents national courts from considering the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, rejecting them, concluding that the measure is completely valid. In the latter case, after all, they are not calling into question the existence of the Community measure.[54]

The question, however, is what to do when courts consider to use the materials obtained from EU authorities, but have doubts as to the legality of the latter's actions. An interesting proposal is made in this respect by Widdershoven and Craig, suggesting that it may not be necessary to refer a case to the CJEU to prevent a sanction from being imposed when the validity of a European authority is in doubt; in the absence of specific

[50] See Katalin Ligeti and Gavin Robinson, 'Transversal Report on Judicial Protection' in Luchtman and Vervaele (eds) (n 11).
[51] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452; see also Case T-48/16 *Sigma Orionis v Commission*, EU:T:2018:245, paras 58–71.
[52] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, paras 14 and 15.
[53] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, para 14.
[54] ibid.

EU provisions, 'national courts are free not to use the materials, as the question of whether an [EU investigation] offers a sufficient, reliable *and lawful basis* for imposing a national sanction is primarily a matter of national evidentiary law, including the rules on the gathering of evidence by using investigatory competences'.[55]

But what about the situation where national courts do want to use the information and have doubts as to their lawful gathering or transfer? In those instances, the first issue is whether assessing the legality of the actions at EU level is allowed under EU law. Strictly speaking, such an assessment does not invalidate the actions of EU authorities, as the assessment is made in light of a later use as evidence in punitive proceedings and an exclusion of the materials does not per se invalidate the actions of the EU authorities. However, in light of the rationales of *Foto-Frost* – protecting the unity and coherence of the EU legal order – diverging or conflicting national decisions on the matter may also be regarded as an unwelcome situation.

Assuming that national courts are thus indeed precluded from making such an assessment, the next question, then, is what are the respective responsibilities of the different EU and national courts involved. The cases of *WebMindLicenses* and *FSL Holdings* may once again be illustrative here. Should there be issues with respect to the lawfulness of the collection and subsequent transfer of materials at the EU level in the light of, for instance, Article 7 CFR or Article 47 CFR and, therefore, indications of violations of essential procedural requirements, then those cases imply that national courts either ask for an assessment of the lawfulness of the actions of EU authorities via a preliminary reference or disregard those materials in their assessment of the case. Incidentally, should they do the latter, then the *Rewe* requirements may alternatively step in; the application and enforcement of EU law is not to be made virtually impossible or excessively difficult.

3.5 In the absence of EU law: Effectiveness, the Charter and procedural autonomy

In the foregoing, we have discussed the added value of specific EU rules on the admissibility of evidence. But sometimes such rules are absent. It may also be – as is the case with Article 11 of Regulation 883/2013 – that their scope does not extend far beyond *Rewe*. What would happen in cases where the relevant EU provisions are not in play and the issue of the higher standards of the forum state is brought up? Does a presumption of (recognition of) equivalence then still apply? Such a situation may occur, for instance, where materials have been lawfully gathered in another EU state, under the auspices of an EU authority, but where the applicable standards (for the gathering or transferring of the materials) are lower than those of the forum state.

We submit that, to give effect to the *Rewe* principles of effectiveness – and possibly equivalence – national courts in such a situation would in principle not be

[55] Widdershoven and Craig (n 14) 349 (emphasis added). This position seems to be confirmed in Case T-48/16, *Sigma Orionis v Commission*, para 76: 'In answer to those arguments, it should be observed that ... OLAF's report continues to be lawful in the EU legal order in so far as it has not been invalidated by the EU judicature, without prejudice to any decisions that might be taken by the national authorities or courts concerning the use that can be made of such a report in proceedings under national law'.

allowed to exclude such materials as evidence, at least not only for that specific reason. That position is founded on the principles of mutual trust and recognition of equivalence, which are in turn based on the applicability of the Charter, as interpreted by the CJEU.[56] Indeed, this study confirms that most national courts are indeed open to materials from other jurisdictions and will break down the chain of information into separate, isolated steps, from the gathering, to the processing, to the transfer, to its use as evidence. Each of those individual steps will then, as far as personal data are concerned, have to meet the requirements of the Charter.[57] Yet as long as all of these steps have been taken lawfully, there appears to be no problem with the use of these materials as evidence in punitive proceedings. That also means, incidentally, that the problem of forum shopping will *de lege lata* most likely *not* be heard by national courts.

There are two (possible) exceptions to this. Where national courts do exclude the use of such materials as evidence in punitive proceedings, this may be because of certain national statutory or even constitutional standards, for instance aiming to prevent silver-platter situations and thus protecting the right to privacy.[58] National law may also be said to require a repetition of procedural steps to protect the rights of defence in criminal proceedings. Assuming that such provisions are also applied in procedures that are outside the scope of EU law, such as direct taxes (equivalence), could those national standards then be called upon to assess – and even exclude – the EU materials as evidence in punitive proceedings?

Recent case law of the CJEU shows an increasing preparedness to balance its intention to uphold the principles of EU law, including the principle of effectiveness and the Charter standards,[59] with the concerns of national courts that they may be required to lower their national standards because of that. For example, the CJEU has accepted in *Taricco II,* dealing with the rules on statutory limitation in light of the Italian legality principle, that the national courts were not obliged to disapply the Italian constitutional standards, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied.[60] An important argument for that position was that, despite the fact that the actions of the national authorities come within the scope of EU law, the protection of the financial interests of the Union by the enactment of criminal penalties falls within the shared competence of the Union and the Member States within the meaning of Article 4(2) TFEU. By consequence, and because the relevant provisions were not (then) harmonised by the EU legislature, the Italian

[56] supra n 23.
[57] See also Michiel Luchtman, Michele Simonato and John Vervaele, 'Comparative Analysis' in Michele Simonato, Michiel Luchtman and John Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities* (*ECN/ESMA/ECB)* (Utrecht University 2018) 165–166.
[58] Silver platter situations involve the circumvention of national safeguards by requesting help from other jurisdictions, or by using the results of their investigations. On this topic, see Sabine Gless, *Beweisrechtsgrundsätze einer Grenzüberschreitenden Strafverfolgung* (Nomos 2006) 168–171; Michiel Luchtman, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities* (Intersentia 2008) 150–151.
[59] supra n 24.
[60] Case C-42/17 *MAS, MB (Taricco II),* EU:C:2017:936.

Republic was free to provide that in its legal system the rules on limitation, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law.[61]

Without referring to (or excluding) any shared competence in the area of the law on evidence, the Court held in *Dzivev* – concerning the consequences of an unlawful interception of telecommunications – that it is for the national legislature to ensure that the procedural rules applicable to the prosecution of offences affecting the financial interests of the European Union, are not only designed in such a way that there arises, for reasons inherent in those rules, no systemic risk that acts that may be categorised as such offences may go unpunished, but also to ensure that the fundamental rights of the accused persons – as defined by the Charter – are protected.[62] The latter means that the requirements derived from the principle of legality and the rule of law must be followed. Moreover, as the interception of telecommunications amounts to an interference with the right to a private life, such an interference is allowed only if it is provided for by law. Where the interception of telecommunications was authorised by a court which did not have the necessary jurisdiction, that interception must be regarded as not being in accordance with the law (Article 52(1) CFR). A national provision which obliges courts to exclude the materials obtained on the basis of such an unlawful interception reflects those EU requirements to protect fundamental rights. In such cases, it follows that EU law cannot require a national court to disapply such a procedural rule, even if the use of that (unlawfully gathered) evidence could increase the effectiveness of criminal prosecutions enabling national authorities, in some cases, to penalise non-compliance with EU law.[63]

Of course, *Dzivev* dealt with unlawfully obtained evidence. The point raised here is related, yet different; it addresses the question of whether national laws – with the purpose of protecting procedural safeguards or defence rights and in the absence of specific EU law – may block the use of EU materials as evidence. The Court's reasoning in *Dzivev* fits perfectly within the narrative of EU law. At first sight, it confirms our previous observation on the Court's handling of unlawful interferences with the right to privacy (supra section 3.3). We are not entirely sure, however, that the Court wanted to express, at the least not with this specific judgement, that a mandatory exclusion of evidence in cases like these necessarily follows from EU law. If not, the Court's narrative cannot do away with the fact that its reasoning – specifically the parts on the need to protect the CFR standards – in fact 'covered up' the fact that the national laws at stake were, of course, the result of a series of national policy choices and that the Court apparently did not wish to exercise any review of the proportionality of these legislative choices or to balance them against the principle of proportionality under Article 52 CFR. The result of this approach was, however, that the EU principle of

[61] ibid. Another expression of that same development can be read in Case C-524/15 *Menci*, EU:C:2018:197; Michiel Luchtman, 'The ECJ's Recent Case Law on *Ne Bis in Idem*: Implications for Law Enforcement in a Shared Legal Order' (2018) 5 *Common Market Law Review* 1717.
[62] cf Case C‑310/16 *Dzivev*, para 31.
[63] ibid, paras 35–39.

effectiveness was strongly mitigated. This begs the question – left open by the Court – to what extent the EU also has the competence to intervene in evidentiary affairs and if so, on which legal basis.[64] It is an important question in light of the current revision of Regulation 883/2013.

The second exception mentioned above concerns the fact that where limitations to the use of materials as evidence in punitive proceedings relate to the respect for the rights of defendants, the Charter (and, occasionally, secondary legislation) obviously require national courts to take account of those standards, also in cases where specific EU rules are absent. The most prominent example of such a situation would be the privilege against self-incrimination and the consequent prohibition of the use of (oral) statements that were obtained under compulsion by EU authorities. In fact, this also follows (for criminal proceedings *sensu stricto*) from Article 7 of Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. As indicated, that provision not only stipulates that Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed, but also that suspects and accused persons have the right not to incriminate themselves. Obviously, the exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

3.6 Interim conclusions

We deduce from the foregoing that the rights of the defence, as defined by the Charter, mean that national courts cannot close their eyes to investigative acts that have occurred outside their territories, when the obtained materials are consequently used as evidence. The principles of mutual trust and non-inquiry, for instance, do not dissolve the responsibility of (EU and national) authorities to guarantee fair proceedings, in which defence rights – *nemo tenetur* or legal professional privilege for instance – are respected. Our analysis does however point to the conclusion that – as long as there are no indications of irregularities – a presumption of mutual trust and equivalence, based on a common set of fundamental rights, does in fact exist.[65] This facilitates the use of evidence in composite proceedings. In such cases, however, the question remains to what extent national courts can still apply their own higher standards, particularly when these follow from authoritative legal sources (section 3.5).

On this basis, EU law can facilitate the inter-operability of materials as evidence by turning these presumptions into hard and fast rules of recognition of equivalence and (a conditional) rule of non-inquiry and may thus even force authorities and courts to act

[64] ibid. The precise legal basis for such shared competences (if existent) is a hotly debated topic. If that basis is Article 82 TFEU, it applies only to criminal law *sensu stricto*. That begs the question of whether Article 325 TFEU can also serve as a legal basis, at least for non-criminal (including punitive) procedures. The CJEU is not clear on the matter.

[65] cf supra n 25.

upon the basis of mutual trust and to disregard any differences with the standards of the forum state. Rules on the admissibility of evidence therefore have at the least three functions. They prevent discussions on the issue of diverging standards and may be perceived as rules of non-inquiry,[66] but they also 'break open' national evidentiary systems; 'foreign' materials need to be accepted, under the conditions provided for in the article. In the third place, such provisions make sure that evidentiary laws come within the scope of the Charter and the jurisdiction of the CJEU.

However, it is also important to emphasize that such rules rest upon the assumption of a lawful gathering and transfer of materials from one jurisdiction to another, and do not necessarily cover the other two problems, identified at the beginning of this section – the transfer from the non-punitive to the punitive stages and from the administrative law sphere to the criminal. The presumption of equivalence – and the legal rules based upon it – carry the inherent risk of concealing certain problems with respect to the transfer of materials from one set of proceedings to another. The best example of this follows from the privilege against self-incrimination which in the setting of this report is by its very definition applied at the interface of multiple legal orders. In fact, situations as in *Martinnen* or *Chambaz* also lend themselves for application in the framework of this study and its predecessors.[67] The question may arise, for instance, to what extent a duty to cooperate in national (or EU) proceedings continues to exist where individuals or companies cannot reasonably exclude the possibility that the materials requested will be used for punitive purposes at the EU (or national) level, so that the procedures may be qualified as 'closely interlinked' ('*suffisamment liées*'). To what extent, then, would the privilege against self-incrimination in punitive proceedings at EU level, forecast its shadow over the non-punitive proceedings at the national level in which the information was collected under compulsion?

Where punitive proceedings do cast their shadows over preceding or parallel non-punitive proceedings (because they run in parallel, into the same facts, or because the initiation of proceedings at EU level leaves persons with no other option than to assume that punitive procedures at the national level will follow), we submit that the element of compulsion has to be removed in the latter type of proceedings – which is what has been done for OLAF through Article 9 of Regulation 883/2013, *but only* for its own investigations – or that restrictions in the latter use, such as are applicable in punitive proceedings, are accepted, as is the case in competition law.[68] If not, those materials cannot be used at all in punitive proceedings (at the national or, for that matter, EU level). We cannot find any reason not to apply these principles to the complex legal setting of the investigations of this study.

Moreover, even where a connection between the EU level and national procedure was not reasonably foreseeable at the time when the materials were

[66] cf Wils (n 35).
[67] supra section 2.1.
[68] We will come back to this in section 7.

obtained,[69] we submit that national procedures must be willing to disregard *as evidence* in punitive proceedings all of the materials that were obtained through compulsion, if their existence is dependent on the will of the accused. In our opinion, the standards to be used here are those of 'Strasbourg' (and we believe these are wider than those of Luxembourg).[70] The proceedings, after all, are national proceedings. In that case, the application of the Strasbourg standard follows from the Charter (Article 52 (1) CFR). For criminal procedures *sensu stricto*, it moreover follows from Article 7 of Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.[71] That provision not only stipulates that Member States shall not only ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed, but also that suspects and accused persons have the right not to incriminate themselves. Obviously, the exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

4. DG COMP

4.1 Introduction

The European Commission's Directorate General for Competition (DG COMP) is responsible for the enforcement of EU competition law.[72] The focus, in line with the previous two reports, is on the enforcement of a) Article 101 TFEU, which prohibits agreements between competitors having as their object or effect the distortion of EU competition law (cartel prohibition); b) Article 102 TFEU, which prohibits abuses of a dominant position. DG COMP attaches significant importance to the enforcement of the abovementioned provisions. Only in 2017, the fines imposed on economic undertakings amounted to approximately €1.95 billion.[73]

DG COMP enforces Articles 101 and 102 TFEU together with its national counterparts, ie the national competition authorities of the EU Member States (NCAs). DG COMP and NCAs have formed a network, the European Competition Network (ECN).[74] The ECN lacks legal personality, it can rather be seen as a forum for cooperation; ECN authorities meet on a regular basis, they exchange best practices and

[69] This situation is relevant for OLAF investigations (as follow-up at the national level is by no means obligatory), particularly for materials other than OLAF reports.
[70] Section 2.2.
[71] Directive (EU) 2016/343.
[72] For the purposes of this report, the terms 'DG COMP' and 'EU Commission' are used interchangeably.
[73] European Commission, DG COMP, 'Annual Activity Report' (2017) 19 <https://ec.europa.eu/info/sites/info/files/file_import/comp_aar_2017_final.pdf> accessed 20 April 2019.
[74] See inter alia on the ECN, David Gerber, 'The Evolution of a European Competition Law Network' in Claus-Dieter Ehlermann (ed), *European Competition Law Annual* 2002: *Constructing the EU Network of Competition Authorities* (Hart 2004).

information, allocate cases, coordinate investigations and share evidence.[75] We are particularly interested in the sharing of evidence aspect of the ECN, as well as the provisions that enable DG COMP to share evidence with authorities other than ECN members. Even though the investigative powers of DG COMP were extensively discussed in the first Hercule report, it is worth mentioning that in December 2018 the European Parliament and the Council adopted an EU Directive,[76] which aims *inter alia* at laying down a minimum set of common investigative and decision-making powers amongst NCAs, for the effective enforcement of Articles 101 and 102 TFEU. For instance, all NCAs should have the power to enter private premises in accordance with national law.[77] Evidentiary matters are also covered. We will discuss the relevant provision pertaining to the admissibility of evidence in the sections below.

We proceed in the following way. First, we discuss the rationale of having in place a rule on the admissibility of evidence. Second, we focus on the regime governing the use of ECN gathered information as evidence by other ECN authorities and by national courts. In addition, we assess whether national law enforcement authorities other than NCAs may use in evidence ECN gathered information, as well as the inverted situation, namely whether DG COMP can admit and use in evidence information transmitted by national authorities, which are not DG COMP's national counterparts. The aforementioned analysis focuses on three issues: first, we are particularly interested in how the system of EU competition law enforcement[78] deals with the question of how materials gathered in other jurisdictions are to be assessed by the receiving authority, second, how the system deals with issues of diverging standards and finally, whether the system foresees the possibility of parallel or consecutive proceedings at the EU and national levels.

4.2 The rationale of having in place a rule on the admissibility of evidence

The existence of rules on the admissibility of ECN collected evidence can be explained by the institutional design of EU competition law enforcement, which is shared in nature.[79] This has not always been the case. The enforcement of EU competition law underwent a modernisation process.[80] In view of the subject matter of this report, it suffices to refer to the fact that prior to 2004 the enforcement of Articles 101 and 102

[75] European Commission, DG COMP, 'European Competition Network' <http://ec.europa.eu/competition/ecn/more_details.html> accessed 20 April 2019.

[76] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.

[77] Recital 34 and Art 7(2) of Directive (EU) 2019/1.

[78] For the purposes of this report, the term 'EU competition law enforcement' means the enforcement of Arts 101 and 102 TFEU. We do not take into account the whole corpus of EU competition rules, which consist of state aid, merger control, etc.

[79] See inter alia, Katalin Cseres and Annalies Outhuijse, 'Parallel Enforcement and Accountability: The Case of EU Competition Law' in Scholten and Luchtman (eds) (n 14).

[80] See inter alia Damien Gerardin, 'Competition between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law' (2002) 9 *Columbia Journal of European Law* 1; David Gerber, 'Two Forms of Modernization in European Competition Law' (2007) 31 *Fordham International Law Journal* 1235.

TFEU was centralised, in the sense that those rules were enforced vertically by the European Commission itself.[81] NCAs had a marginal role to play in that system, as did national courts. As a result, as posited by the CJEU in the *Spanish Banks* case,[82] NCAs could not rely on information transmitted to them by DG COMP and use it as evidence to justify a sanctioning decision. Such information ought to remain internal to the national authorities and could be used only as circumstantial evidence for deciding whether or not to initiate a national procedure.[83] Because it transpired that such a centralized scheme hampered effective application of EU competition rules by NCAs and national courts, while also imposing a significant burden on the EU Commission, which could not focus on investigating only the most serious of infringements,[84] the previous system was abolished and replaced by a decentralised system of parallel enforcement.[85] In this new system, all ECN authorities are in parallel responsible for enforcing Articles 101 and 102 TFEU. Due to the fact that the responsibility for enforcing EU competition law is now shared between DG COMP and NCAs, it logically follows that ECN authorities must be enabled to exchange information and use it in evidence. The cornerstone of the modernised system of EU competition law enforcement is Regulation 1/2003 which inter alia lays down rules for the exchange of information within the network, as well as the admissibility and use of ECN collected evidence by other ECN members for the purposes of enforcing Articles 101 and 102 TFEU. This regime, as well as its rationales are explored below.

4.3 How the legal framework of EU competition law enforcement deals with diverging standards

We firstly discuss the EU legal provisions that enable authorities involved in EU competition law enforcement to exchange information and use it in evidence for enforcing Articles 101 and 102 TFEU. Thereafter, we discuss the rules and principles that have been put in place to deal with the issue of diverging standards that we put forward at the beginning of our report.

4.3.1 The regime of evidence sharing between the authorities involved in the enforcement of Articles 101 and 102 TFEU

Regulation 1/2003 lays down rules that facilitate unfettered exchange of information between the members of the ECN, as well as its admissibility and use in evidence. The ability to have a free flow of information between the network's authorities seems to be a necessity when a case has been re-allocated from one authority to another or when

[81] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed 87.
[82] Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others (Spanish Banks)*.
[83] ibid, para 42.
[84] Recital 3 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 (hereinafter 'Regulation 1/2003').
[85] See inter alia Cseres and Outhuijse (n 79).

ECN members work in parallel or when ECN members assist one another in collecting information.[86] It shall be mentioned at the outset that it has been questioned whether the system introduced by Regulation 1/2003 truly respects rights of defence.[87] This section however is only concerned with providing a synopsis of how the composite issues that are of interest to this project and to OLAF are dealt with in the specific system of EU competition law enforcement.

Article 12 of Regulation 1/2003 is concerned with the exchange and use of information vertically, ie between the EU Commission and NCAs and horizontally, ie between and among different NCAs.[88] Specifically, pursuant to Article 12(1) of Regulation 1/2003,[89] the EU Commission and NCAs shall have the power to provide one another with any matter of fact or law including confidential information and use it in evidence for the purpose of applying Articles 101 and 102 TFEU. Presumably, the rationale underpinning this provision is the need to overcome potential hurdles that could be posed by diverging national procedural standards. In this respect, Article 12(1) of Regulation 1/2003 must be read in conjunction with Recital 16, which states that the exchange of information between the ECN members and its use in evidence should be allowed 'notwithstanding any national provision to the contrary'.[90] Finally, it is worth referring to the provision contained in the recent Directive 2019/1, which is concerned with the admissibility of ECN gathered evidence before national competition authorities. Member States must ensure that the types of proof that are admissible as evidence before an NCA include documents, oral statements, electronic messages, recordings and all other objects containing information, irrespective of the form it takes and the medium on which information is stored.[91] Therefore, not only does this Directive harmonise investigative powers, it also harmonises the admissibility of evidence gathered on the basis of those powers.

Exchange of information, its admissibility and use in evidence does not take place only between ECN authorities. Since the entry into force of Regulation 1/2003, national courts are competent to apply Articles 101 and 102 of the Treaty.[92] National courts can therefore apply EU competition provisions in claims between private parties, but also in relation to appeals lodged against NCAs' decisions.[93] The relationship between DG COMP and national courts is regulated by Article 15 of Regulation 1/2003,

[86] Christopher Kerse and Nicholas Khan, *EC Antitrust Procedure* (5th edn, Sweet & Maxwell 2005) 266.
[87] See inter alia Daniel Reichelt, 'To What Extent Does the Co-operation within the European Competition Network Protect the Rights of Undertakings?' (2005) 42 *Common Market Law Review* 745; Denis Waelbroeck, 'Twelve Feet All Dangling Down and Six Necks Exceeding Long. The EU Network of Competition Authorities and the European Convention on Fundamental Rights' in Ehlermann (ed) (n 74).
[88] Commission notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43, para 27.
[89] Art 12(1) of Regulation 1/2003.
[90] Recital 16 of Regulation 1/2003.
[91] Art 32 of Directive (EU) 2019/1.
[92] Recital 7 of Regulation 1/2003.
[93] On the role of national judicial authorities in the enforcement of Articles 101 and 102 TFEU, see Louis Ortiz Blanco and Konstatin Jörgens, 'The Role of National Judicial Authorities' in Luis Ortiz Blanco (ed), *EU Competition Procedure* (3rd edn, Oxford University Press 2013).

which states inter alia that national courts may ask DG COMP to transmit to them information or its opinion on questions concerning the application of EU competition rules.[94] Article 15 does not specify which national courts in particular, it simply refers to national courts 'in proceedings for the application of Article 101 and 102 TFEU'.[95] That being said, administrative, criminal and civil courts arguably fall within the scope of the provision, as long as they have been entrusted – as a matter of national law – with the application of EU competition provisions. The EU Commission may – on its own initiative – submit written or oral observations to national courts.[96] It is clear that since national courts are competent to enforce Articles 101 and 102 TFEU, there should be a mechanism allowing them to obtain DG COMP collected evidence. A limitation to the general rule that DG COMP can transmit information to national courts is the case of information voluntarily submitted by a leniency applicant, without the consent of the applicant.[97] Finally, reference should be made to the *Otto Postbank* case,[98] where the District Court of Amsterdam had asked the CJEU whether in national civil proceedings a national court is required to apply the *Orkem* principle of *nemo tenetur*, which provides that an undertaking is not obliged to answer questions if by providing such answers this would involve an admission that competition rules had been infringed.[99] The CJEU responded that the national court is not obliged to do so, that the application of Articles 101 and 102 TFEU by national authorities is governed by national procedural rules and that it is 'a matter for national law to define the appropriate procedural rules in order to guarantee the rights of the defence of the persons concerned. Such guarantees may differ from those which apply in Community proceedings'.[100] In enforcing EU competition law, national courts remain thus free to apply national procedural safeguards.

So far we have discussed the possibilities of evidence sharing between ECN authorities and between DG COMP and national courts. What about authorities other than the national counterparts of DG COMP and the national courts? Does the legal framework leave the door open for those authorities to potentially gain access to ECN collected information, as is for instance the case in the SSM/ECB legal framework?[101] Regulation 1/2003 does not explicitly govern exchange of information and subsequent use of such information in evidence by 'other' authorities. Nevertheless, according to Article 28(2) of Regulation 1/2003, 'the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities

[94] Art 15(1) of Regulation 1/2003.
[95] Art 15 of Regulation 1/2003.
[96] Art 15(2) of Regulation 1/2003.
[97] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04) [2004] OJ C101/54, para 26.
[98] Case C-60/92 *Otto v Postbank*, EU:C:1993:876.
[99] ibid, para 8.
[100] ibid, para 14.
[101] Art 136 of Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L 141/1.

of the Member States' must not disclose information acquired or exchanged by them, covered by the obligation of professional secrecy.[102] As can be seen, the abovementioned legal provision also refers to 'officials and civil servants of other authorities of the Member States', without however further specifying what these 'other' authorities and officials are. This raises the question of whether Article 28(2) of Regulation 1/2003 presupposes that – in certain Member States – NCAs are often enabled or even obliged to disclose information to other national authorities, for instance public prosecution services.[103] Should that be the case, seeing that information acquired through requests for information, interviews, inspections, sectoral investigations and mandated investigations must be used only for the purposes for which it was acquired,[104] we are of the opinion that potential disclosure of such information to 'other' authorities should only be used as intelligence or 'circumstantial evidence' to initiate a new procedure.[105]

4.3.2 Dealing with diverging standards: Purpose limitation and presumption of equivalent protection of legal persons' defence rights

How does Regulation 1/2003 deal with diverging standards? Article 12(2) of the Regulation requires that exchanged information shall be used by the ECN members only for the application of Articles 101 and 102 TFEU and only 'in respect of the subject matter for which it was collected by the transmitting authority'.[106] Obviously, this provision is a codification of the *Dow Benelux* case,[107] whereby the CJEU had crystallised the principle of purpose limitation, by explaining that information obtained during DG COMP investigations must not be used for purposes other than those indicated in the decision of the EU Commission ordering the investigation.[108] According to the CJEU, the *raison d'être* of a purpose limitation is to safeguard the rights of the defence of the undertakings, as 'those rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof'.[109]

In addition, Recital 16 of Regulation 1/2003 articulates a presumption of equivalent protection of defence rights across the EU, by specifying that 'the rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent'.[110] The Recital refers specifically to 'undertakings', therefore this presumption applies only to legal persons. An equivalence rule clearly facilitates the use of ECN gathered information as evidence by all 29 members of the ECN. In the absence of equivalence, problems stemming from the diverging standards of defence

[102] Art 28(2) of Regulation 1/2003.
[103] See, eg, District Court Rotterdam 9, June 2005.
[104] Art 28(1) of Regulation 1/2003.
[105] Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others (Spanish Banks)*, para 39.
[106] Art 12(2) of Regulation 1/2003.
[107] Case 85/87 *Dow Benelux v Commission*.
[108] ibid, para 17.
[109] ibid, para 18.
[110] Recital 16 of Regulation 1/2003.

rights across the 28 Member States would arguably arise, since not all national laws protect defence rights in the same manner; legal professional privilege is a typical example in this respect.[111] Finally, it is important to note that, according to the ECN notice, the question of whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to the transmitting authority: 'when transmitting information, the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested'.[112] It therefore follows that the equivalence rule covers only lawfully obtained evidence.

4.3.3 Dealing with diverging standards of defence rights of natural persons

The provisions discussed thus far concerned the admissibility and use as evidence of information collected by ECN authorities by other ECN authorities or by national courts, for the purpose of enforcing EU competition law vis-à-vis economic undertakings, thus, vis-à-vis *legal* persons. What about natural persons and their defence rights, particularly in light of the fact that certain Member States have criminalised violations of competition law provisions?[113] While Recital 16 lays down the above discussed presumption, ie that undertakings enjoy sufficiently equivalent protection of their defence rights in the different Member States, when it comes to natural persons, the picture is altered and this presumption does not fully apply. With regard to natural persons, Recital 16 of Regulation 1/2003 states that they 'may be subject to substantially different types of sanctions across the various systems' and as a result, it is necessary to ensure that information can only be used in evidence if it has been collected 'in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority'.[114] Indeed, given that natural persons can – depending on the laws of the Member State at issue – be subjected to criminal liability and as a corollary be faced with criminal sanctions, including custodial sanctions, Regulation 1/2003 takes stock of those differences and specifies the circumstances under which ECN exchanged information can be used in evidence to impose sanctions on natural persons. According to Article 12(3) of Regulation 1/2003, using ECN collected evidence to impose sanctions on natural persons is possible only if:

a) The law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 101 or Article 102 TFEU. According to Böse,[115] the assumption underlying this provision is again that imposing

[111] Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:C:2010:512, paras 73–74. See also Vesterdof (n 7).
[112] Commission notice on cooperation within the Network of Competition Authorities (n 88), para 27.
[113] For example, Greece, the UK.
[114] Recital 16 of Regulation 1/2003.
[115] Martin Böse, 'The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases' in Katalin Ligeti (ed), *Toward a Prosecutor for the European Union* (Hart 2013) 853.

sanctions of a similar kind is tantamount to a similar level of protection of defence rights.

b) In the absence of similar kind of sanctions, the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. Therefore, equivalence is in this case assessed on an *ad hoc* basis. In any case, according to Article 12(3) of Regulation 1/2003, ECN exchanged information cannot be used by the receiving authority for imposing custodial sanctions.[116] As follows from the *Spanish Banks* case, NCAs are certainly not expected to undergo 'acute amnesia'.[117] Such information would serve as circumstantial evidence to justify the initiation of a national procedure.

4.4 Parallel and consecutive proceedings

Parallel and consecutive EU administrative proceedings and national punitive proceedings are a real possibility. Firstly, national competition law can be applied in parallel to EU competition law.[118] Secondly, court proceedings may run in parallel to an EU Commission investigation or follow up on a Commission decision. What is more, seeing that the same acts or facts that run afoul of the cartel or abuse of dominance prohibitions could simultaneously constitute criminal offences, for instance bribery, forgery etc, the likelihood of a national parallel or consecutive (criminal) procedure is real, even more so because certain national provisions foresee the possibility or the obligation of the national competition authority to transmit information to public prosecution services and other criminal justice authorities.[119]

Concerning the possibility of using ECN gathered information as evidence for the parallel application of national competition law in the same case, the situation is governed by Article 12(2) of Regulation 1/2003. According to that provision, ECN exchanged information can be used for the application of national competition law, in parallel to EU competition law, insofar as national proceedings do not lead to a different outcome.[120] It follows that the use as evidence of ECN exchanged information for the application of national competition law is possible only with regard a) to the same case, b) in parallel to EU law and c) if the outcome would be the same. It appears that those three requirements should be met cumulatively. However, nowhere is the term 'different outcome' defined more precisely.[121]

As regards the occurrence of consecutive or parallel proceedings in DG COMP and a national court, the framework governs the issue in the following way: when national courts reach a decision before the EU Commission, they must 'avoid giving

[116] Art 12(3)(b) of Regulation 1/2003.
[117] Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others (Spanish Banks)*, para 39.
[118] Recital 16 of Regulation 1/2003.
[119] See, for instance, Koen Bovend'Eerdt, 'The Netherlands' in Luchtman, Vervaele and Simonato (eds) (n 57) 140.
[120] Art 12(2) of Regulation 1/2003.
[121] Kerse and Khan (n 86) 273.

decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated'.[122] If, on the other hand, DG COMP has reached a decision before the national court, the latter must not take a decision conflicting with the EU Commission's decision.[123] This stipulation is on par with the *Rewe* principle.

Lastly, concerning the occurrence of consecutive or parallel proceedings in DG COMP and other national authorities for purposes outside the scope of EU or national competition law, such as tax related matters, the answer is to be found in the *FSL Holdings* case. As discussed in section 3.3, the *FSL Holdings* case dealt with transmission of information by the Italian tax and finance police to DG COMP. The CJEU asserted that the lawfulness of the transmission to the EU Commission of information obtained in application of national criminal law is a question governed by national law.[124] Endorsing the Advocate General's opinion, the Court furthermore advocated that 'Article 12 of Regulation No 1/2003 pursues the specific objective of simplifying and encouraging cooperation between the authorities within the European Competition Network by facilitating the exchange of information' and that this does not give expression to any general rule that precludes DG COMP from using in evidence information transmitted by national authorities other than its national counterparts 'on the sole ground that that information was obtained for other purposes'.[125] What can therefore be deduced from this case is that DG COMP is not prohibited from using in evidence (or for initiating an investigation on the basis of) information fortuitously transmitted to it by a national, non ECN, authority. If national law permits the transmission, then DG COMP may rely on such information.

5. ECB

5.1 Introduction

In November 2014, the European Central Bank assumed the role of the exclusive prudential supervisor of credit institutions established in the euro area Member States.[126] While responsibility rests with the ECB, the enforcement of prudential banking legislation is shared between the ECB and its national counterparts (NCAs),[127] which together form the Single Supervisory Mechanism (SSM). While the ECB is responsible for the supervision of the most significant credit institutions in the euro

[122] Art 16(1) Regulation 1/2003; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 (n 97), paras 12 and 13.
[123] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (n 97), para 13.
[124] Case C-469/15 P *FSL and Others v Commission*, para 32.
[125] ibid, para 35.
[126] Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63 (hereinafter 'SSM Regulation').
[127] For an overview of the shared system of prudential law enforcement see Ton Duijkersloot, Argyro Karagianni and Robert Kraaijeveld, 'Political and Judicial Accountability in the EU Shared System of Banking Supervision and Enforcement' in Scholten and Luchtman (eds) (n 14).

area, NCAs assist the ECB in the implementation of its exclusive tasks,[128] by carrying out the day-to-day supervision of the less significant banks.[129] For executing its tasks, the ECB gathers a plethora of information at recurring intervals and on an ad hoc basis.[130] Given that the EU institution has been vested with direct monitoring, investigating and sanctioning powers,[131] it becomes evident that its information position is particularly strong. Gathered information may subsequently be transmitted to the national level for punitive administrative or even criminal follow up. Given that irregularities in banking activities often give rise to criminal responses, a situation of parallel proceedings, involving the ECB conducting prudential supervision on the one hand and national criminal law enforcement authorities conducting a criminal investigation on the other hand, is not purely theoretical. After all, the ECB is only responsible for specific prudential supervisory tasks. Criminal law falls outside the scope of the ECB's supervision.[132] At the same time, according to Articles 53 and 54 of the Capital Requirements Directive (CRD IV),[133] the national transpositions of which the ECB has to apply, while persons who work for the ECB and NCAs are under a duty of professional secrecy,[134] this is without prejudice to cases covered by criminal law.[135] This provision seems to allow for the ECB and NCAs transmitting information to criminal justice actors.

We proceed in the following way. Firstly, we discuss the two distinct mechanisms through which the EU authority transmits information to the national level. Next, we discuss the issue of parallel proceedings, ie a national criminal investigative authority conducting an investigation and requesting ECB held information.[136] Subsequently, we delve into the question of how the EU legal framework regulates – if at all – the admissibility of ECB transmitted information as evidence in national proceedings. Does the EU legal framework provide for any specific rules as to how a national authority – be it a national counterpart of the ECB's or another national authority – is to assess materials collected in another jurisdiction? How does the ECB legal framework deal with diverging standards? Last but not least, to what extent is the

[128] Argyro Karagianni and Mira Scholten, 'Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework' (2018) 34 *Utrecht Journal of International and European Law* 185.
[129] Recital 5 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (hereinafter SSM Framework Regulation) [2014] OJ L 141/1.
[130] For the (composite) organisational structures involved in the gathering of information see Miroslava Scholten and Michele Simonato, 'EU Report' in Luchtman and Vervaele (eds) (n 11).
[131] When it comes to sanctioning powers, NCAs are also involved in the sanctioning of natural persons and of breaches whose legal basis is to be found in national law.
[132] Recital 28 of SSM Regulation.
[133] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338 (hereinafter 'CRD IV').
[134] Art 53(1) of CRD IV.
[135] ibid.
[136] See Decision EU/2016/1163 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) [2016] OJ L 192/73.

legal position of a person subjected to parallel or consecutive EU non-punitive and national punitive proceedings safeguarded?

5.2 Follow up by the ECB's national counterparts

The ECB is endowed with direct sanctioning powers,[137] but only as far as legal persons are concerned and only in relation to breaches whose legal bases are to be found on directly applicable EU Regulations.[138] Additionally, the ECB is empowered to impose direct sanctions in case of a breach of an ECB Regulation or decision.[139] In all other cases, that is, for the imposition of sanctions vis-à-vis natural persons and for breaches of national law transposing EU Directives, the ECB cannot impose sanctions *suo motu*. It is however empowered to request an NCA to open sanctioning proceedings. Obviously, the NCA which is then responsible for follow up should have at its disposal the relevant information on the basis of which the ECB's suspicion was triggered. Despite the general obligation of professional secrecy,[140] the ECB and the NCAs, both vertically and horizontally, are enabled to exchange information with each other.[141] Such information may only be used for specific purposes, inter alia to impose penalties.[142] This provision thus constitutes a purpose limitation, similar to the one found in the DG COMP legal framework. However, as already mentioned, the confidentiality of the information acquired by supervisors is 'without prejudice to cases covered by criminal law'.[143] In any case, the ECB is enabled to transmit information to its national counterparts for the opening of sanctioning proceedings.[144]

Such sanctioning proceedings are a typical example of a composite procedure. The information is gathered by the organisational structures of the ECB, to a large extent through the use of investigative powers which have their basis in EU law. The collected information is subsequently transmitted to an NCA and the latter opens a sanctioning proceeding. However, the national counterpart enjoys discretion[145] in deciding whether a sanction should be imposed or not and the procedure is governed by national procedural law. The ECB legal framework does not contain any additional rules, such as the presumption of equivalent protection of defence rights, as is the case with DG COMP. Therefore, no EU guidance is provided as to how the 19 NCAs are to assess materials gathered in another jurisdiction. In addition, it is worth noting that

[137] For an analysis of the ECB's sanctioning powers, see inter alia Christos Gortsos, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: Analysis of Article 19 of the SSM Regulation' (2015) ECEFIL Working Paper 2015/11; Valentina Felisatti, 'Sanctioning Powers of the European Central Bank and the *Ne Bis In Idem* Principle within the Single Supervisory Mechanism' (2018) 8 *European Criminal Law Review* 378.
[138] Art 18(1) of the SSM Regulation.
[139] Art 18(7) of the SSM Regulation.
[140] Art 53(1) of the CRD IV.
[141] Art 53(2) of the CRD IV.
[142] Art 54(b) of the CRD IV.
[143] Art 53(1) of the CRD IV.
[144] Art 18(5) of the SSM Regulation.
[145] Laura Wissink, Ton Duijkersloot and Rob Widdershoven, '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* 92, 103.

while NCAs are empowered to impose punitive and – depending on the law of the Member State at issue – also criminal sanctions for breaches of prudential legislation,[146] the ECB framework is silent on such issues as the admissibility of ECB collected information as evidence and its use by NCAs for the imposition of punitive or criminal sanctions vis-a-vis natural persons. By contrast, DG COMP explicitly regulates this by stating that ECN gathered information *cannot* be used by the receiving authority to impose custodial sanctions.[147] It therefore appears that the defence rights of natural persons are somewhat lost of sight in the ECB framework.

5.3 Punitive follow up by national criminal investigative authorities

Another way through which ECB gathered information can end up in national punitive proceedings, but this time the national authority involved would not be the national counterpart of the ECB, but presumably a criminal law enforcement authority, is through Article 136 of the SSM Framework Regulation. According to this provision, which is entitled 'evidence of facts potentially giving rise to a criminal offence', when the ECB in carrying out its tasks under the SSM Regulation, comes across information which raises a suspicion that a criminal offence may have been committed, it shall request the relevant NCA to refer the matter to the relevant national authorities for investigation and possible criminal prosecution in accordance with national law.[148] From the wording of this provision, we can see that no purpose limitation is foreseen; in essence, any information raising a suspicion that a criminal offence may have been committed, irrespectively of where and why it has been gathered, can potentially end up in the hands of national criminal law enforcement authorities. The admissibility of ECB transmitted information as evidence in national proceedings is thus not regulated at the EU level, but is left to national law. In addition, the *Saunders* type of problem – but now in a composite setting – is not dealt with, therefore the persons concerned are under a duty to cooperate at the EU level, but may be subjected to punitive proceedings at the national level, on the basis of information gathered precisely because they were under a duty to cooperate with the ECB. The issue of diverging national standards is not taken into account either, as there is no similar rule on the presumption of equivalent protection of defence rights, which is used in the EU competition law enforcement setting.

5.4 Parallel proceedings at the EU and national levels

As we explained above, the ECB's tasks are only of a prudential, supervisory nature. Criminal activities, such as money laundering and terrorist financing are explicitly excluded from the scope of the ECB's mandate. However, it is not inconceivable that the same facts could give rise to both breaches of prudential requirements and to criminal investigations at the national level; in fact, such examples did occur in the

[146] Art 65(1) of the CRD IV.
[147] Art 12(3) of Regulation 1/2003.
[148] Art 136 of the SSM Framework Regulation.

aftermath of the financial crisis.[149] For instance, the same facts could give rise both to a violation of a prudential nature at the EU level and to money laundering at the national level. While the ECB is investigating in the context of its mandate and the supervised persons are under a duty to cooperate and disclose information, national criminal investigative authorities may meanwhile request from the ECB the disclosure of relevant information. The relationship between the ECB and national criminal justice authorities is governed by Decision EU/2016/1162 on the disclosure of confidential information in the context of criminal investigations.[150] We have discussed the content of this Decision in the previous study.[151] In light of the present study, it is important to reiterate that, in principle, the ECB would transmit information requested by a national criminal justice authority, if there is an express obligation to disclose the requested information under EU or national law or the transmission would not jeopardise the accomplishment of the ECB's tasks and the interests of the Union.[152] Besides this decision, it follows from the *Zwartveld* case[153] that EU institutions are under a duty of sincere cooperation with the judicial authorities of the Member States and they must at any rate justify a refusal to produce documents to a national judicial authority on legitimate grounds.[154]

The aforementioned situation resembles the *Martinnen* and *Chambaz* cases we discussed previously (supra section 2.1), but now in a vertical, composite setting. Two sets of investigations are running in parallel, based on different procedural frameworks. Can the (legal or natural) person subjected to the ECB investigation exclude a later use of ECB gathered evidence in punitive proceedings? The answer seems to be in the negative, as the EU legal framework does not regulate this issue, neither are there any rules in effect which coordinate the two sets of investigations and ensure the inter-systemic application of the safeguards. Is the ECB or a national authority expected to stop its investigation if a second investigation is running in parallel? Or should we a priori accept that the effectiveness of composite EU law enforcement sometimes leads to a mitigation of fundamental rights standards?

6. OLAF

6.1 Introduction

Article 11 of Regulation 883/2013 stipulates that on the completion of an investigation OLAF draws up a report which gives an account of the legal basis for the investigation, the procedural steps followed, the facts established and their preliminary classification in law, the estimated financial impact of the facts established, the respect of the

[149] See Matej Avbelj, 'The European Central Bank in National Criminal Proceedings' (2017) 42 *European Law Review* 474.
[150] Decision EU/2016/1163 of the European Central Bank (n 136).
[151] Argyro Karagianni, Mira Scholten and Michele Simonato, 'EU Vertical Report' in Luchtman, Vervaele and Simonato (eds) (n 57) 26.
[152] Art 2 of the Decision EU/2016/1163 of the European Central Bank (n 136).
[153] Case C-2/88 Imm *Zwartveld and Others*, EU:C:1990:440.
[154] ibid, paras 10–11.

procedural guarantees and the conclusions of the investigation. This report is to be accompanied by recommendations which specify whether or not – amongst other sorts of follow-up – punitive action ought to be taken by the national competent authorities of the Member State concerned.[155] In drawing up an investigation report OLAF is to take account of the national law of the Member State concerned. Investigation reports, again according to Regulation 883/2013, shall constitute admissible evidence also in punitive proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. Reports are to be subject to the same evaluation rules and have identical evidentiary value as national administrative reports.[156]

The rules in Regulation 883/2013 that govern the admissibility of OLAF reports in national punitive proceedings raise a host of questions. Why is there such a rule in the first place, particularly when other authorities – notably the ECB – lack such a rule (sections 4 and 5)? Following up on the first question, why *this* rule? Why did the European Parliament and the Council opt for a rule of assimilation rather than another mechanism such as a purpose-limit, to govern the transmission of evidence from the European to the Member State level in the application of Union competition law (see section 3)? How does the current rule on the admissibility of evidence grapple with the issues identified in section 1? Does it provide guidelines on how a national authority is to assess materials gathered in another jurisdiction? Does it anticipate the existence of diverging standards? Does it provide a means to safeguard the legal position of a person subject to parallel or consecutive EU administrative and national punitive investigations? Does the OLAF legal framework exercise foresight and proffer mechanisms – in particular those of an evidentiary nature – that (attempt to) resolve the issues, or does it relegate the resolution of such problems to the national sphere? And lastly, will the proposed amendment to the OLAF Regulation bring about a change in the workings of these mechanisms?

The concern of this section is solely the admissibility of evidence in national punitive proceedings. Not considered is the admissibility of OLAF evidence in proceedings other than those of a punitive nature, such as recovery measures or administrative follow-up. It does not discuss the admissibility of evidence collected by national authorities in EU proceedings, as happens, for instance, in EU staff investigations (ie, national to EU level). Neither do we examine in great detail the horizontal transfer of evidence, however interesting, to other EU authorities as is foreseen in, for example, the EPPO Regulation and the proposal amending the OLAF Regulation.[157]

[155] Art 11(1) of Regulation 883/2013/EU, Euratom.
[156] Art 11(2) of Regulation 883/2013/EU, Euratom.
[157] Art 101 of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, and Art 12e of the Commission's 'Proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' COM(2018) 338 final, 23 May 2018.

Lastly, we acknowledge that this report focuses mostly on the role of the OLAF investigation report. By paying attention solely to the report and its admissibility as evidence in national punitive proceedings *after* completion of its investigation one could lose sight of the fact that OLAF continuously interacts with the competent national authorities, primarily by means of transmission of information (not evidence per se), *prior to* and *during* an investigation.[158] Because the information transferred does not form part of the OLAF investigation report, the assimilation obligation laid down in Article 11(2) of Regulation 883/2013/EU, Euratom does not apply (but see section 6.3). This in and by itself of course does not mean that such information is not admissible in national (punitive) proceedings. Rather, it means that the determination of the status and use this information in national proceedings, in the absence of EU legislation on the matter, is within the purview of Member States' procedural autonomy, subject to the *Rewe* requirements of equivalence and effectiveness.[159] In addition, such information can, where a national investigation has not yet been started, prompt national authorities to do so.

6.2 The reason for a rule on the admissibility of evidence in OLAF's legal framework

The existence of a rule on the admissibility of evidence in the OLAF legal framework can be explained by the shared enforcement design of the protection of the Union's financial interests and OLAF's position and role therein. OLAF is an investigative body, which means that its central function is to gather information with the aim of establishing the existence of fraud, corruption or any other irregularities in any areas of

[158] Where OLAF, before an investigation or in case it decides not to open an investigation, handles information which suggests illegal activities that affect the financial interests of the Union, OLAF may – and if it concerns an internal investigation *must* – inform the competent authorities of the Member States concerned (whichever these might be) for action to be taken in accordance with their respective national laws (see Arts 3(6), 4(8), 5(5) and 5(6) of Regulation 883/2013/EU, Euratom). In case of an external investigation, the competent authorities must ensure that appropriate action is taken and must, on request, inform OLAF of the results thereof (Arts 3(5) and 5(6) of Regulation 883/2013/EU, Euratom). If it concerns information related to an internal investigation, the competent authorities may – in accordance with national law – decide to take action they deem suitable. The competent authorities must inform OLAF if they decide on any such action (Art 4(8) of Regulation 883/2013/EU, Euratom). The information transferred prior to opening an investigation does not concern facts established as a result of investigative acts (eg, interview and/or inspections) as such acts can only take place after the opening of an investigation. Likewise, the information transmitted cannot concern data retrieved from EU agencies or databases as OLAF only has access to such information during an investigation (Arts 3(5) and 4(2) of Regulation 883/2013/EU, Euratom). *During* an external investigation, OLAF may transmit information to the competent authorities to enable them to take appropriate (enforcement) action in accordance with national law. If OLAF is conducting an internal investigation, it must transmit information concerning facts which fall within the jurisdiction of a national judicial authority (Arts 12(1) and (2) of Regulation 883/2013/EU, Euratom). The transfer in the course of an investigation can concern information obtained by means of OLAF's investigative powers or information procured from EU databases and institutions, bodies, offices and agencies (Arts 3(5) and 4(2) of Regulation 883/2013/EU, Euratom).

[159] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, para 5.

Union activity whenever its financial interests are affected.[160] OLAF's legal framework does not empower it to prosecute or impose punitive sanctions – or any sanctions for that matter – on an investigated economic operator after it has established an act or omission harmful to the Union's financial interests that would warrant such action: OLAF conducts merely administrative investigations.[161] Rather, once OLAF completes an investigation, it transmits its investigation report to the competent national authority, which holds exclusive competence over prosecution and sanctioning. Together with the report, the buck for subsequent punition is passed to the national level.[162] Both OLAF and the national competent authorities therefore have their respective tasks to fulfil in the protecting the Union budget.[163] To bridge the divide between, on the one hand, the gathering of materials under administrative investigations and the use thereof in criminal proceedings and, on the other hand, to span the rift from EU investigations to national follow-up – which the OLAF legal framework explicitly anticipates,[164] the OLAF Regulation provides for a rule on the admissibility of evidence.[165]

6.3 The logic of OLAF's rule on the admissibility of evidence

Article 11(2) of Regulation 883/2013 encapsulates an assimilation obligation, requiring national administrative reports and OLAF investigation reports to be treated in like manner with regard to their admissibility, their evaluation and their evidentiary value in national punitive proceedings.[166] On paper, the rule laid down in Article 11(2) provides a seemingly simple instruction on how a competent national authority is to assess materials gathered by OLAF (in another jurisdiction) in punitive proceedings: treat the OLAF investigation report as you would treat a national administrative report from a national administrative inspector, subject it to the same evaluation rules and grant it equivalent evidentiary status. However, the obligation incumbent on the competent national authority to treat OLAF final reports as equivalent to national administrative reports is premised on the presumption that such equivalence exists or, in any case, has been designated by national law. Which authority is considered to be equivalent to OLAF and, consequently, to which national administrative report the competent

[160] Art 1(1) of Regulation 883/2013/EU, Euratom; Art 8(1) of 'Guidelines on Investigations Procedures for OLAF Staff (Ref Ares (2013)3077837' (hereinafter 'GIP 2013').
[161] Michele Simonato, 'OLAF Investigations in a Multi-Level System. Legal Obstacles to Effective Enforcement' [2016] *eucrim* 136, 137; Justyna Łacny, Lech Paprzycki and Eleonora Zielińska, 'The System of Vertical Cooperation in Administrative Investigation Cases' in Ligeti (ed) (n 115) 814. The authors read OLAF's circumscribed powers in light of the principle of conferral: 'Competences not conferred upon the EU in the Treaties remain with the Member States, and neither the Commission within which OLAF operates, nor OLAF itself, were attributed with competence for criminal investigations that could be exercised during OLAF's investigations'.
[162] Michiel Luchtman and John Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)' (2014) 10 *Utrecht Law Review* 132, 132. That is not to say, however, that OLAF has no further role to fulfil. As Art 24 of the GIP 2013 demonstrates, OLAF has an important monitoring role to fulfil by following the progress of the implementation of recommendations by the competent authorities.
[163] See Art 325(1) TFEU and the CJEU's interpretation thereof in Case C-42/17 *MAS*, *MB*, para 43.
[164] Recitals (28) and (29) and Arts 5(1) and 11(2) of Regulation 883/2013/EU, Euratom.
[165] See above-mentioned Art 11 of Regulation 883/2013/EU, Euratom.
[166] Art 11(2) of Regulation 883/2013/EU, Euratom.

national authority is to assimilate the OLAF report to, is not dealt with by EU law but is a matter left to the national law. A more pressing issue is when national law has not appointed an equivalent national administrative authority as being equivalent. In the latter case, how is a national authority to assess the OLAF investigation report? Likewise, what is the competent national authority to do if national law does not allow for the admissibility of administrative reports in criminal procedures?

The assimilation rule has been subject to criticism from academic circles,[167] from EU institutions,[168] and from OLAF itself.[169] There are a number of recurring issues that can be distilled. The first is that, as stated in the paragraph above, the rule of assimilation presupposes the existence of a comparable national administrative authority: 'if there is no such actor at national level, the assimilation provision will remain an empty box leading to the potential inadmissibility of the OLAF final report'.[170] The second is that, in certain Member States, where national procedures are not followed to the letter or where information obtained in the process of an administrative investigation is as such not admissible in punitive proceedings, investigations must be duplicated. This, in turn, is prejudicial to procedural economy and the rights of the person under investigation.[171] The third main strand of criticism holds that the assimilation rule conserves national discrepancies.[172] As harmonisation of the law of evidence is largely absent,[173] it is largely left to Member State discretion to decide on, for instance, what should be the applicable evidential standards and whether or not administrative evidence should constitute admissible evidence in punitive

[167] See for instance Jan Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor's Office* (Europa Law Publishing 2011) 122–123; Katalin Ligeti and Michele Simonato, 'Multidisciplinary Investigations into Offences against the Financial Interests of the EU: A Quest for an Integrated Enforcement Concept' in Francesca Galli and Anne Weyembergh (eds), *Do Labels still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* (Éditions de l'Université de Bruxelles 2014).

[168] Most recently the study carried out by Katalin Ligeti and Angelo Marletta for the European Parliament: Katalin Ligeti and Angelo Marletta, 'The Protection of the Procedural Rights of Persons Concerned by OLAF Administrative Investigations and the Admissibility of OLAF Final Reports as Criminal Evidence' (Study for the European Parliament's Committee on Budgetary Control 2017) 24–26. See also ECORYS, 'Study on the Impact of Strengthening of Administrative and Criminal Law Procedural Rules for the Protection of the EU Financial Interests' (JUST/A4/2011/EVAL/01 Final Report 2013) 28–29, 39.

[169] Commission, 'Commission Staff Working Document Implementation of the Article 325 by the Member States in 2009 accompanying document to the "Report from the Commission to the European Parliament and the Council: Protection of the Financial Interests of the Communities – fight against fraud annual report 2009"' SEC(2010) 897 and indirectly also OLAF, 'The OLAF Report 2013' (2014) 22.

[170] Ligeti and Marletta (n 168) 25.

[171] Commission, 'Commission Staff Working Paper accompanying the document "Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money"' SEC(2011) 621; ECORYS (n 168) 28; OLAF, 'The OLAF Report 2013' 22ff; Ligeti and Marletta (n 168) 25; Ligeti and Simonato (n 167) 92.

[172] ECORYS (n 168) 39; Ligeti and Marletta (n 170) 25.

[173] John Spencer, 'The Green Paper on Obtaining Evidence from One Member State to Another and Securing its Admissibility: The Reaction of One British Lawyer' (2010) 5 *Zeitschrift für Internationale Strafrechtsdogmatik* 602, 604; Luchtman and Vervaele, 'European Agencies for Criminal Justice' (n 162) 147.

proceedings. The obligation to assimilate OLAF investigation reports therefore does nothing to change the 'variable geometry'.

The arguments lodged against the assimilation rule are concerned primarily with the consequent repercussions for the effective follow-up to OLAF investigations by rendering the admissibility of its reports arduous and sometimes even impossible. While these criticisms ring true, they beg a further question: if the assimilation rule hinders the effective follow-up to OLAF investigations, what can explain its design? This question requires an understanding of the rule's rationale. Appreciating its logic, in turn, demands not only that we pay attention to the admissibility and use of OLAF investigation reports, but also that we take into account the nature of this report, its constituents, and particularly the way in which it was gathered.

The OLAF investigation report is the end-product or fruit of an investigation. The findings contained in the report, and the recommendations accompanying it, are the result of investigative activities carried out by OLAF in order to gather information to establish the existence of administrative irregularities, criminal acts, and/or serious misconduct by EU officials in all areas of Union activity whenever its financial interests are affected. However, there is, as was established in the 2017 study on OLAF's investigatory powers, no coherent framework governing the way in which investigative powers are used to gather information of illegal activity with the EU budget.[174] The information in an OLAF report can be the outcome of investigative acts carried out under the lead and responsibility of national authorities on the basis of domestic law;[175] acts under the lead of OLAF but on the basis of a mix of both Union and national law; and operations undertaken by OLAF solely on the basis of EU law.[176] Which law applies – national, European or both – and, in turn, the type of authorities with whom OLAF cooperates, the scope, content and enforceability of their powers, and the scope and content of the procedural safeguards they are to take into account depend on whether OLAF carries out an internal or external investigation (or combines the two of them), the jurisdiction in which an investigation is conducted,[177] and the particular policy field in which OLAF acts (VAT, customs duties, agriculture, etc).

On completion of an investigation OLAF draws up an investigation report and, where it deems this necessary, forwards it to the competent national authority for the initiation of the recommended punitive proceedings in which the report is to be used.[178] The national authority in question faces information gathered, as is apparent from the above, by possibly numerous authorities acting and cooperating with each other in

[174] See Michiel Luchtman, 'Introduction' in Luchtman and Vervaele (eds) (n 11) 2, and Luchtman and Vervaele, 'Comparison of the Legal Frameworks' (n 11) 247–253.
[175] For instance when OLAF conducts investigations in the area of customs on the basis of sectoral legislation, ie, Arts 18 and 4–8 of Regulation 515/97/EC 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.
[176] Luchtman and Vervaele, 'Comparison of the Legal Frameworks' (n 11) 247–253.
[177] This is particularly salient in case of an external investigation.
[178] The decision to start punitive follow-up proceedings is a national decision. OLAF recommendations do not entail an obligation to start proceedings or to start a specific type of proceedings (administrative, criminal, etc).

different constellations and acting in accordance with their own (different) standards. What does the assimilation obligation demand of this national authority?

First, it requires of the authority that – notwithstanding the divergent EU and national standards according to which evidence is gathered (the nature of the authorities, their powers and their enforceability, and the safeguards which they must abide) – for purposes of using this information in national punitive proceedings such divergences are to be discounted, on the condition that there is an equivalent administrative authority whose reports are admissible in punitive proceedings. One rationale of the assimilation obligation therefore is to accommodate the diverging standards between national and European law in the absence of a common EU code of procedure on which OLAF can base its investigations by stipulating that materials gathered by OLAF ought to be treated in the same way as materials gathered by comparable national authorities.

Second, it requires of the national authority in question that with regard to the use of materials obtained under an administrative head in punitive proceedings, Member State authorities should treat procedures that aim to protect the Union's financial interests in the same way as those which aim to protect their own national (financial) interests.[179]

Underlying the assimilation obligation is therefore a twofold expression of the principle of equivalence: where national punitive proceedings permit the use of evidence obtained by means of administrative law in purely national cases, such permission should be extended on equal terms – even though standards do differ – to materials gathered under EU administrative investigations.

What then is the added value of the assimilation rule laid down in Regulation 883/2013, Euratom over the *Rewe* principle of equivalence? In our understanding the assimilation obligation offers more guidance. It 'routes' or 'directs' the status of the OLAF report under national law. Article 11(2) states, in essence, that it has the status of a national administrative report with the concomitant evidentiary status (without further specifying what the status of an administrative report is to be under national law, or whether it is admissible in punitive proceedings, or how it is to be evaluated in such proceedings). If we compare this to information transferred prior to or during an OLAF investigation (see section 6.1), this channelling function becomes clear. While such information is subject to the *Rewe* requirement of equivalence and, as a result, is to be treated in the same way as national information of a similar nature, the principle of equivalence does not – unlike Article 11(2) – specify the status of such information under national law and in national proceedings. Equivalence in that respect can result in that information having numerous statuses under national law (eg, information that can instigate a national proceeding).

Another relevant question, related to the remarks above, is why opt for an assimilation obligation instead of, for instance, a purpose limitation, as is the case for the ECN? The answer to this question lies, at least in part, in the context in which the

[179] We can clearly derive this from Art 325(2) TFEU, which states that Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

authorities operate. European competition law is enforced in parallel by both DG COMP and the national competition authorities within the closed confines of the ECN, established and governed solely by EU law (see section 4).[180] Within this closed network, the missions, status and powers of the NCAs and DG COMP are aligned. As a result, a purpose limitation can function to safeguard defence rights by prohibiting – within the network – the use of information gathered by administrative means for punitive purposes.

In contrast to the ECN, OLAF is not embedded in a delineated or closed network.[181] Given the wide range of cooperation situations that may arise, there are numerous authorities which could potentially be classified – by national law – as 'competent' for purposes of cooperating with OLAF.[182] Depending on the specific field and jurisdiction in which OLAF investigates, it cooperates with customs authorities, tax authorities, anti-fraud coordination services (AFCOS), to name but a few. The status of these authorities (judicial or administrative), the powers which they have at their disposal, and the safeguards which they must respect, are not harmonised and depend on national law.[183] Considering these particularities of the OLAF enforcement context, imposing a purpose limitation would necessarily have a debilitating effect on OLAF's ability to effectively conduct investigations into illegal activity with the EU budget and, consequently, its ability to protect the Union's financial interests.

6.4 From gathering by EU administrative investigations to use in national punitive proceedings: Regulation of consecutive and parallel proceedings in OLAF's legal framework

Parallel and consecutive EU (administrative) and national (punitive) proceedings are a real possibility in the context of OLAF investigations. Both internal and external administrative investigations can lead to – as a result of the forwarding of an OLAF investigation report to the competent national authorities – consecutive punitive proceedings at the national level.[184] In case of an internal investigation, OLAF will only transmit a report to national judicial authorities in case the report reveals the existence of facts which could give rise to criminal proceedings *stricto sensu* (ie, excluding punitive administrative proceedings).[185]

While national punitive proceedings *can* take place after administrative investigations by OLAF, this is not a necessity. OLAF does not have an investigative monopoly. OLAF investigations do not affect a Member State's ability to initiate punitive proceedings or conduct its own investigations (punitive or otherwise). This is a result of the shared burdens to be carried by the Union, in particular OLAF, and the Member States in the protection of the Union's financial interests. The OLAF legal

[180] Luchtman, Simonato and Vervaele, 'Comparative Analysis' (n 57) 168.
[181] Karagianni, Scholten and Simonato (n 151) 8.
[182] ibid 13.
[183] OLAF, 'The OLAF Report 2015' (2016) 22.
[184] Art 11(3) and (5) of Regulation 883/2013/EU, Euratom. This rule is mirrored in Art 8(3) of Regulation 2185/96/Euratom, EC.
[185] Art 11(5) of Regulation 883/2013/EU, Euratom.

framework does not accord priority to OLAF investigations over national investigations (or vice-versa) nor does it regulate the occurrence of EU-national investigations. Rules on the concurrence of EU administrative and national administrative or criminal investigations are to be found in national law.[186] Parallel investigations by both OLAF and the Member State authorities are therefore not excluded.[187]

The OLAF legal framework regulates the occurrence of consecutive and parallel investigations in two principle ways to prevent a later trial from being unfair (see section 2.2). The first is to take out the element of compulsion in OLAF's administrative investigations. When OLAF wishes to interview a witness or a person concerned during an external investigation, it can invite the person it wishes to interview, but lacks the enforcement mechanisms – sanctions for instance – to subpoena or force persons to show up and/or speak truthfully. In other situations OLAF can, albeit through national authorities, exercise compulsion. For instance, when OLAF takes statements in the context of on-the-spot inspections, depending on national law, compulsion can be exercised and duties to cooperate can be enforced. The situation is different yet again in internal investigations. EU officials and other servants are under an obligation to cooperate when interviewed by OLAF in the context of an internal investigation.[188] Disciplinary measures for non-cooperation can be imposed by a disciplinary board of the respective institution, body, office or agency (IBOA) in accordance with the Staff Regulations. Such sanctions range from a written warning to, for severe misconduct, removal from post.[189] In internal investigations the OLAF legal framework, albeit indirectly, exercises a certain degree of compulsion on EU officials and staff.

The second way in which Regulation 883/2013 regulates the occurrence and parallel proceedings is to provide for a number of safeguards which aim to elevate the level of protection to that of judicial investigations so as to facilitate the later use of material gathered by OLAF in national punitive proceedings (or in the phrasing used in the previous section: to bridge the divide between the gathering of materials under administrative investigations and the use thereof in criminal proceedings).

An example is the inclusion of the privilege against self-incrimination in Article 9 of Regulation 883/2013. The privilege contained therein affords protection to both persons concerned and witnesses. Many questions with regard to the privilege remain unanswered however. With regard to the material scope, the OLAF Regulation is silent. It is unclear whether the privilege constitutes an absolute right to remain silent during

[186] See for instance Joske Graat, 'The Netherlands' in Luchtman and Vervaele (eds) (n 11), para 4.2.3.
[187] Art 2(4) of Regulation 883/2013/EU, Euratom.
[188] Art 4(7) of Regulation 883/2013/EU, Euratom; Art 16(2) of 'Guidelines on Digital Forensic Procedures for OLAF Staff' (2016).
[189] Art 9 of Regulation 31/EEC, 11/EAEC Laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 45/1385, Annex IX. Other sanctions include a reprimand, deferment of advancement to a higher step, relegation in step, temporary downgrading, downgrading in the same function group, classification in a lower function group, removal from post and, where appropriate, reduction pro tempore of a pension or withholding, for a fixed period, of an amount from an invalidity allowance.

an interview. Though OLAF cannot compel a person concerned or witness to provide answers that involve an admission of an illegal activity (a limit of OLAF's own enforcement capabilities), can OLAF draw adverse inferences from an interviewees' silence during an interview? It is also unclear what information is covered by the privilege. Does it cover evidence that exists independently of the will of the person concerned or the witness?

Another example is the right to be assisted by a person of choice.[190] During both interviews and on-the-spot inspections a person concerned has the right to be assisted by a person of choice, in most cases a lawyer. Here too, questions arise with regard to the scope of this right. The personal scope of the right seems to be limited to persons concerned only: do witnesses not enjoy the same protection? Also, the OLAF Regulation does not specify the temporal dimension of the right (eg, when assistance may be provided or whether assistance can be given for the whole duration of the interview) or the material dimension (eg, what is the exact role of the assisting person?).

In addition to these questions a more general, and perhaps more critical, remark with regard to harmonisation of defence rights and safeguards in the OLAF legal framework is in order. As stated above, harmonisation of certain safeguards and rights seeks to smooth the transition from the gathering of materials by OLAF in administrative investigations to the use of these materials in national punitive proceedings. The current approach is lacking and fragmented in two respects. First, while indeed certain rights and safeguards are provided for (most notably, access to a lawyer and, albeit limited in scope, the privilege against self-incrimination) other defence rights which aim to render punitive proceedings fair, such as protection of the legal professional privilege, are conspicuous by their absence. Second, and more importantly, the harmonised defence rights apply only in cases in which OLAF conducts investigations on the basis of its cross-sectoral framework (ie, Regulation 883/2013, Euratom and Regulation 2185/96/Euratom, EC). In case OLAF decides to conduct investigations on the basis of sectoral legislation, such as in the area of customs where investigations are based on Regulation 515/97/EC, the presence and scope of any of the rights and safeguards mentioned above is completely dependent on national law as such investigations are conducted by means of mutual administrative assistance. Taking on board more or more comprehensive safeguards and/or rights by means of harmonisation in OLAF's cross-sectoral framework will not solve the second issue.

6.5 Proposed Amendment to the OLAF Regulation

In its evaluation of Regulation 883/2013 carried out between 2015 and 2017 the Commission noted a number of shortcomings related to the effectiveness of OLAF's investigative function.[191] One of the Commission's findings was that the current rule on

[190] Art 9(2) of Regulation 883/2013/EU, Euratom. Of course, when a witness becomes a person concerned, the former witness does have the right to be assisted.

[191] Commission Report, 'Evaluation of Regulation 883/2013' COM(2017) 589 final, 2 October 2017, 3–5; Commission Staff Working Document, 'Evaluation of the application of Regulation (EU, Euratom) No

the admissibility of evidence hampers the effectiveness of its activities.[192] Many of the criticisms pointed out above in section 6.3 were reiterated by the Commission.[193] To enhance the effectiveness of OLAF investigations the Commission proposed to amend the current OLAF legal framework governing its investigation in May 2018.[194]

The proposed amendment, if passed, would not change the way in which Regulation 883/2013 reaches out to national authorities and provides guidelines for how to assess materials gathered in another jurisdiction. Nor does it provide for different means to deal with the issue of diverging standards or to safeguard the legal position of a person subject to parallel or consecutive investigations. The proposal distinguishes between criminal and non-criminal follow-up. On the one hand, the rule which lays down the assimilation obligation will remain applicable to OLAF reports and recommendations in cases of national criminal proceedings. As national law on the use of reports by administrative inspectors in criminal proceedings varies, the Commission deems it appropriate that conditions of national law should apply. With respect to the current rule of assimilation, no changes are therefore expected. On the other hand, the Commission introduces a principle of admissibility of OLAF reports in administrative proceedings and in judicial proceedings of an administrative, civil, and commercial nature in the Member States. In these cases, admissibility should only be subject to a simple verification of authenticity.[195] In addition, the proposal does not intend to further facilitate punitive follow-up through harmonisation of the procedural safeguards studied in this report.[196]

The 2019 Draft European Parliament Legislative Resolution of the Committee on Budgetary Control (CONT), if passed, would relegate the issues set out above completely to the national level. The CONT amendment reads as follows: upon simple verification of their authenticity, reports drawn up on that basis shall constitute admissible evidence in judicial proceedings before national courts and in administrative proceedings in the Member States. The power of the national courts to freely assess the evidence shall not be affected by this Regulation.[197]

883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)' SWD(2017) 332 final, 2 October 2017, 13–28.

[192] COM(2017) 589 final 4; SWD(2017) 332 final 18–22.

[193] SWD(2017) 332 final 20–21.

[194] COM(2018) 338 final; European Commission Staff Working Document, 'Assessment accompanying the document Proposal for a regulation of amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' SWD(2018) 251, 23 May 2018.

[195] Art 11(2) of COM(2018) 338 final. For the rationale, see COM(2018) 338 final 11; SWD(2018) 251 final 27.

[196] The Commission states that 'the evaluation has not shown a need to revise the existing provisions' (COM(2018) 338 final 7–8).

[197] Draft European Parliament Legislative Resolution on the proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations (COM(2018)0338 – C8-0214/2018 – 2018/0170(COD)), amendments 57 and 58.

The Resolution provides for a single rule for both punitive and non-punitive follow-up and does away with the current assimilation rule. As a result, OLAF investigation reports *will* be admissible in punitive proceedings. The Resolution thereby provides an answer to some of the long-held critiques against the assimilation rule (see section 6.3). No longer is there a need to find an equivalent national administrative authority as OLAF reports are evidence in national proceedings per se, regardless of the existence and status of a comparable national administrative authority. Also national laws which do not allow for administrative evidence in punitive proceedings have to admit administrative OLAF reports as evidence in punitive follow-up. Furthermore, the Resolution circumnavigates national laws which render inadmissible OLAF reports where national law is not followed verbatim.

The changes in the OLAF rules on evidence are accompanied by strengthening the legal position of the person subject to investigation. This is done through opening up the action to annul the investigation report transmitted to the national authorities[198] on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties (including the CFR) or misuse of power.[199] In addition, the Resolution provides for the establishment of a controller for procedural guarantees. If established, any person concerned by an OLAF investigation is entitled to lodge a complaint with regard to OLAF's compliance with the procedural guarantees set out in its legal framework. Upon receipt of the complaint, the controller informs OLAF and gives it the possibility to resolve the issue internally within 15 working days. Afterwards, the controller issues a recommendation on the complaint which OLAF must follow, save in duly justified cases in which OLAF may deviate from said recommendation.[200] The Resolution does not aim to (further) approximate much-needed safeguards, such as the legal professional privilege or the privilege against self-incrimination, in the OLAF cross-sectoral legal framework.[201]

While the Resolution manages to resolve some of the criticisms lodged against the current evidence regime, particularly the need to find an equivalent national administrative partner, it does not – nor does it purport to – solve all the problems that plague the admissibility of OLAF reports in national punitive proceedings. The Resolution would ensure the admissibility of OLAF reports, upon simple verification, in punitive proceedings, but does not alter the fact that the use of this evidence (ie, applicable evidentiary standards, rules on evaluation, etc) and the power of the national court to freely assess this evidence is still governed by national law. While this is certainly a step forward as the admissibility of OLAF reports is no longer subject to 28 national laws, in making this step the CONT Committee also sets aside some of the upsides of the assimilation obligation currently provided for in Article 11(2) of Regulation 883/2013. This rule, as demonstrated in section 6.3, 'routes' or 'directs' the

[198] Or to institutions, offices, bodies or agencies for that matter.
[199] Draft European Parliament Legislative Resolution on the proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 (n 197), amendment 65.
[200] ibid, amendment 52.
[201] The Resolution does provide for a right to access to the file, a right not considered in this study (ibid, amendment 51).

status of the OLAF report under national law. It requires that an OLAF report has the status of administrative report drawn up by national inspectors and has the same evidentiary value. If the Resolution passes, the OLAF legal framework is no longer a guiding hand with regard to the status of OLAF reports in national punitive proceedings. Under such a regime, it is quite possible that national courts – while still bound by the principles of equivalence and effectiveness – accord to OLAF reports various statuses (not necessarily that of 'administrative report'), under national law.

7. CONCLUSIONS

We have provided an analysis of the legal provisions of DG COMP, ECB and OLAF dealing with the admissibility of ELEA (European law enforcement authorities) collected information as evidence in national punitive proceedings, and have dealt with three issues in particular: (i) how to deal with the fact that national and European Courts may apply different standards for defence rights and procedural safeguards, as well as how to deal with the effectuation of those rights and safeguards at the interfaces of (ii) non-punitive and punitive enforcement and (iii) administrative law and criminal law enforcement.

The EU Courts and legislature attempt to fill in the gaps that inherently exist in EU composite procedures by developing general principles and legal rules such as principles of mutual trust and presumption of equivalent protection of defence rights across the EU Member States, which in turn are based on, inter alia, a shared system of values, including common standards for fundamental rights (Article 2 TEU).[202] These presumptions allow for the introduction of hard and fast rules, such as the instruments for judicial cooperation in the Area of Freedom, Security and Justice, but also for rules on the mutual admissibility of evidence. Indeed, we have seen some – but not too many – examples of how EU law facilitates the inter-operability of materials as evidence by turning the aforementioned presumptions into legal rules. We have also seen how such rules may consequently force authorities and courts to disregard any differences with the standards of the forum state.

It is thus clear what the added value of admissibility rules is. They are necessary to break open national laws, to define the content and scope of the legal rules of non-inquiry and (recognition of) equivalence and to bring evidentiary laws within the scope of the Charter. With specific rules of EU law present, the Court of Justice will be offered more possibilities to ensure the coherence and consistency of the European legal order. In turn, such rules will force national courts (and legislators) to align their systems with these principles. Yet despite their clear added value, we only see these rules in the frameworks of OLAF and DG Comp, not ECB. Moreover, their scope is often limited.

We have seen that DG COMP enforces Articles 101 and 102 of the Treaty in a network structure (ECN), that is, in a 'closed circle', which comprises ECN authorities and national courts of the EU Member States that are competent to enforce EU

[202] cf supra n 25.

competition law provisions. Competition authorities can freely exchange information and use it as evidence; the umbrella Regulation 1/2003 lays down a purpose limitation, which essentially aims at ensuring that, should an authority use in evidence ECN transmitted information, the duty to state reasons will be respected. The mechanism through which the DG COMP legal framework attempts to deal with the problem of vertically divergent standards is the equivalence rule, which entails that defence rights of legal persons in the various Member States are presumed to be sufficiently equivalent. The equivalence rule however applies only in relation to lawfully obtained evidence. As far as the use of ECN transmitted information for imposing sanctions on natural persons is concerned, the legal framework lays down the following blanket ban: the receiving competition authority is precluded from using such information to impose custodial sanctions on individuals. ECN transmitted information may only serve as intelligence. National competition authorities are not precluded from disclosing information to criminal justice authorities, if such an obligation exists under their national law. Nevertheless, the latter must at any rate initiate their own investigation.

What, then, can one learn from OLAF and the system of EU competition law enforcement? The following points can be made in this regard. First of all, it is clear that the enforcement landscape for DG COMP is different from that of OLAF. First, investigative powers, safeguards and defence rights are much more aligned in competition law – via harmonisation (voluntary or mandatory)[203] – than in the OLAF setting. Second, the goals for which the exchanged materials may be used show a significantly higher degree of coherence; at any rate, they do not have to tackle the complicated interface between administrative and criminal models of law enforcement. Third, the EU Regulation spells out that ECN gathered evidence cannot be used for the imposition of custodial sanctions. All of that provides for a strong basis for a full rule of equivalence. However, it is also an approach which is not very likely to succeed in the OLAF setting. In the latter setting, unlike for DG COMP, admissibility rules – and the system in which they function – need to bridge all three problems of divergence; not only the bridge from one legal order to another, but also, possibly, the ones from non-punitive to punitive and from administrative to criminal. Moreover, a criticism to the approach in competition law and certainly prudential supervision, is that those models seem to have a blind eye for the criminal law elements of composite enforcement. To respect the rights of the defence, all criminal investigations arguably have to start from scratch. The question is whether this provision imperatively follows from Articles 47 and 48 of the Charter.

The need for a framework for the admissibility of evidence is particularly important for OLAF. It stems from OLAF's position in the shared enforcement design in the protection of the financial interests of the Union. By looking at the rationale of the rule, we found that OLAF currently deals with the divergent standards and the interface between administrative and punitive proceedings by means of a combination of an equivalence and assimilation rule. Article 11 of Regulation 883/2013, as said, aims to bridge all three categories of divergence, identified in section 2. The

[203] See, recently, Directive (EU) 2019/1.

assimilation rule requires that a national authority, notwithstanding the divergent EU and national standards according to which evidence is gathered, is to treat materials gathered by OLAF in the same fashion as materials gathered by comparable national authorities. Furthermore, it demands that with regard to the use of materials obtained under an administrative law framework in punitive proceedings, Member State authorities should treat EU procedures in the same way as national procedures. The rules of equivalence and, arguably, non-inquiry that also follow from Article 11, are consequently made dependent on the presence of a national 'benchmark' partner.

To ease the admissibility of EU administrative materials in national punitive proceedings, a number of defence rights and safeguards have been harmonized in the OLAF legal framework. There is much to be said for this approach. Framed in the words of the Strasbourg Court the question remains, however, to what extent OLAF investigations and national follow-up procedures can be considered to be 'sufficiently interlinked'. Were that indeed the case, the mere possibility of a punitive follow-up at national level would force the EU legislator (or the national courts)[204] either to take away the element of compulsion in OLAF investigations, or to guarantee that its results may not be used in punitive proceedings. Article 9 of Regulation 883/2013 chooses the former approach. In fact, we submit that the existence of these safeguards already tackles much of the problems that are now covered by the assimilation rule of Article 11. That implies that on the one hand, as is the case in the reform proposals – partially in the Commission proposal, completely in the Resolution of the CONT Committee – the assimilation rule may be abandoned,[205] yet on the other hand, there is still a need to harmonise the safeguards also outside the specific context of Article 9 and extend its safeguards beyond OLAF's cross-sectoral legal framework. Moreover, such harmonization of safeguards needs to include a number of defence rights that have currently not been included. Due to their relationship with the *nemo tenetur* principle, the rights of access to a lawyer and legal professional privilege would be prime candidates.

Article 9, as it stands now, also has its pitfalls, of course. After all, why apply criminal law standards in investigations that will not necessarily end up in punitive procedures? Why accord persons concerned rights that other citizens do not have? An alternative to the approach currently chosen could be to work with a limited harmonisation of laws at the national level. Instead of guaranteeing persons concerned a set of rights which may unduly hamper the investigations, there is also the option of a limitation of the use that can be made of OLAF reports in a national punitive follow-up. Such a rule (which, incidentally, would also need a cross-sectoral implementation)

[204] It appears to us that a remedy at EU level may not be available. The OLAF investigations may, in and of themselves, be executed in a fully lawful way. It is the (potential) use at national level that makes the procedures unfair.

[205] Which also has, as a side effect as shown in section 6.5 when discussing the CONT Committee, that – while OLAF reports are admissible – the surrender of the assimilation obligation also results in a situation in which the status of OLAF reports under national law becomes unclear. By cutting the cord with national law through the assimilation rule, the OLAF report is thereby no longer equated to national administrative reports, whatever their value might be.

would, in our view, also be sufficient to remove the assimilation rule from Article 11 of Regulation 883/2013. As indicated in the above, the standards to be used here are the ones of 'Strasbourg' (and we believe these are wider than those of Luxembourg).[206]. The proceedings, after all, are national proceedings. In that case, the application of the Strasbourg standard follows from the Charter (Article 52(1) CFR). Article 7 of Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings is not sufficiently precise in that respect.[207]

One final remark remains. Some reports of the current Hercule III study show that a repetition of procedural steps – particularly in criminal proceedings – is often justified with a reference to the rights of defence. In many cases, however, it remains unclear what rights are meant specifically. In the above, we have paid attention particularly to the privilege against self-incrimination and its related safeguards. There are more, particularly the rights of access to the file and the right to be heard. Yet in the broader discussion of a revision of the OLAF framework that must interfere with national evidentiary laws, there is also a task for the national legal orders to indicate and specify which other rights they have in mind, so that the rights of defence – as important as they may be – do not become a blank cheque for national courts to ward-off OLAF-reports and its investigatory results in national proceedings.

[206] Section 2.2.
[207] Directive (EU) 2016/343.