9. THE NETHERLANDS

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1. GENERAL FRAMEWORK

In the Netherlands, punitive sanctions can be imposed on the basis of criminal and administrative law. The fact that sanctions under criminal law are punitive does not require further explanation. However, the Dutch administrative law system provides for two different kind of sanctions. In the first place, administrative sanctions may be of a reparatory nature; these sanctions are aimed at restoring a lawful situation. Good examples are tax surcharges (*naheffing* or *uitnodiging tot betaling*) and the recovery of unlawfully paid subsidy. These may be imposed by Customs or the subsidy authorities on the basis of an OLAF report (see section 2.2). Another example of a reparatory sanction is the periodic penalty payment (*last onder dwangsom*) which is sometimes imposed to enforce compliance with existing legal obligations in competition cases (the area of DG COMP) and banking/financial supervision (area of ECB and ESMA).[1] In the second place, administrative law provides for sanctions of a punitive nature. According to Dutch legislation and case law, administrative fines are always considered to be of a punitive nature.[2] They qualify as a 'criminal charge' in the meaning of Article 6 ECHR and as a 'sanction of a criminal nature' under EU law.[3] Administrative fines are the most important administrative sanctions imposed in the area of competition (competence of DG COMP) and in banking/financial supervision (competence of ECB and ESMA). Moreover, the tax and customs authorities (competence of OLAF) are empowered to impose administrative fines as well. Because fines are considered to be punitive, specific criminal law guarantees apply.[4] Most important for the topic of this report is the *nemo*

[1] It should be noted that at present, no Dutch credit rating agencies are registered with ESMA and there are no Dutch trade repositories either. This might change in future.

[2] See Art 5:2(1)(c) and Art 5:40 GALA. The first provision gives a definition of a 'punitive sanction' and the second one defines the 'administrative fine' (*bestuurlijke boete*). GALA stands for 'General Administrative Law Act' (*Argemone wet bestuursrecht* or *Awb*), the Dutch act which contains general rules on administrative decision-making, administrative enforcement and procedural law (applied by the administrative courts).

[3] In this context, the so-called *Engel*-criteria – which have also been adopted by the CJEU – are relevant. See *Engel and Others v the Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) and Case C-489/10 *Bonda*, EU:C:2012:319. That administrative fines qualify as 'criminal charge' and 'sanctions of a criminal nature' follows from *Öztürk v Germany* App no 8544/79 (ECtHR, 21 February 1984); Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105. See also Case C-524/15 *Menci,* EU:C:2018:197.

[4] Besides the *nemo tenetur* principle, the following procedural guarantees apply to the imposition of administrative fines: the presumption of innocence (Arts 6(2) ECHR and 48(1) CFR), specific defence rights (Arts 6(3) ECHR and 48(2) CFR), the legality principle (Arts 7 ECHR and 49(1) CFR), the proportionality principle (Arts 6(1) ECHR and 49(3) CFR) and the *ne bis in idem* principle (Art 50 CFR).

tenetur principle, as the violation of this principle by the supervisory authorities might lead to the exclusion of the evidence thus gathered in the punitive administrative or criminal proceedings (see section 4.1).

1.1 Function of admissibility rules in national criminal law

The function in Dutch criminal law of rules on evidence in general – and admissibility rules in particular – is related to the essence of the 'rule of law' (*rechtsstaatgedachte*). Punishment of a citizen by the state is only accepted if it has been established in a proper way and according to the applicable rules of law that an offence has really been committed and that the accused can be held responsible for that offence. In establishing these elements rules on evidence play an important role.[5] The rules on evidence prevent courts from declaring offences proven based on a foundation in fact that is too small, for example through the presence of an amount of evidence which is too limited or because certain material is (potentially) unreliable or obtained unlawfully. This function shines through in various provisions of the Dutch Code of Criminal Procedure (CCP) (see section 1.4).

The rules on admissibility of evidence in Dutch criminal law are usually characterised as a negative regulatory system (*negatief wettelijk stelsel*).[6] It is 'regulatory' (and not 'free'), because only means of evidence that have a basis in the law are in principle admissible. It is 'negative', because the court is not obliged to find a suspect guilty of an offence if a minimum of evidence has been brought forward – as is the case in a 'positive' system. Instead, the judge should also be *convinced* on the basis of the available evidence that the suspect did indeed commit the offence. Because of the fact that these rules have been elaborated upon in case law the expression negative jurisprudential system is also used. The founding principle of the rules on evidence is the principle of immediacy (*onmiddellijkheidsbeginsel*). The principle of immediacy can be discerned in Article 301 CCP which reads:

> 1. Official records, reports of expert witnesses or other documents shall be read out by order of the presiding judge, when requested by one of the judges or the public prosecutor.
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> 2. The aforementioned documents shall also be read out on application of the defendant, unless the District Court orders otherwise, ex officio or on application of the public prosecutor.
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> 3. Instead of reading out the documents, the presiding judge may give a verbal summary of the contents of said documents, unless the public prosecutor or the suspect objects thereto on reasonable grounds.
>
> 4. Documents, which have not been read out or whose contents have not been given in a verbal summary in accordance with paragraph (3), shall not be taken into account to the detriment of the defendant.

Formally, the principle of immediacy is expressed in the fact that the court is in its deliberations bound by the court hearing (Articles 338, 348 and 350) and also in other CCP provisions (eg, Articles 33, 301, 322). The aim of the principle of immediacy *in*

See Felix CMA Michiels and Rob JGM Widdershoven, 'Handhaving en Rechtsbescherming' in Felix CMA Michiels and Erwin R Muller (eds), *Handhaving. Bestuurlijk Handhaven in Nederland* (Kluwer 2013) 105.

[5] See Jan M Reijntjes, *Minkenhof's Nederlandse Strafvordering* (Kluwer 2017) 4.

[6] Geert JM Corstens and Matthias J Borgers, *Het Nederlandse Strafprocesrecht* (Kluwer 2013) 676.

materiae is furthering the fact that only information that has been put forward during the trial – in the presence of the defence, the prosecutor, the deciding judge(s) and eventually the public – is used. However, it should be noted that the Supreme Court of the Netherlands (*Hoge Raad*) has accepted that a written statement obtained during the preliminary investigative phase can be used as evidence at the hearing.[7] In general, witnesses no longer have to come to court to give evidence directly as an official report (*proces-verbaal*) containing their statements acquired during the preliminary investigative phase suffices.

1.2 Function of admissibility rules in national punitive administrative law

Rules on admissibility of evidence in Dutch administrative law are limited. The guiding principle of Dutch administrative law of evidence is the so-called free evidence doctrine (*vrije bewijsleer*).[8] Administrative law courts have much discretion as far as evidence is concerned: this relates to questions about the scope of evidence, the division of the burden of proof, means of evidence and the appreciation of evidence by the courts. The General Administrative Law Act only contains a few provisions concerning formal law of evidence, in particular on the involvement in proceedings of witnesses and experts (Article 8.1.6 GALA). In addition, Dutch legal doctrine (*rechtsleer*) has derived some substantive rules on evidence from the GALA system. In this regard, the duty for administrative authorities to investigate carefully the case before issuing a decision (Article 3:2 GALA) and the duty for the citizen to provide information which is necessary to decide on an application for the decision (Article 4:2 GALA) give guidance in dividing the responsibilities between the parties as far as the establishment of facts is concerned. The *ratio* behind or *function* of these rules on admissibility of evidence is first and foremost – and in the view of the legislator – the wish to search for substantive truth (*materiële waarheid*).[9] Nevertheless, the literature has also pointed at other (possible) functions, like guaranteeing the rights of defence.[10]

In addition, it should be noted that the judicial discretion implied in the free evidence doctrine may be limited by international or EU fundamental rights, in particular by the ECHR and the CFR. The latter has supremacy above national law on the basis of EU law itself. The Convention enjoys the same status on the basis of Dutch constitutional law, as the ECHR is considered to have direct effect in the Dutch legal order on the basis of Articles 93 and 94 of the Dutch Constitution (*Grondwet*). The supremacy of the ECHR is concerned with the case law of the ECtHR as well (also in cases in which the Netherlands is not a party) which is considered to be incorporated in the ECHR rights.

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[7] Supreme Court of the Netherlands (*Hoge Raad*, HR), 20 December 1926, *NJ* (*Nederlandse Jurisprudentie*) 1927, 85. See also Marloes C van Wijk, *Cross-Border Evidence Gathering. Equality of Arms in the EU?* (Eleven International Publishing 2017) 110.

[8] Michiels and Widdershoven (n 4) 114. See also Arthur R Hartmann, *Bewijs in het Bestuursstrafrecht* (Gouda Quint 1998).

[9] *Kamerstukken* II 2003/04, 29 702, nr. 3 131. Albert T Marseille and Hanna D Tolsma (eds), *Bestuursrecht. Rechtsbescherming Tegen de Overheid* (Boom juridische uitgevers 2016) 281.

[10] See Ymre Schuurmans, 'Rechtsvorming Bewijsrecht in Bestuurlijke Boetezaken' (2017) 4 *JBPlus* 273.

The supremacy of EU law and the ECHR obviously also applies in the area of criminal law.

1.3 System of proof: Free or controlled?

1.3.1 Criminal law

The criminal law system concerning evidence is controlled. Article 338 CCP states that a criminal court may find that there is evidence that the defendant committed the offence as charged in the indictment *only* when the court through the hearing has become convinced thereof from legal means of evidence. Those legal means of evidence have been enumerated in Article 339(1) (1° to 5°) CCP.[11] Exclusively admissible as legal means of evidence are the court's own observations, the statements of the defendant, the statements of a witness, the statements of an expert witness, and written materials. Facts or circumstances which are common knowledge shall not require evidence (Section 339(2) CCP). Articles 340 to 344a CCP provide for more specific rules for each of these means of evidence. In the present context, Section 344 is of particular importance. It concerns written materials and reads:

> 1. 'Written materials' shall mean:
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> 1°. decisions drawn up in the form prescribed by law by tribunals, courts or persons charged with the administration of justice, as well as punishment orders drawn up in the form prescribed by law; 2°. official records and other documents drawn up in the form prescribed by law by competent bodies and persons, and containing their statement of facts or circumstances which they have observed or experienced; 3°. documents prepared by public bodies or civil servants concerning issues related to their competence, as well as documents drawn up by a person in the public service of a foreign state or of an organisation under international law; 4°. reports of expert witnesses prepared in answer to the assignment given to them to provide information or to conduct an investigation, based on the insights they have gained from their own expertise and knowledge about the subject on which their opinion is sought; 5°. all other written materials; however, said materials may only be used in conjunction with the content of other means of evidence.
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> 2. The court may find that there is evidence the defendant committed the offence as charged in the indictment on the basis of the official record of an investigating officer.

From this provision it is clear that 'documents drawn up by a person in the public service of a foreign state or of an organisation under international law' qualify as written materials that can be used as evidence in criminal proceedings. Obviously this category includes documents drawn up by EU institutions, agencies or offices as well.

The Dutch criminal law system contains some minimum evidence rules as well. For instance, Article 344a(1) CCP determines that the court may not find that there is evidence that the defendant committed the offence as charged in the indictment exclusively or to a decisive extent on the basis of written materials containing statements of persons whose identity is concealed. Other examples are found in Article 344a(2) to (4) CCP:

[11] Corstens and Borgers (n 6) 680.

> 2. An official record of questioning conducted before the examining magistrate, which contains the statement of a person who is deemed to be a threatened witness, or the statement of a person who is deemed to be a protected witness and whose identity is concealed, may be used as evidence that the defendant committed the offence as charged in the indictment only if at least the following conditions have been met:
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> a. the witness is a threatened witness or a protected witness and has been questioned as such by the examining magistrate, and
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> b. the offence as charged in the indictment, to the extent proven, involves a serious offence as defined in section 67(1), and in view of its nature, the fact that it was committed by an organised group or the relation to other serious offences committed by the defendant constitutes a serious breach of law and order.
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> 3. Apart from the case described in paragraph (2), a written material containing the statement of a person whose identity is concealed may only be used as evidence that the defendant committed the offence as charged in the indictment, if at least the following conditions have been met:
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> a. the judicial finding of fact is supported to a significant extent by other evidence, and
>
> b. the application to question or to have others question the person, referred to in the opening sentence has not been made by or on behalf of the defendant at some point in the proceedings.
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> 4. The court may not find that there is evidence the defendant committed the offence as charged in the indictment exclusively on the basis of statements of witnesses with whom an agreement has been made under Articles 226h(3) or 226k.

1.3.2 Punitive administrative law

As far as administrative law is concerned, the system of evidence is free. In the administrative law system, the leading principle is the free evidence doctrine (*vrije bewijsleer*, section 1.2). This doctrine implies that the administrative court in principle is free to accept as means of evidence all materials, statements, etc, that can contribute to the evidence. The doctrine applies irrespective of the possible punitive nature of the sanction decision contested. By exception, sectoral laws may require to prove certain facts with specific (authentic) documents.

1.4 Review of the decision on admissibility

1.4.1 Criminal law

The decision on admissibility cannot be subject to review as such. The Public Prosecutor's Office (*Openbaar Ministerie* or *OM*) assembles the file and decides to put evidence in the file. This is not the task of the court. The rules on admissibility of evidence do not as such apply to the OM. In criminal court proceedings the judgment of this court concerning the admissibility of certain evidence can be the object of appeal only as part of the appeal proceedings concerning the court judgment as a whole. There is no possibility of a separate review.

1.4.2 Punitive administrative law

In administrative proceedings, the option of appealing against the use of evidence corresponds to the one in criminal matters. The decision of the first instance court on the admissibility of evidence cannot be contested separately, but only as part of the appeal

against the first instance judgment as a whole (Article 8:104(3)(b) GALA). This rule applies irrespective of whether the contested decision is a punitive administrative sanction or not.

1.5 Use in criminal proceedings of evidence declared inadmissible in administrative proceedings

In the present context, it is prudent to differentiate between two questions which are relevant with regard to the use in criminal proceedings of evidence that was unlawfully obtained in administrative proceedings. The first question concerns the norms which govern the use of evidence that was gathered unlawfully. Can such evidence be admitted on the basis of Dutch criminal law and, if so, under which conditions? Secondly, can a criminal court make an autonomous assessment on the admissibility if that evidence *has already been declared* to be unlawful in the (parallel) administrative procedure? Evidently, the use of lawfully obtained evidence does not raise any questions.

A detailed answer to the first question is provided later in this report (section 4.1). In short, it can be concluded that this question has been rarely dealt with in Dutch case law. The provision on the admissibility of evidence in the CCP (Article 359a) does not apply to evidence obtained during administrative proceedings. Consequently, evidence will be admissible as a rule. According to the literature, evidence that has been unlawfully seized in administrative investigations may be used in criminal proceedings, unless it has been seized in a way that runs so much against the proper acting of government that any use of it is intolerable, or when the use of the evidence would violate the fair trial requirement, or when the proper conduct of procedure has been (severely) violated, or when fundamental rights have been infringed in an excessive way.[12]

With respect to the question concerning the admission and use in criminal proceedings of evidence *declared inadmissible* in administrative proceedings, we also refer to the detailed explanation of the Dutch system of rules on evidence in criminal cases (section 4.1). From this system it is clear that a criminal court determines the question of admissibility of evidence by applying the criminal law rules in the Code of Criminal Procedure and case law of the *Hoge Raad*. Therefore, criminal courts are in principle not bound by a prior judgment on admissibility of evidence by an administrative court.

1.6 Use in administrative proceedings of evidence declared inadmissible in criminal proceedings

The questions posed in the previous paragraph are also relevant in the reversed situation: can evidence which was obtained unlawfully during criminal investigations be admitted in administrative proceedings and, if so, under which conditions? And can the administrative court make an autonomous assessment of the admissibility if the evidence

[12] See Opinion of Advocate General Wattel, 28 May 2014, NL:PHR:2014:521, point 7.18.

has already been declared to have been obtained in an unlawful manner by a criminal court?

Since 1992, the case law of the *Hoge Raad* is clear: no legal rule exists under Dutch law which precludes *every* use of unlawfully obtained evidence during criminal investigations in administrative proceedings.[13] It follows from the wording of the *Hoge Raad* that the use of unlawfully obtained evidence is only disallowed under certain circumstances. The use of evidence is certainly not impermissible if it is not the procedural rights of the suspect himself that have been violated. If the rights of the suspect himself are violated and the evidence is obtained as a consequence of this violation, it should be established – with due observance of all circumstances of the case – whether the administrative authority acts contrary to any general principles of good administration (*algemeen beginsel van behoorlijk bestuur*), if the evidence is used in administrative proceedings, especially for imposing a fine. Special regard should be given to the principle of due care (*zorgvuldigheidsbeginsel*) under administrative law. In subsequent case law, the *Hoge Raad* added that there can be no violation of general principles of good administration if the administrative authority could have obtained the evidence in a lawful way as well. The *Hoge Raad* concludes by stating that the use of evidence unlawfully obtained in criminal proceedings in administrative proceedings is precluded *only* in case that evidence is obtained in a way that runs so counter to what may be expected of a properly acting administrative authority (*zozeer indruist tegen hetgeen van een behoorlijk handelende overheid mag worden verwacht*) that the use of evidence should be considered inadmissible in all circumstances.[14] We will refer to this criterion as the 'manifestly improper criterion'.[15] It should be noted that the manifestly improper criterion has also been adopted by the administrative courts to assess whether evidence which was gathered unlawfully during administrative procedures – ie, both monitoring and administrative investigations – can be used in punitive administrative procedures.[16]

The application of the manifestly improper criterion does not lead to the exclusion of evidence very often. It is a high threshold. The criterion has been elaborated in the case law. Judgments of the administrative courts show that especially infringements of fundamental rights such as Articles 6 and 8 ECHR may result in inadmissibility of evidence.[17] With respect to Article 6 ECHR, not warning (cautioning) a citizen that he or she is not obliged to answer questions when interrogated in relation to the imposition of

[13] HR 1 July 1992, NL:HR:1992:ZC5028, para 3.2.2.
[14] HR 1 July 1992, NL:HR:1992:ZC5028, para 3.2.5.
[15] See Opinion of AG Wattel 28 May 2014, NL:PHR:2014:521, para 6.1.
[16] Ymre Schuurmans, 'Onrechtmatig Verkregen Bewijsmateriaal in het Bestuursrecht' (2017) 5 *Ars Aequi* 391. See for example: Central Appellate Court (*Centrale Raad van Beroep*, CRvB), 15 March 2016, NL:CRVB:2016:947; CBb 22 February 2017, NL:CBB:2017:47. Interestingly, the administrative courts are more inclined to exclude evidence which was unlawfully obtained during an *administrative* investigation than evidence which stems from criminal investigations. See in that context Meriam CD Embregts, *Uitsluitsel over Bewijsuitsluiting. Een Onderzoek naar de Toelaatbaarheid van Onrechtmatig Verkregen Bewijs in het Strafrecht, het Civiele Recht en het Bestuursrecht* (Kluwer 2003) 292–293; Karianne CLGFH Albers, 'Bestraffend bestuur 2014' in Karianne CLGFH Albers et al (eds), *Boetes en Andere Bestraffende Sancties: Een Nieuw Perspectief?* (Boom Juridische uitgevers 2014) 93.
[17] See Schuurmans (previous n) 391ff.

a punitive administrative fine – as required by Article 5:10a GALA[18] – means that his or her statement cannot be used as evidence for the facts that underlie the sanction.[19] Concerning Article 8 ECHR, entering a private home without (informed) consent of the inhabitant as prescribed by Article 1(4) General Act on the Entry into Dwellings (*Algemene wet op het binnentreden*) is in some cases regarded as meeting the threshold of the manifestly improper criterion as well.[20] Thus, the evidence gathered after entering the home is excluded.

A recent judgment of the *Hoge Raad* has explicitly reaffirmed the well-established case law from 1992 and the manifestly improper criterion.[21] This judgment is also of importance as far as the more specific question whether evidence that has been *declared inadmissible* by a criminal court can still be used in administrative proceedings is concerned. Although this is a tax case, its relevance for administrative law is more general. According to the *Hoge Raad* the administrative court determines autonomously, in accordance with its own procedural law, which facts have to be regarded as being certain. Therefore, it is not bound by the judgment of the criminal court relating to the evidence, not even if it concerns the same means of evidence as the criminal court. In this context, the *Hoge Raad* refers a previous ruling from 1999 which establishes the same rule.[22] As far as the legal question of whether the gathering of evidence in a criminal case, taking into account the certain facts, has been unlawful is concerned, the administrative court is again not bound by the irrevocable judgment of the criminal court, even if the criminal court has built its decision upon the same facts. However, specific authority has to be attributed to the judgment of the criminal court, because this court is the pre-eminent one to answer this type of legal question. If the administrative court – building upon the same facts – deviates from the judgment of the criminal court with respect to the unlawfulness of the gathering of evidence, it has to explicitly state in its judgment its reasons for deviating. A divergence is acceptable because of the differences concerning the existing rules on evidence in criminal and administrative law, as well as the differing frameworks relating to judgment on the use of the available evidence in such procedures.[23]

[18] As mentioned, administrative fines are considered to be punitive according to Dutch law and fall under the scope of the 'criminal charge' within the meaning of Art 6 ECHR and 'sanctions of a criminal nature' under EU law respectively. Accordingly, in proceedings concerning the imposition of such fines the *nemo tenetur* principle applies and the supervisor has a duty to warn (caution) the individual that he is not obliged to answer questions. See Michiels and Widdershoven (n 4) 114.
[19] ABRvS 27 June 2018, NL:RVS:2018:2115.
[20] See, eg, ABRvS 20 April 2016, NL:RVS:2016:1163.
[21] HR 20 March 2015, NL:HR:2015:643.
[22] HR 10 March 1999, NL:HR:1999:AA2713, para 3.5.
[23] HR 20 March 2015, NL:HR:2015:643, paras 2.6.1-2.6.6.

2. Admissibility of OLAF-collected evidence in national punitive administrative proceedings

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

On the basis of the principle of equivalence the (few) Dutch administrative rules of evidence apply to the admissibility of evidence collected by OLAF as well. These rules do not as such limit the use of OLAF collected evidence in any way.[24] OLAF reports are treated in the same way as reports of Dutch supervisors or inspectors. There are no specific provisions related to OLAF collected evidence.

At present specific case law regarding the possible inadmissibility of OLAF evidence in punitive and non-punitive administrative cases obtained by OLAF unlawfully does not exist. In the area of tax law and social security law, there is some case law concerning the admissibility of foreign evidence which was (possibly) unlawfully obtained abroad. From this, it is clear that the manifestly improper criterion developed and applied by the *Hoge Raad* in purely domestic cases, is applicable in a cross-border context as well.

The leading case in tax law is *KB Lux*.[25] This case concerned Dutch citizens that held an account at Kredietbank Luxembourg (KB-Lux). They did not declare their income from these accounts and, consequently, the Dutch treasury suffered a significant tax loss. In the early 1990s, an employee of KB-Lux stole microfiches with account numbers and names from the bank and provided them to the Belgian judicial authorities which were involved in the scheme to steal the microfiches. Via these authorities, the microfiches eventually came into the possession of the Dutch tax authorities. On the basis of the information from the microfiches, the Dutch account holders of KB-Lux were faced with additional tax assessments, but also with criminal prosecution and administrative fines. In both the criminal and the (punitive) administrative cases of the KB-Lux affair, it was argued that evidence was obtained unlawfully in another country, ie, Belgium.

In its judgment of 21 March 2008, the *Hoge Raad* ruled on the admissibility of this foreign evidence. In the earlier appeal proceedings, the Court of Appeal has decided that the evidence was admissible in the (punitive) administrative proceedings. In its ruling, the Court of Appeal referred to the standard case law of the *Hoge Raad* that there is no absolute rule which precludes the use of unlawfully obtained criminal evidence in a punitive administrative procedure. In that context, the Court of Appeal stated that it remained uncertain whether the foreign (Belgian) authorities had been actively involved in the gathering of evidence through the theft of microfiches, but that – even if that had been the case – this would not be an impediment for the tax inspector as long as he would not act contrary to any (Dutch) general principle of good administration. In that regard, the Court of Appeal established that a tax subject is under the obligation to provide the tax authorities with required information and, thus, the latter could have lawfully obtained

[24] Adrienne JC de Moor-van Vugt and Rob JGM Widdershoven, 'Administrative Enforcement' in Jan H Jans, Sacha Prechal and Rob Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 325–326.
[25] HR 21 March 2008, NL:HR:2008:BA8179.

the information. Moreover, the Court of Appeal reiterates that the use of unlawful evidence is only precluded if it has been obtained in a way which runs so counter to what can be expected of a properly acting administrative authority (*zozeer indruist tegen hetgeen van een behoorlijk handelende overheid mag worden verwacht*) that the use of evidence should be considered inadmissible in all circumstances. Thus, the Court of Appeal applied the manifestly improper criterion in the context of foreign evidence. In its ruling, the *Hoge Raad* dismissed the appeal in cassation and stated that the judgment of the Court of Appeal was neither incomprehensible nor unclear.[26]

It can be concluded from the *KB-Lux* case that the question on the admissibility of evidence unlawfully obtained abroad is dealt with in accordance with the well-established manifestly improper criterion of the *Hoge Raad*. Thus, there is no difference as to the stringency of review. Cases of unlawfully obtained evidence are dealt with in an identical way, regardless of the national or foreign character of the evidence.

In social security law cases the competent administrative court of appeal, the Central Appellate Court (*Centrale Raad van Beroep* or *CRvB*) has followed the line of reasoning of the *Hoge Raad*. The cases concerned investigations carried out by Dutch authorities in Turkey – without the involvement of the Turkish authorities – from which it appeared that several persons who were receiving Dutch social security benefits possessed real estate with considerable value in Turkey. As a result of the investigations, the benefits were withdrawn and recovered and administrative fines were imposed because the persons had violated their statutory duty to inform the Dutch authorities about the real estate.

In appeal the CRvB formulated general rules on the admissibility of the evidence gathered abroad which are also applicable to the situation in which *foreign officials* would have carried out the investigations. According to the court the admissibility of the evidence gathered should be assessed on the basis of the Dutch law, including the applicable international and European law. Compliance with the applicable foreign rules is not relevant. Under Dutch law, the use of the evidence concerned is excluded only if this would violate the fair trial requirement of Article 6 ECHR or the right of respect of private life of Article 8 ECHR, or if the evidence otherwise was obtained in a way which runs so counter to what can be expected of a properly acting administrative authority, that the use of it should be considered inadmissible in all circumstances, ie, the manifestly improper criterion.[27] In the case at hand, the CRvB determined that the fair trial requirement had not been violated, as the appellants had the opportunity to contest the foreign evidence. Moreover, their right of private life had not violated. Consequently, the use of evidence did not meet the manifestly improper threshold and was admissible.

There is no case in the Netherlands in which the admissibility of OLAF collected evidence has been questioned by one of the parties and/or has been assessed by the administrative courts. If this did occur, it is most probable that the OLAF report would be excluded as evidence only if it had been obtained by OLAF in a way which runs so counter to what can be expected of a properly acting administrative authority that the use

[26] ibid, paras 3.4.1–3.4.2.
[27] CRvB 1 October 2018, NL:CRVB:2018:2914; CRvB 1 October 2018, NL:CRVB:2018:2913.

of it should be considered inadmissible in all circumstances (the 'manifestly improper criterion'). This would be the case particularly if the use of it would violate the right to a fair trial (Article 6 ECHR) or the right of respect of private life (Article 8 ECHR). The Dutch court will not assess the question whether OLAF complied with the rules of evidence of the Member State in which the OLAF investigation was conducted.

2.2 Case law on the admissibility of OLAF-collected evidence in punitive administrative proceedings

There is a substantive amount of Dutch case law concerning tax surcharges (*uitnodigingen tot betaling*) in customs cases in which OLAF reports play a role. These decisions are not, however, punitive. Moreover, in this aforementioned case law the unlawfulness of the OLAF investigation has never been questioned by the parties and/or assessed by the court. Case law concerning punitive administrative decisions based on OLAF-collected evidence does not exist. This is the result of a search of the online search engine www.rechtspraak.nl (keyword: OLAF) which contains all relevant case law.

2.3 Impact of potentially higher national standards on admissibility of OLAF-collected evidence

In the Netherlands, the Legal Professional Privilege principle (LPP) applies to all lawyers who are member of the Dutch Bar Association. Therefore, the principle extends to in-house lawyers as well. In administrative law, this wider principle can be derived from Article 5:20 (2) GALA, which states that any person who is bound by a duty of secrecy by virtue of his office or profession or by statutory regulation may refuse to cooperate with an inspector. Article 10a (1) Council Act (*Advocatenwet*) establishes the duty of secrecy for all lawyers. Consequently, the Dutch LPP principle offers more protection than the EU principle of LPP as interpreted by the Union courts in the case of *AKZO & Akcros*.[28] How this tension is resolved in competition law, is elaborated upon later in this report (section 3.3). In the context of OLAF investigation LPP problems have never occurred. Therefore, it is not completely clear how the Dutch courts would assess a national punitive administrative sanction based on an OLAF investigation in another Member State in which the wider Dutch LPP principle was not upheld. The yard stick is, as always, the manifestly improper criterion. Whether a violation of the wider principle would mean that OLAF obtained the information in a manifestly improper way is doubtful. We expect that the Dutch courts would declare the OLAF report evidence admissible, because this violation would not qualify as a breach of the fair trial requirement of Article 6 ECHR/47 CFR and would not affect the essence of Article 8 ECHR/7 CFR either.

[28] Joined Cases T-125/03 and T-253/03 *Akzo & Akcros*, EU:T:2007:297. Confirmed by the ECJ in Case C-550/07 P *Akzo & Akcros*, EU:C:2010:512.

2.4 Challenges to OLAF-collected evidence on the ground of violation of EU rules

The concerned person can challenge the use of evidence on the ground of a violation of EU rules before the administrative court during the proceeding directed against the administrative sanction based on the OLAF report. It is not possible to contest the investigation (and the means used in it) separately (see section 1.4). Ex officio control by the Dutch administrative courts only comprises rules concerning the competence of the administrative authority and of the court itself and rules regarding the admissibility of remedies.[29] Rules on the admissibility of evidence – even if they are derived from a fundamental right, such as Article 6 ECHR – do not fall within that scope.

3. ADMISSIBILITY OF EVIDENCE COLLECTED BY ECB, ESMA AND DG COMP IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

3.1 ECB-collected evidence and national punitive administrative proceedings (Article 136 SSM Framework Regulation)

The administrative law rules of evidence under Dutch law apply mutatis mutandis to the admissibility of ECB-collected evidence. There are no specific provisions relating to ECB-collected evidence. As regards the possible inadmissibility of ECB-collected evidence, the manifestly improper criterion applies.

3.2 ESMA-collected evidence and national punitive administrative proceedings (Article 64(8) EMIR)

The rules concerning evidence collected by ESMA are the same as those that govern ECB evidence: the administrative rules on the admissibility of evidence apply and there are no specific provisions on evidence collected by ESMA. The manifestly improper criterion is relevant.

3.3 DG COMP-collected evidence and national punitive administrative proceedings (Article 12 of Regulation 1/2003)

The administrative law rules of evidence under Dutch law apply mutatis mutandis to the admissibility of DG COMP-collected evidence. There are no specific provisions related to it. As regards the possible inadmissibility of DG COMP-collected evidence, the manifestly improper criterion applies.

As mentioned above (see section 2.3), in the Netherlands the LPP principle applies to all lawyers who are member of the Dutch Bar Association and, thus, also to in-house lawyers. In competition law, this wider Dutch LPP principle is – on the basis of the case of *AKZO & Akcros*[30] – not applied in cases where the Dutch competition authority (Authority for Consumers and Markets) assists in a Commission investigation of an infringement of European competition law. However, the wider Dutch LPP principle still

[29] Marseille and Tolsma (eds) (n 9) 245ff.
[30] Joined Cases T-125/03 and T-253/03 *Akzo & Akcros*. Confirmed by the ECJ in Case C-550/07 P *Akzo & Akcros*.

applies when the authority itself investigates a violation of Dutch or European competition law. Whether DG COMP-collected evidence would be declared inadmissible by a Dutch court if the wider Dutch LPP principle were not upheld, is doubtful, as non-observance of the wider Dutch LPP principle does not seem to meet the threshold of the manifestly improper criterion (see already section 2.3). As yet there is no Dutch case law, confirming or rejecting this opinion.

4. ADMISSIBILITY OF EVIDENCE COLLECTED BY EU BODIES AND AGENCIES IN NATIONAL CRIMINAL PROCEEDINGS

4.1 General rules on the admissibility in criminal proceedings of evidence collected by national administrative authorities

In principle the Dutch legal system allows for the admissibility of information gathered by national administrative authorities as evidence in criminal proceedings. After all, it qualifies as 'written material' in the meaning of Article 344 CCP (see section 1.3.1). When assessing possible admissibility problems in criminal proceedings two scenarios should be distinguished.

The first scenario concerns the situation in which the administrative supervisor or inspector has gathered information in the monitoring phase before there was a reasonable suspicion of a criminal act.[31] In this phase the *nemo tenetur* principle stemming from Article 6 ECHR does not apply yet. The individual is obliged to cooperate with the supervisor and, thus, to provide oral or written information and materials. In the case of *Saunders*, the ECtHR has ruled that the use of incriminating evidence not existing independently of the will of the accused – in particular oral and written statements – obtained during this phase cannot be used in a subsequent criminal case.[32] Therefore, in line with *Saunders*, those incriminating statements made *before* a reasonable suspicion has arisen are in principle excluded in Dutch criminal proceedings. However, they may be used as starting information for a criminal investigation into the case at hand. This rule is considered to be the reflex effect of the *nemo tenetur* principle.[33] It should be stressed that this exclusion does not cover evidence gathered by the administrative supervisor which exists independently of the will of the accused, for example evidence deriving from the professional administration or computer data.

In the second scenario, the administrative supervisor has acted unlawfully in some way when applying monitoring/investigatory powers, for example because procedural rules were not followed. Can the evidence which is collected unlawfully be admitted in the criminal trial? As regards the possible inadmissibility in criminal proceedings of evidence, Article 359a CCP is the starting point.[34] It holds:

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[31] Or of an act which can be sanctioned with a punitive administrative sanction.
[32] *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996).
[33] Opinion of Advocate General Keus, 12 April 2017, NL:RVS:2017:1034, para 4.3.4.
[34] Matthias J Borgers and Lonneke Stevens, 'The Use of Illegally Gathered Evidence in the Dutch Criminal Trial' (2010) 14 (3) *Electronic Journal of Comparative Law* 2. See also Reindert Kuiper, *Vormfouten: Juridische Consequenties van Vormverzuimen in Strafzaken* (Kluwer 2014).

> 1. The District Court may, if it appears that procedural requirements were not complied with during the preliminary investigation which can no longer be remedied and the law does not provide for the legal consequences thereof, determine that:
>
> a. the length of the sentence shall be reduced in proportion to the gravity of the non-compliance with procedural requirements, if the harm or prejudice caused can be compensated in this manner;
>
> b. the results obtained from the investigation, in which there was a failure to comply with procedural requirements, may not be used as evidence of the offence as charged in the indictment;
>
> c. there is a bar to the prosecution, if as a result of the procedural error or omission there cannot be said to be a trial of the case which meets the principles of due process.
>
> 2. In the application of subsection (1), the District Court shall take into account the interest served by the violated rule, the gravity of the procedural error or omission and the harm or prejudice caused as a result of said error or omission.
>
> 3. The judgment shall contain the decisions referred to in subsection (1). Said decisions shall be reasoned.

In short, this provision establishes that the deciding criminal court *can*, when it becomes clear that there has been a breach of procedural rules (*vormverzuim*) that cannot be remedied and that the legal consequences of that breach cannot be established on the basis of the law, decide that the sentence should be reduced, the evidence be excluded or that the public prosecutor be declared inadmissible in the prosecution.[35]

In principle, only a breach of procedural rules during the *preliminary (criminal) investigative phase*, within the meaning of Article 132 CCP, that took place in the case of the suspect can be addressed on the basis of Article 359a CCP. Thus, the scope of application of the Article is limited. This follows directly from the case law of the *Hoge Raad*.[36] Consequently, breaches that have taken place during an *administrative* investigation cannot lead to the exclusion of unlawfully obtained evidence on the basis of Article 359a CCP.[37] In other words, this means that evidence that is obtained during the administrative compliance monitoring phase will, as a rule, be admissible in a criminal case.[38]

However, the *Hoge Raad* has recognised that the exclusion of evidence is also possible outside the scope of Article 359a CCP in exceptional circumstances. In 2013, it ruled that the exclusion of evidence outside the scope of that provision is only possible if an important rule or principle of criminal procedural law has been violated to such a considerable extent (*in zodanig aanzienlijke mate geschonden is*) by the breach of procedural rules that the evidence should be excluded.[39] In respect of evidence gathered in the administrative phase, there is hardly any case law. According to Dutch legal literature, evidence that has been unlawfully seized in the administrative investigations

[35] In accordance with the wording of Dutch law, it is the *public prosecutor* who is declared inadmissible, not the *evidence* (Art 348 CCP). If the public prosecutor is declared inadmissible, he cannot bring a case to court and the court will not assess the material aspects of the case. This constitutes a grave sanction and is – according to the *Hoge Raad* – only applicable in cases of the most serious breaches of procedural rules. See Corstens and Borgers (n 6) 732.
[36] HR 30 March 2004, NL:HR:2004:AM2533; HR 19 February 2013, NL:HR:2013:BY5321.
[37] Corstens and Borgers (n 6) 728.
[38] Kuiper (n 34) 222.
[39] HR 29 January 2013, NL:HR:2013:BY0816.

may be used in criminal proceedings, unless it has been seized in a way that runs so counter to a proper government action that any use is intolerable (the 'manifestly improper criterion'), or when the use of the evidence would violate the fair trial requirement, or when the proper conduct of procedure has been (severely) violated, or when fundamental rights have been infringed in an excessive way.[40]

4.2 Admissibility of evidence collected by EU bodies, and especially OLAF, in criminal proceedings

Evidence which is gathered by ECB, ESMA, DG COMP or OLAF is, in principle, admissible in criminal proceedings. As mentioned above, Article 344 CCP is of particular relevance because it establishes that documents drawn up by a person in the public service of a foreign state or of an organisation under international law can be admitted as evidence. It should be noted that the admissibility of this kind of evidence has never been questioned before a Dutch criminal court and no case law exists which establishes how Dutch courts deal with evidence which has been gathered illegally – ie, through the breach of procedural rules – by EU bodies.[41] In this context, two situations are possible: evidence has been gathered in breach of procedural rules by an EU authority *in the Netherlands* – eg, during an on-the-spot inspection carried out by OLAF – or evidence has been gathered by an EU body *in another Member State*. How would the Dutch courts review the evidence in these situations? Because this question has never been dealt with in the Netherlands, it is not possible to provide a clear-cut answer. However, several overarching principles can be discerned from judgments of the *Hoge Raad* which will, in our view, be highly relevant to sketching the approach of Dutch courts in such situations.

Firstly, the well-established case law of the *Hoge Raad* on the admissibility of evidence which was gathered by national administrative authorities should be taken into account. As we have seen, the scope of the review on the admissibility of evidence which has been gathered during an administrative procedure is limited in criminal proceedings (see section 4.1). In short, Article 359a is the central provision in the CCP for the context of the admissibility of evidence. It follows from the wording of the Article and the case law of the *Hoge Raad* that its scope of application does not cover administrative procedures – ie, monitoring and administrative investigations – but only the preliminary criminal investigation within the meaning of Article 132 CCP. Evidence which has been gathered illegally in the administrative phase is, in principle, admissible in the criminal proceedings and will only be excluded in exceptional cases. This approach should, in our view, also apply if the evidence has been gathered by a foreign administrative authority or an EU body, for example OLAF. It should be remembered that the EU bodies are administrative authorities. Therefore, the evidence which is gathered by the EU authority will be subjected to the same conditions and stringency of review as evidence which has

[40] See Opinion of Advocate General Wattel, 28 May 2014, NL:PHR:2014:521, para 7.18.
[41] There is case law available in which the *reliability* of OLAF reports is challenged. However, this does not concern the *admissibility* of such reports. Instead, it concerns the autonomous evidentiary value of the reports after they have been admitted in the proceedings. See Court of Noord-Holland 23 July 2013, NL:RBNHO:2013:9668; Court of Noord-Holland 23 July 2013, NL:RBNHO:2013:9658.

been obtained by national administrative authorities. In this regard, the principle of equivalence comes into play.[42]

Secondly, the case law of the *Hoge Raad* on the review on the admissibility of foreign evidence is relevant. In 2010, the *Hoge Raad* explained how Dutch courts should review the admissibility of evidence which was gathered in a State which is a party to the ECHR.[43] The *Hoge Raad* ruled that if evidence is gathered during an investigation abroad which was led by foreign authorities, the Dutch criminal courts should restrict their assessment to establishing whether the use of the evidence would violate Article 6 ECHR.[44] They are not allowed to review whether the foreign investigation complied with the national legal provisions of that country, or whether another ECHR right – in particular that described in Article 8 ECHR – was violated in the foreign investigation. This lenient and restricted review is primarily legitimised by the mutual trust between the ECHR Member States, but the *Hoge Raad* also stipulates that other violations of fundamental rights can be addressed before the courts of the other Member State on the basis of Article 13 ECHR.

The above-mentioned approaches could – in our view – both be opted for if evidence is gathered by EU bodies. Evidently, we can engage only in reasoned speculation until the Dutch courts are confronted with this complex question and provide a conclusive answer to it. However, we can conclude that the review of evidence collected by EU bodies will *not* take place on the basis of Article 359a CCP and will, therefore, be lenient. Regardless of the approach taken, the result will essentially be the same: the review will be limited to ensuring compliance with Article 6 ECHR and Articles 47 and 48 CFR and the exclusion of evidence will be limited to the exceptional case where a breach of procedural rules renders the proceedings as a whole unfair. The case law of the *Hoge Raad* on the admissibility of administrative evidence and foreign evidence stipulates that the right to a fair trial should be guaranteed at the minimum.[45]

An example of a possible breach of Article 6 ECHR in a foreign investigation or an investigation conducted by ECB, ESMA, DG COMP or OLAF which can be assessed by a Dutch criminal court and may lead to the exclusion of the evidence obtained, is a violation of the *nemo tenetur* principle. This principle is concerned with the right to remain silent, and is in principle not applicable to incriminating evidence produced by the individual existing independent of his will.[46] Therefore it does not apply to business records, documents and digital forensic operations. It does, however, apply to oral or written statements made during an interview.

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[42] See, eg, Art 11 of Regulation 883/2013 and Art 8 of Regulation 2185/96.

[43] That the EU itself is not a party to the ECHR seems not to be a reason for not applying this approach, as the level of fundamental rights protection within the EU is equivalent to that of the ECHR. See Art 52(3) CFR.

[44] HR 5 October 2010, NL:HR:2010:BL5629.

[45] ibid, para 4.4.1; HR 30 March 2004, NL:HR:2004:AM2533, para 3.4.2.

[46] *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996). Unless an exception to this rule exists as recognised by the ECtHR. See, eg, *JB v Switzerland* App no 31827/96 (ECtHR, 3 May 2001) and *Chambaz v Switzerland* App no 11663/04 (ECtHR, 5 April 2012).

As stated before (section 2.3), in the Netherlands the LPP principle applies to all lawyers who are member of the Dutch Bar Association, which includes in-house lawyers as well. Moreover, according to the *Hoge Raad* it is in principle the lawyer who decides whether documents, records of other information fall under their legal privilege.[47] In both respects the Dutch principle of LPP seems to offer more protection than the EU principle of LPP. At present, the admissibility of evidence collected by ECB, ESMA, DG COMP or OLAF in cases where the wider Dutch principle was not upheld, has not been decided in the case law. Most probably it will be treated as 'foreign' evidence and the admissibility will be assessed in the light of Article 6 ECHR. Although we are not completely certain, we presume that the criminal courts will accept the evidence, because the (lower) EU principle of LPP seems not to be contrary to Article 6 ECHR and Articles 47 and 48 CFR. After all, on the basis of Article 52(3) CFR, the level of protection of both CFR rights which correspond to Article 6 ECHR cannot be lower than the protection offered by the Convention.

The concerned person can put forward arguments in the criminal proceedings before the criminal court that certain evidence has been obtained in violation of EU rules on investigatory and procedural safeguards. The criminal court will then apply the rules on admissibility of evidence described above. But also if the person concerned does not raise the question of inadmissibility of evidence, the Dutch criminal court will control this question ex officio. The main task of the criminal court in criminal proceedings has been laid down in Article 350 CCP. The court shall, on the basis of the indictment and the hearing at the court session, deliberate on the question whether it has been proven that the defendant committed the criminal offence, and, if so, which criminal offence is constituted under the law by the judicial finding of fact; if it is found that the offence is proven and punishable, then the District Court shall deliberate on the criminal liability of the defendant and on the imposition of the punishment or measure, prescribed by law.

In conformity with the continental tradition, the criminal court has an active role during the court hearing. It has to seek the truth, and controls whether the relevant procedural rules are complied with. The criminal court takes responsibility for the completeness of the investigation during the court hearing, the way it takes place and the correct outcome of the criminal procedure.[48] This finds expression in, inter alia, the fact that the court decides on the admissibility of evidence as well as the evidence as such.

5. Problems and practices in dealing with admissibility of OLAF-collected evidence in national criminal proceedings

5.1 Exchange of views between OLAF and national authorities on the requirements for admissibility of evidence

In accordance with the Dutch Customs Manual, a Dutch representative from Customs – ie, the Anti-fraud coordination service (AFCOS), in practice – will always be present

[47] HR 29 March 1994, NL:HR:1994:ZC9693.
[48] See Stijn AA Franken, 'De Zittingsrechter in Strafzaken' (2012) 34 *Delikt & Delinkwent* 361.

during on-the-spot inspection by OLAF.[49] After the joint inspection has been conducted, OLAF is informed by the Dutch authorities of the requirements an inspection report must meet to be used as evidence in Dutch (punitive) administrative or judicial proceedings. These requirements are mainly concerned with the way the established facts are to be formulated. The data and materials which have been collected during the inspection must be added in an annex to substantiate the findings of the report. It should be noted that the joint inspection by OLAF and Dutch inspectors cannot concern the investigation of criminal acts. After all, OLAF is not competent to conduct criminal investigations on the basis of Regulation 2185/96. If the Dutch inspector is of the opinion that a reasonable suspicion of a criminal act arises during the inspection, the OLAF inspection is halted.[50] The facts and circumstances of the particular case are communicated to a specialised official from Customs: the penalty fraud coordinator/contact official (*boete fraude coördinator/contactambtenaar*). This official will assess whether there really is a reasonable suspicion in accordance with Dutch law. If this is the case, the investigation is usually transferred to the Fiscal Intelligence and Investigation Service (*Fiscale Inlichtingen- en Opsporingsdienst* or *FIOD*).[51] If this is not the case, OLAF can continue its inspection. Before the inspection takes place, OLAF is informed of this modus operandi.

After the conclusion of the joint inspection, OLAF drafts a preliminary report which contains the facts found during the inspection. This report is handed over to the national inspector in the joint evaluation meeting which takes place after each inspection. If the national inspector agrees with OLAF's account of the inspection findings, he will sign the report. The preliminary report then becomes the final OLAF report in the meaning of Article 11 Regulation 883/2013. It should be noted that the Dutch inspector that is present during the on-the-spot inspection always drafts a 'national' report as well. It contains an overview of the course of the inspection, an account of the inspection findings and, as an annex, a shadow dossier of the data which have been copied by OLAF.[52] This national report, however, does not function as a parallel report to the OLAF report in the sense that it is drawn up with the aim of being used as an autonomous basis for, for example, the imposition of a fine.[53] It allows OLAF to elaborate its report if the Dutch inspector is of the opinion that the OLAF account of the factual findings of the inspection is insufficient and, thus, constitutes a back-up. OLAF can complement its finding on the basis of the national report. As long as the Dutch inspector does not agree with the OLAF account of the factual findings, he will not sign the report. It follows from Article 8 Regulation 2185/96 that the signature of a national official is not required for the report to be admitted as evidence; the signature is merely a sign for OLAF that the national inspector has taken note of the findings. Thus, a final report within the meaning

[49] Handboek Douane, section 45.00.00 Samenwerking met OLAF, 4.3.1. See also Joske Graat, 'The Netherlands' 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) 93–94.
[50] See Corstens and Borgers (n 6) 76.
[51] Handboek Douane, section 45.00.00 Samenwerking met OLAF, 4.3.5.
[52] ibid, 4.4.1.
[53] In national case law concerning decisions based on OLAF reports, the national report is never mentioned.

of Regulation 883/2013 does not require the signature to be admitted as evidence in the Netherlands.[54] It should be noted that as yet a Dutch national inspector has never completely refused to sign the OLAF report.

5.2 Duplication of OLAF activities

Inspection activities performed by OLAF are not repeated on the ground of provisions in the Dutch CCP. As seen before, an OLAF report is considered to be written materials in the meaning of Article 344(1) CCP, and may in principle be used as evidence in criminal proceedings (see section 1.3.1). In criminal proceedings, an OLAF report is treated in the same way as a Dutch administrative inspection report. The rules on the possible inadmissibility of such reports in criminal proceedings apply mutatis mutandis (see section 4.1). It should be noted that the standard for criminal liability may be different or higher than the standard for (punitive) administrative liability. In order to meet the criminal law standard, it might be necessary for the criminal authorities to conduct additional investigatory activities.

[54] In the Customs Manual, the term 'synthesis report' is used to refer to the OLAF report which has been complemented on the basis of the national report. However, this is not a legal term under Regulation 883/2013. See Handboek Douane, section 45.00.00 Samenwerking met OLAF, 4.5.