

## 2. EU REPORT

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### 2.1 OVERVIEW OF TASKS AND ARCHITECTURE OF EU AUTHORITIES (DG COMPETITION, ECB, ESMA AND OLAF)

#### 2.1.1 Tasks of the four EU authorities: a general overview

##### 2.1.1.1 DG Comp

The mandate of the EU Commission (DG COMP) covers the four traditional pillars of competition law: cartels and other agreements, abuse of a dominant position, mergers, and state aid. The most relevant investigative powers are provided in the field of antitrust, i.e. the agreements between undertakings (Art. 101 TFEU) and the abuse of a dominant position (Art. 102 TFEU). Art. 103 TFEU is the legal basis for enforcement rules. These rules are provided by Regulation 1/2003 (which replaced Regulation 17/62); they are further implemented by Commission Regulation 773/2004 (the ‘Implementing Regulation’, consolidated version of August 2015). Clarifications are provided by the Commission notice on best practices for the conduct of proceedings of 2011 (Best practices); as well as by the Explanatory note of the Commission on inspection pursuant to Art. 20(4) of September 2015 (Explanatory note).

DG COMP also has sanctioning powers in relation to these areas. The procedure before the Commission can be outlined as follows:

- (1) *Investigations*. DG COMP conducts an investigation either (a) into a particular type of agreement; or (b) into a particular sector of the economy (‘sector inquiries’).<sup>1</sup>
- (2) *Statement of objections*. When DG COMP believes that an infringement has occurred, it informs the parties in writing of the objections against them;
- (3) *Access to the file*. The parties have the (limited) right to access the Commission’s file;
- (4) *Written submissions*. The parties can make written submissions;
- (5) *Hearing*. It is not automatic, but must be requested; since 1982 hearings are conducted by a hearing officer ‘in full independence’;<sup>2</sup>
- (6) *Commission’s decision*. DG COMP makes a decision and imposes ‘*behavioural or structural remedies*’ which are proportionate to the infringement committed and are necessary to bring the infringement effectively to an end;
- (7) *Fines*. DG COMP may also impose fines in cases of intentional or negligent infringements. Art. 23(5) of Reg. 1/2003 clearly states that fines ‘shall not be of a criminal law nature’;

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1 The most recent sector inquiry regards e-commerce: <[http://ec.europa.eu/competition/antitrust/sector\\_inquiries\\_e\\_commerce.html](http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html)>.

2 See the 2004 Implementing regulation and the Decision of the President of the EU Commission 2011/695/EU of 13 October 2011.

(8) *Judicial Review*. Judicial reviews can be sought before the General Court and the CJEU.

It is worth mentioning that the CJEU was asked whether the whole enforcement system is compatible with the Charter of Fundamental Rights of the European Union (CFREU), since DG COMP acts as ‘investigator, prosecutor, judge and jury’ and it might raise concerns as to the requirement of the independent tribunal. The CJEU answered that it is compatible, provided that the General Court exercises a full review of the Commission’s decisions.<sup>3</sup>

In general, DG COMP cannot use force or coercion. However, enforcement is ensured by the possibility to impose fines for a failure to cooperate with investigative measures. Therefore, not only does DG COMP have the power to impose substantive fines for violations of Arts. 101 and 102 TFEU, but it can also subject undertakings to procedural sanctions in order to ensure the possibility to conduct the investigations provided by Reg. 1/2003. Furthermore, DG COMP can also take temporary ‘interim measures’<sup>4</sup> when there is a *prima facie* finding of an infringement, and the risk of serious and irreparable damage to competition requires urgent action. Reg. 1/2003 does not define the content of such measures, and the COM has rarely used this power, especially because the requirement of ‘irreparability’ is very difficult to meet in practice. In principle, however, the Commission is not confined to only imposing negative measures to desist from certain action, but may also include a positive order to perform some act.<sup>5</sup> From the EU case law, it may be concluded that the interim measures are not acceptable when they concern a different subject matter and thus exceed the scope of the main procedure.<sup>6</sup>

#### 2.1.1.2 ECB

As of November 2014, the ECB has become exclusively competent for the financial supervision of ‘significant’ credit institutions, representing almost 85% of total banking assets in the euro area. The legal framework governing this new so-called Single Supervisory Mechanism includes SSM Council Regulation 1024/2013, SSM Framework Regulation 468/2014 issued by the ECB, the Decision of the ECB concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16) and Council Regulation (EU) No. 2532/98 concerning the powers of the European Central Bank to impose sanctions.

The SSM Regulation, implemented in accordance with Article 127 (6) TFEU, confers supervisory and investigatory powers upon the ECB. The ECB has the tasks of authorizing credit institutions and withdrawing their authorizations, assessing notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, conducting the daily supervision of significant credit institutions, and investigating alleged violations of relevant EU law (Article 4 SSM Regulation). The division of supervisory tasks (defined in Article 4 SSM Regulation) between the EU and national levels is made on the basis of the significance of a credit institution, i.e., its size, its importance for the economy of the Union or any Member State,<sup>7</sup> and the significance of its cross-border activities (Article 6 (4) SSM Regulation). The ECB takes the decision as to when a supervised group is considered to be significant or not (Article

3 See e.g. Case C-67/13, *Groupment des Cartes Bancaires*, [2014] ECLI:EU:C:2014:2204.

4 Art. 8 Regulation (EC) No. 1/2003

5 See L. Ortiz Blanco (ed.), *EU Competition procedure* (2013), p. 622.

6 See in particular Case T-23/90, *Peugeot v Commission*, [1991], ECR II-653, ECLI:EU:T:1991:45. See also L. Ortiz Blanco (ed.), *op. cit.*, p. 623.

7 The three biggest banks of each MS are supervised by the ECB irrespective of their total assets unless justified by particular circumstances (Art. 6 (4) Regulation (EU) No. 1024/2013 (SSM)).

39 (1) SSM Framework Regulation). As a result, as of the time of writing, the ECB directly supervises approximately 120 groups representing approximately 1,200 supervised entities (out of 4,700 in total). National competent authorities conduct the direct supervision of less significant institutions, subject to the oversight and instructions of the ECB, which they shall follow (Article 6 (3) SSM Regulation). The ECB may take over the supervision over less significant institutions (Articles 67-69 SSM Framework Regulation). If the ECB does not do this, these ‘less significant banks’ fall under the authority of the national competent authorities.

Supervision by the ECB entails daily monitoring by Joint Supervisory Teams (JSTs), appointed for each supervised group/entity, and regular/planned on-site inspections, organised by the Centralised On-site Inspections Division. JSTs consist of the ECB’s staff and the NCA’s staff from those MSs where the supervised entity in question is situated. JSTs set out annual plans, in which they outline the necessity to have on-site inspections of specific banks with a specific purpose. The purpose can be connected to a particular issue or be a general inspection. In the framework of EU law, the Centralised On-site Inspections Division exercises such planned inspections at the request of JSTs. If the JTS suspects a violation, it requests a special body of the ECB, i.e., the Enforcement and Sanctions Division, to conduct an investigation into that alleged breach of EU law, which may lead to the imposition of sanctions by the Governing Council (prepared by the Supervisory Board). The Supervisory Board (comprising the Chair and Vice-Chair, four representatives of the ECB, and one representative of the NCAs in each participating Member State) is the highest organ in the ECB for the purposes of planning and executing the SSM tasks. It proposes draft decisions for adoption by the ECB’s Governing Council (the six members of the Executive Board appointed by the European Council and the governors of the national central banks of the 19 euro area countries). This is done on the basis of the so-called ‘non-objection’ procedure, which means that the Supervisory Board is not a decision-making body. The ultimate decision-making body is the Governing Council. In case of a disagreement the Regulation also provides for a ‘mediation panel’ (Article 25 of the SSM Regulation).

All in all,

- (1) Investigations. The ECB can conduct investigations and on-site inspections as a matter of daily supervision (by JSTs and the Centralised On-site Inspections Division) and when a breach of EU law is suspected (in this case by the Enforcement and Sanctions Division, in the legislation referred to as the ‘Investigating Unit’).
- (2) Statement of objections. On completion of an investigation and before a proposal for a complete draft decision is prepared and submitted to the Supervisory Board, the investigating unit shall notify the supervised entity concerned in writing of the findings under the investigation carried out and of any objections raised thereto. The Investigating Unit shall inform the supervised entity concerned of its right to make submissions in writing to the Investigating Unit on the factual results and the objections raised against the entity as set out therein, including the individual provisions which have been allegedly infringed, and it shall set a reasonable time limit for the receipt of such submissions (Article 126 SSM Framework Regulation).
- (3) Access to the file. The parties shall have the right to access the file subject to the legitimate interests of legal and natural persons other than the relevant party, in the protection of their business secrets (Article 32 SSM Framework Regulation). The right of access to the file shall

not extend to confidential information, including internal documents of the ECB and NCAs and correspondence between the ECB and an NCA or between NCAs.

- (4) Written submissions. The parties can make written submissions (Article 126 (2) SSM Framework Regulation).
- (5) Hearing. It is not automatic, but the Investigating Unit may invite the entity to a hearing upon completion of its investigation (Articles 31 and 126 (3) SSM Framework Regulation).
- (6) ECB's decision. The Supervisory Board takes the decision, thereby closing the case and imposing the level of the penalty.
- (7) Fines. The ECB can impose administrative pecuniary penalties for violations of relevant EU and national laws and impose sanctions for non-compliance with its decisions.

Judicial Review. Judicial reviews can be sought before the CJEU and the Administrative Board of Review.

### 2.1.1.3 ESMA

ESMA's objectives include establishing a sound, effective and consistent level of financial regulation and supervision and preventing regulatory arbitration and promoting equal conditions of competition (Article 1 of Regulation 1095/2010). The legal framework includes its founding Regulation 1095/2010 (the 'ESMA Regulation') as well as other EU instruments:

- Regulation (EU) No. 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies (CRAs), also known as the CRAR,
- Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (TRs), also known as EMIR,
- Commission Delegated Regulation No. 946/2012 supplementing the rules on credit rating agencies, including more specific provisions on the right of defence,
- Commission Delegated Regulation No. 667/2014 supplementing the rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority including rules on the right of defence.

These regulations give ESMA the ultimate responsibility to deal with the registration, authorization, supervision of and enforcement vis-à-vis credit rating agencies (CRAs) and trade repositories (TRs). By the way, these financial entities were not previously regulated at the national level; the TRs did not exist before they became regulated by the mentioned legal acts.<sup>8</sup>

More specifically, the Supervision Department of ESMA has individual persons ('supervisors') monitoring the daily operations of registered ESMA CRAs and TRs. ESMA has its own investigation and sanctioning powers. It has the power to request information (a simple request or by a decision), conduct general investigations by supervisors on an ongoing basis and investigations into alleged breaches of EU law by independent investigation officers (IIOs), and impose supervisory measures and administrative fines for breaches of relevant EU laws (Articles 23(e)(5) CRAR and 64 (5) EMIR). ESMA can also withdraw authorisations. The sharing of enforcement tasks does not really exist. ESMA can, however, ask to provide assistance in or delegate tasks to national competent authorities (NCAs) carrying out specific supervisory

<sup>8</sup> From an informal discussion with officials from AFM (October 2016).

(Articles 30 CRAR and 74 EMIR) and investigatory tasks and on-site inspections (Articles 23d (6) CRAR and 63 (6) EMIR). Thus far, this has not happened in light of investigations into a suspected breach of EU law<sup>9</sup> and it is unlikely to occur due to the expertise existing at ESMA in relation to the supervision of CRAs and TRs and not at the national level.<sup>10</sup>

All in all,

- (1) Investigations. ESMA can conduct investigations as a matter of daily supervision (by the internal departments mentioned above) and when it suspects a breach of EU law (by an Independent Investigation Officer (IIO)).
- (2) Statement of objections. Upon the completion of an investigation, the IIO shall provide the opportunity for the party under investigation to be heard and to comment on the findings (Articles 23e CRAR and 64 EMIR).
- (3) Access to the file. The persons subject to an investigation shall be entitled to have access to the file, subject to the legitimate interests of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information affecting third parties (Articles 23e (4) and 36 c (2) CRAR and 64 (4) and 67 EMIR).
- (4) Written submissions. Although it is not explicitly stated ('the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated' (Articles 23e (4) CRAR) and 64 (3) EMIR)), the parties may have the opportunity to make written submissions. The Commission's Delegated Regulations specify the possibility to submit written comments.
- (5) Hearing. Although it is not explicitly stated ('the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated' (Articles 23e (4) CRAR) and 64 (3) EMIR)), the parties may have a hearing. The Commission's Delegated Regulations specify the possibility for the IIO/ESMA to invite the party under investigation to an oral hearing (Article 2(4)). However, this choice is ESMA's /IIO's prerogative (unlike in the area of competition law, although that area may apply to ESMA stemming from CFR, etc.): 'it may occur that some elements of the written submissions that the trade repository made to the investigation officer or to ESMA are not sufficiently clear or detailed, and that they need to be further explained by the trade repository. Should the investigation officer or ESMA consider that this is the case, the trade repository or the persons subject to investigation may be invited to attend an oral hearing to clarify those elements' (Recital 3, Commission Regulation 667/2014; Recital 5 of Commission Regulation 946/2012 regulates this for CRAs).
- (6) ESMA's decision. The ESMA's Board of Supervisors can take one or more decisions to impose one or more supervisory measures listed in Articles 24 CRAR and 73 EMIR and a fine as listed in Articles 36a CRAR and 65 EMIR.
- (7) Fines. See also point 6. One or more supervisory measures, such as the withdrawal of an authorization and public notices, shall be imposed when the investigation has shown that the supervised entity has committed one of the infringements listed in the respective annexes. Fines shall be imposed when the investigation shows that the supervised entity has, *intentionally or negligently*, committed one of the infringements listed in the respective annexes. ESMA has no discretion regarding fines. The basic amounts and adjustments because of mitigating/

<sup>9</sup> From an informal discussion with an official from ESMA (October 2016).

<sup>10</sup> From an informal discussions with officials from AFM and ESMA (October 2016).



aggravating factors are set out in the regulations (see Article 36a CRAR and Annex IV CRAR, and Article 65 EMIR and Annex II EMIR).

- (8) Judicial Review. Judicial review of ESMA's decisions can be sought before the Board of Appeal established for the three European Supervisory Authorities and the CJEU.

#### 2.1.1.4 OLAF

OLAF is competent to exercise the powers of investigation conferred upon the Commission by the relevant Union acts, 'in order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union'. This means that OLAF investigations may 'horizontally' cover all areas of EU activity if the EU budget is allegedly affected by illegal activities, in particular all EU expenditures and most of its revenues (e.g. customs duties, agricultural duties, etc.). It is worth mentioning that the scope of OLAF's competence concerns not only the revenue and expenditure of the EU institutions, but also the budget of EU bodies and agencies.

The complex legal framework concerning OLAF investigations is composed of horizontal regulations (Regulation No. 883/2013; Regulation No. 2988/95 supplemented by Regulation No. 2185/96) and sectoral regulations concerning specific EU policy areas (e.g. on customs, CAP, structural funds, etc.).

OLAF carries out 'internal' and 'external' investigations. Internal investigations are conducted within institutions, bodies, offices and agencies of the EU, notably when alleged fraud involves EU officials. External investigations are conducted when a suspicion of fraud concerns economic operators and evidence may be found outside EU premises. Such a distinction is often artificial, since evidence of suspected fraud may be gathered both within and outside EU institutions. In this case, 'Articles 3 and 4 apply respectively',<sup>11</sup> therefore at least the legal consequences are clear: both measures can be adopted in the same case; while for internal investigations there is a uniform set of powers defined by EU law,<sup>12</sup> for external investigations there are several references to national law (see below). If the case requires both internal and external investigations, the Director-General 'may, where necessary, assign a case to an investigation unit other than the responsible one or to a special investigation team established for that purpose'.<sup>13</sup>

The EU legal framework highlights the administrative nature of OLAF's investigations. This means that they do not affect national competence regarding the prosecution of criminal offences. Furthermore, OLAF does not have sanctioning powers: OLAF's investigations conclude with a report that is sent to the national authorities, which are not compelled to take any action. This report indicates the facts established and the precise allegations, as well as recommendations on the appropriate follow-up to be undertaken at the national level.<sup>14</sup> The EU legal framework provides that the final report constitutes admissible evidence in administrative or judicial proceedings in the Member States in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.<sup>15</sup>

<sup>11</sup> Art. 7(4) Regulation (EU) No. 883/2013.

<sup>12</sup> Actually some differences in investigative powers can be observed also in internal investigations: Art. 4(1) Regulation (EU) No. 883/2013 provides that internal investigations are conducted in accordance with the conditions set out in the Regulation 'and in the decisions adopted by the respective institution, body, office or agency'. Such decisions are adopted on the basis of the interinstitutional agreement. Interviewees reported that they can differ in some minor aspects relating to OLAF's access to their premises.

<sup>13</sup> Art. 6(3) GPI.

<sup>14</sup> Art. 11 Regulation (EU) No. 883/2013.

<sup>15</sup> Art. 11(2) Regulation (EU) No. 883/2013.

## 2.1.2 Cooperation with national authorities

### 2.1.2.1 DG Comp

Both the EU Commission and the Member States have enforcement powers at their disposal and they can exercise them on the same facts. The investigating authorities are part of the European Competition Network (ECN), a ‘network of public authorities’. It is not a new legal entity or organisation, but provides a framework where the Commission and national competition authorities (NCAs) discuss the sharing of work in order to determine the allocation of cases. The ECN as such does not have specific powers. The powers are exerted by either national authorities or the Commission, which basically may act in two ways:

- (a) DG COMP may request national competition authorities to undertake inspections on its behalf using ‘their powers in accordance with their national law’;<sup>16</sup> in this case, EU officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned (this authority has only been used on two occasions, because inspections carried out by national authorities are considered to be unsuitable for cases involving inspections in more than one Member State).<sup>17</sup>
- (b) Compared with other policy areas, the COM also has direct enforcement powers, in the sense that it does not have to rely on the assistance of NCAs: DG COMP can directly conduct investigations on its own, and such investigative powers are defined by EU law. EU staff conduct investigations by producing either a written authorisation or a decision (issued by the Commission), depending on the investigative measure. In some cases, depending on the investigative measure, NCAs may be requested to provide assistance to DG COMP (when NCAs assist DG COMP in conducting an inspection they have the same investigative powers provided by EU law for DG COMP). On the other hand, there are obligations for DG COMP to inform NCAs and to consult them in the execution of certain investigative measures (i) in order to facilitate coordination with investigations on the national level; (ii) in order to enable NCAs to provide for effective assistance.

The powers of DG Comp cover the following investigative measures: the interviewing of persons and the issuing of production orders, and the right to enter premises.

### 2.1.2.2 ECB

The ECB has, in principle, all investigative and sanctioning powers of its own: the investigative unit shall have all the powers granted to the ECB under the SSM Regulation (Article 125 SSM Framework Regulation). According to the SSM Regulation, the ECB has the power to request information (Article 10), to conduct necessary investigations, including examining books and records and interviewing (Article 11), to make on-site inspections (Article 12), to impose administrative pecuniary penalties for violations of EU law but also sanctions for ‘breaches of its decisions’ (Article 18(7) SSM Regulation). Furthermore, the ECB has all the powers which NCAs shall have under relevant Union law (Article 9 (1) SSM Regulation) and the ECB may also instruct NCAs to use a ‘purely’ national power (Article 9(1) SSM Regulation). Finally, ‘where, in carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA to refer the matter to the

<sup>16</sup> Art. 22(2) Regulation (EC) No. 1/2003.

<sup>17</sup> M. Böse, ‘The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases’, in K. Ligeti (ed.), *Toward a Prosecutor for the European Union* (2013), vol. 1, pp. 838, 848.

appropriate authorities for investigation and possible criminal prosecution, in accordance with national law' (Article 136 SSM Framework Regulation).

Furthermore, as regards the following investigative measures:

- The interviewing of persons and the issuing of production orders

Under Article 11 SSM Regulation (on general investigations), the ECB has the right to obtain written or oral explanations from supervised entities and officials and their parties which may perform certain outsourced tasks for the supervised entities. Since this provision concerns investigations and investigations must be instigated by a ECB decision, non-compliance with the ECB's decision can lead to sanctions in accordance with Regulation No. 2532/98 (Article 18 (7) SSM Regulation).

According to Article 11 SSM Regulation, when a person obstructs the conduct of the investigation, the national competent authority of the participating Member State where the relevant premises are located shall afford, in compliance with national law, the necessary assistance including, in the cases referred to in Articles 12 and 13, facilitating access by the ECB to the business premises of the legal persons referred to in Article 10(1), so that the aforementioned rights can be exercised.

- Monitoring of bank accounts (real time)

The ECB does not have this power; in fact it may not need this power.<sup>18</sup>

- Right to enter premises

Powers of on-site inspection (with or without prior announcement) are defined by Article 12 SSM Regulation. This power exists only in relation to the inspection of business premises and land belonging to legal persons or other undertakings included in the supervision under Article 4 (1) SSM Regulation. Recourse to national law is necessary if an undertaking refuses to allow an inspection to take place: 'where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Where that power is not available to the national competent authority concerned, it shall use its powers to request the necessary assistance of other national authorities'.

- Access to traffic data and recorded communications

The ECB does not explicitly have this power. But the ECB can request information 'that is necessary in order to carry out the tasks conferred on it by this Regulation, including information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes' (Article 10 SSM Regulation). And the ECB shall have the right to 'examine the books

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<sup>18</sup> From an informal discussion with a member of a JST (October 2016).



and records of the persons referred to in Article 10(1) and take copies or extracts from such books and records' (Article 11 SSM Regulation).

It is worth highlighting, as regards the procedural safeguards:

- The right of access to a lawyer

Not specifically regulated in the SSM legislative framework.

- Professional privilege and professional secrecy

Recital 48 of the SSM Regulation states that 'legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)'.

SSM Regulation Article 10 (on a general request for information) states that 'professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.'

- Right to remain silent

Not explicitly regulated in the SSM legislative framework.

### 2.1.2.3 ESMA

ESMA has, in principle, all investigative and sanctioning powers of its own: it may request information by a simple request or by decision (Articles 23b CRAR and 61 EMIR), conduct investigations, including the powers to summon witnesses and ask for oral and written explanations concerning facts and documents (Articles 23c CRAR and 62 EMIR), conduct on-site inspections (Articles 23d CRAR and 63 EMIR), and impose a supervisory measure, such as issuing public notices and imposing fines (Articles 24+36a CRAR and 73 EMIR). The 'sharing' of tasks with national authorities concerns only the possibility for ESMA to ask competent national authorities to carry out specific supervisory and investigatory tasks and on-site inspections on its behalf.<sup>19</sup> No conditions are prescribed as to when ESMA must or may make such a request. The delegation of a supervisory task in light of an investigation into an alleged breach of EU law has not so far occurred. In any case, these articles apply to two types of ESMA investigations – 'general investigations' and investigations by IIOs. The latter applies in cases when 'ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements.' In this case, 'ESMA shall appoint an independent investigating officer within

<sup>19</sup> In light of the focus of the project on the investigation by IIOs, the delegation of power by ESMA to an NCA is not discussed here. This possibility exists in accordance with Arts. 30 Regulation (EU) No. 462/2013 (CRAR) and 74 Regulation (EU) No. 648/2012 (EMIR). These articles allow ESMA to delegate specific supervisory tasks where necessary for the proper performance of a *supervisory* task. In this light, we can conclude that ESMA cannot delegate an investigation task performed by the IIO to an NCA. The latter can also be supported by the fact that ESMA must appoint an IIO within ESMA (Arts. 23e (1) Regulation (EU) No. 462/2013 (CRAR) and 64 (1) Regulation (EU) No. 648/2012 (EMIR)).

ESMA to investigate the matter' (Articles 23e CRAR and 64 EMIR). The IIO has the same powers as ESMA during general investigations, so the possibility to make a request to a national competent authority seems to apply to him, too (Articles 23e (2) CRAR and 64 (2) EMIR)).

National competent authorities can also be triggered when ESMA finds that a person is resisting an inspection. 'The competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection' (Articles 23d (7) CRAR and 63 (7) EMIR).

Finally, 'ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of *res judicata* as the result of criminal proceedings under national law' (Articles 23e (8) CRAR and 64 (8) EMIR).

Furthermore, as regards the following investigative measures:

- Interviewing and production orders

ESMA has the power to request information by a simple request or by a decision (Articles 23b CRAR and 61 EMIR) and to 'summon and ask any person referred to in <...> or their representatives or staff for oral or written explanations on facts or documents related to the subject matter and purpose of the inspection and to record the answers; interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation; request records of telephone and data traffic' (Articles 23c CRAR and 62 EMIR).

The officials and other persons authorised by ESMA for the purposes of the investigations shall exercise their powers upon the production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 61(1) are not provided or are incomplete, and the fines, where the answers to questions asked to persons referred to in Article 61(1) are incorrect or misleading (Articles 62 EMIR; 23c CRAR regulates this for CRAs).

- Monitoring of bank accounts (real time)

ESMA does not have this power.

- Right to enter premises

Powers of on-site inspection (with or without prior announcement) are defined by Articles 23d CRAR and 63 EMIR. This power exists only in relation to the inspection of business premises or land belonging to legal persons. Recourse to national law is necessary if an undertaking refuses to allow an inspection to take place: ‘where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection’.

– Access to traffic data and recorded communications

ESMA has the power to request records of telephone and data traffic (Articles 23c (1 (e)) CRAR and 62 (1(e)) EMIR). ‘If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure’ (Articles 23e (5) CRAR and 62 (5) EMIR).

As regards the following procedural safeguards, respective regulations regulate these in the following way (a general overview):

– Right of access to a lawyer

Both CRAR and EMIR mention the possibility for lawyers, who are duly authorised to act, to supply information on behalf of their clients (Articles 23b (4) CRAR and 61 (4) EMIR); there is no obligation to provide access to a lawyer, although CRAR and EMIR do state that ‘the rights of defence of the persons concerned shall be fully respected during investigations under this Article’ (Articles 23e (3) CRAR and 64 (3) EMIR). The Commission Regulations mention the possibility to be assisted by lawyers or other qualified persons admitted by the investigating officer when the parties under the completed investigations are invited to an oral hearing (Article 2(4)).

– Legal professional privilege and other professional secrecy

Both CRAR (Article 23a) and EMIR (Article 60) state that ‘the powers conferred on ESMA or any official of or other person authorised by ESMA by Articles <...> [articles on the request of information and on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege.’

– Right to remain silent

Not explicitly regulated in relevant EU secondary law (CRA and EMIR legislative frameworks).<sup>20</sup>

<sup>20</sup> Several officials from ESMA (during conversations in October 2016) are of the opinion that a number of judgements, including Case 374/87, *Orkem v. Commission*; Case T-112/98, *Mannesmannröhren-Werke AG v Commission*; T-297/11, *Buzzi Unicem SpA, contre Commission européenne*, which set out the scope of the right to silence, will be applicable.

#### 2.1.2.4 OLAF

Basically three ways of conducting OLAF's tasks can be identified:

- (a) OLAF can provide assistance to Member States 'in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud' ('*coordination cases*').<sup>21</sup>
- (b) OLAF can ask national authorities to conduct an investigation on suspected fraud or irregularities, and can participate in such investigations ('*mixed inspections*'). Since investigations are opened and conducted at the national level, national law applies; OLAF staff act as seconded experts or joint investigators, with the same powers as the national authorities. An example is provided by Art. 18(4) of Regulation No. 515/1997 on mutual assistance in customs and agricultural matters,<sup>22</sup> whereby '[w]here the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall at the earliest opportunity carry out an enquiry, at which Commission officials may be present under the conditions laid down in Articles 9 (2) and 11 of this Regulation'; such provisions clarify that investigative measures are adopted by national authorities; however, the Commission's staff shall have access to the same premises and the same documents through the national partners.<sup>23</sup>
- (c) OLAF conducts proper autonomous investigations (the following sections of the report will focus on these types of investigations). Various investigative activities can be performed by OLAF investigation units; the most relevant, which require the authorisation of the Director-General, are: interviews with persons concerned and witnesses, the inspection of EU premises (in internal investigations) and on-the-spot checks of economic operators (in external investigations). During the inspection of EU premises and on-the-spot checks digital forensic operations may be carried out.<sup>24</sup>

As regards external investigations, OLAF can conduct on-the-spot checks according to Regulation No. 2988/95 and Regulation No. 2185/96. These regulations do not lay down an exhaustive EU law procedure, but refer to sectoral regulations<sup>25</sup> and to national law.<sup>26</sup> This entails that the extent of OLAF's powers may vary from one country to another. According to these regulations, checks and inspections shall be prepared and conducted in close cooperation with the Member States concerned; Member States' authorities may participate therein and normally they do so, at least at the beginning of the inspection; however, on-the-spot checks are carried out under OLAF's authority. In this case, the national law dimension is relevant:

21 Art. 1(2) Regulation (EU) No. 883/2013.

22 Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [1997], OJ L 82/1.

23 See Art. 9(2) of Regulation (EC) No. 515/97. This approach is different to the one adopted by Regulation (Euratom, EC) No. 2185/96 on external checks and by sectoral regulations, for example by Art. 37 of Council Regulation (EC) No. 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005], OJ L 209/1, or by Art. 72 of the Council Regulation (EC) No. 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No. 1260/1999 [2006], OJ L 210/25: in these cases the Commission (OLAF) conducts on-the-spot checks and informs national authorities, while personnel from the Member State concerned may take part in such checks.

24 See the Guidelines on Digital Forensic Procedures for OLAF Staff, 15 February 2016.

25 Art. 9(2) Regulation (EC, EURATOM) No. 2988/95.

26 Art. 8 Regulation (EC, EURATOM) No. 2988/95.

- (i) as regards the investigative powers as such. OLAF staff shall act, ‘subject to the Union law applicable’, in compliance with the rules and practices of the Member State concerned and with the procedural safeguards provided in the Regulation. OLAF should be granted access to information and documents under the same conditions as the competent authorities of the Member States concerned.<sup>27</sup> OLAF staff exercise these powers in the Member States on the production of the written authorisation showing their identity and capacity. The Director-General issues such authorisation indicating the subject matter and the purpose of the investigation, the legal bases for conducting the investigation and the investigative powers stemming from these bases;<sup>28</sup>
- (ii) as regards the assistance from Member States in order to use coercive powers, since OLAF cannot use force or coercion,<sup>29</sup> Regulation 883/2013 specifies that Member States ‘shall give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively.’ It is worth mentioning that OLAF has experienced difficulties in identifying the national authority which is competent to provide assistance to its staff. For this reason, Regulation 883/2013 provides that Member States shall ‘designate a service (‘the anti-fraud coordination service’) to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office’ (AFCOS).<sup>30</sup>

### 2.1.3 Opening of investigations

#### 2.1.3.1 DG Comp

DG COMP may initiate proceedings either following a ‘complaint’ or by acting on its own initiative.<sup>31</sup> There is no specific time or moment for the initiation of proceedings, nor does the initiation have any effect on DG COMP’s powers of investigation, which can be used both before and after initiation.<sup>32</sup> However, proceedings must be formally initiated no later than the issuing of the statement of objections to the undertakings concerned (or the publication of the Article 24(7) notice prior to a decision on making commitments binding, or a declaration of non-applicability).<sup>33</sup> It is worth mentioning that the primary significance of the initiation of proceedings is that it ousts the jurisdiction of NCAs; furthermore, it interrupts the limitation period for the imposition of fines and penalties.

When the Commission decides to initiate proceedings, it ‘may’ publicise the initiation ‘in any appropriate way’ (unless this harms the investigations).<sup>34</sup> This is normally done through publication on the website of DG COMP and a press release.<sup>35</sup>

27 Art. 7(1) Regulation (EC) No. 2186/96.

28 Art. 7(2) Regulation (EU) No. 883/2013.

29 Art. 3(3) Regulation (EU) No. 883/2013.

30 Art. 3(4) Regulation (EU) No. 883/2013.

31 It is not necessary to start an investigation to reject a complaint.

32 Art. 2(3) (EC) No. Regulation 773/2004.

33 N. Khan, *Kerse & Kahn on EU Antitrust Procedure* (2012), p. 99: ‘The Commission has recently moved from a policy of initiating proceedings only on the issue of the statement of objections to initiating proceedings at an earlier stage in most cases’.

34 Art. 2(2) Regulation (EC) No. 773/2004.

35 N. Khan, *op. cit.* 101.



### 2.1.3.2 ECB

The Enforcement and Sanctions Division opens an investigation into an alleged violation when there has been a referral by the JST (Article 124 SSM Framework Regulation). This Division can make requests to the supervised entity concerned under the powers granted to the ECB pursuant to the SSM Regulation (the powers mentioned in the previous section). In this request, the Division shall specify the subject matter and the purpose of the investigation (Article 125 (2) SSM Framework Regulation). This Division enjoys the same powers as those that are outlined for ‘daily’ supervision (requests for information and making on-site inspections).

### 2.1.3.3 ESMA

On a daily basis, ESMA supervisors perform monitoring with the purpose of ensuring that CRAs and TRs comply with the requirements under the CRA Regulation and EMIR. They may, for instance, request information, examine records and documentation, summon persons and conduct interviews, and inspect CRAs’ or TRs’ business premises. If the supervisory teams, as part of their investigations in a given case, find serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I or III of EMIR and the CRA Regulation respectively, this department informs the Executive Director (‘ESMA’ in the Regulation). The latter ‘shall’ appoint a person within ESMA as an independent investigation officer to further investigate the matter (Articles 23e(1) CRAR and 64(1) EMIR); thus far, the investigation officer has been a member of the Legal, Cooperation and Enforcement Department of ESMA. He/she is not involved or has not been involved directly or indirectly in the supervision or the registration process of the trade repository or credit rating agency concerned in order to ensure his complete independence. He/she performs his/her functions independently from ESMA’s Board of Supervisors.

### 2.1.3.4 OLAF

According to Art. 5 Regulation 883/2013 the decision to open an investigation is made by the OLAF Director-General on his own initiative, or following a request by Member States or other EU bodies. The ‘Investigation Selection and Review Unit’ analyses information of possible investigative interest and provides an opinion to the Director-General on whether an investigation or coordination case should be opened or whether the case should be dismissed.<sup>36</sup> Such a decision takes the following into consideration:

- (a) whether ‘there is sufficient suspicion’ of an illicit activity affecting the EU’s financial interests. This is in line with the CJEU case law whereby the threshold of sufficient suspicion is a safeguard against a disproportionate use of investigative powers.<sup>37</sup> The suspicion may ‘also be based on information provided by any third party or anonymous information’;
- (b) whether the investigation falls within the policy priorities and the annual management plan established by the Director-General;<sup>38</sup>

<sup>36</sup> Art. 1 2013 Guidelines on Investigation Procedures for OLAF Staff.

<sup>37</sup> See Case C-15/00, *Commission v European Investment Bank*, [2003] ECR I-07281, in particular para 164; Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-07147, in particular para. 141. See also the Report No. 3/2014 from the Supervisory Committee of OLAF to the European Parliament, the Council, the Commission and the Court of Auditors.

<sup>38</sup> It is worth mentioning that the OLAF Supervisory Committee, in its Activity Report 2015, observed that ‘OLAF refrained from defining a true ‘investigation policy’ and only indicated undocumented criteria, without any impact assessment or evaluation of the implementation of previous Investigation Policy Priorities (IPPs),

- (c) whether it is ‘necessary and proportionate’ to open an investigation at OLAF. With regard to an internal investigation, Art. 5(1) specifies that the decision should consider whether disciplinary authorities within the institutions are better placed to conduct the investigation. With regard to an external investigation, the Director-General should consider whether it is more appropriate to limit the role of OLAF to coordination, without conducting autonomous investigations.

It is worth mentioning that if ‘the investigation unit envisages conducting an investigative activity outside the existing scope of the investigation, it shall submit a request to extend the scope of the investigation to the Investigation and Selection Unit’, which verifies the legality and necessity of the proposed extension of its scope and provides an opinion for the Director-General on the basis of which he makes a decision.<sup>39</sup> This is also used when an external investigation also requires internal investigative activities, and vice versa.

#### **2.1.4 Threshold for opening an investigation**

##### **2.1.4.1 DG Comp**

Some tasks similar to ‘market supervision’ in competition law are identifiable in the ‘sector inquiries’, which are investigations that DG COMP carries out into sectors of the economy when it believes that a market is not working as well as it should, and also believes that breaches of competition rules might be a contributing factor. The threshold which must be met in order for the Commission to commence a sector inquiry is relatively low: the Commission only requires a ‘suggestion’ that competition may be restricted or distorted. There is generally no public consultation on the decision to launch an inquiry; however, the Commission will normally announce its formal decision to initiate an inquiry, which details why the Commission considers that the inquiry is necessary and the legal basis for that inquiry. Art. 17 of Regulation 1/2003 provides the Commission with extensive information-gathering powers, including the ability to conduct dawn raids. It does not, however, provide the Commission with powers to adopt measures aimed at remedying the situation under investigation. Nevertheless, it may prompt the Commission to initiate changes to the regulations and may trigger the launching of investigations against specific undertakings. It is not specified what is the threshold to open an investigation; this is not surprising given the blurred line between pre-investigative and investigative phases (see above).

##### **2.1.4.2 ECB**

JSTs supervise their entities on a daily basis. When they have reason to suspect violations of relevant EU laws (when a JST ‘considers that there is reason to suspect one or more breaches’ of EU law), they shall refer the matter to the investigating unit, i.e., the Enforcement and Sanctions Division (Article 124 SSM Framework Regulation).<sup>40</sup> The Enforcement and Sanctions Division

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performance indicators, and no systematic linkage with EU spending priorities and EU policy priorities in fighting against financial crimes’.

39 Art. 12(3) 2013 Guidelines on Investigation Procedures for OLAF Staff.

40 From an informational discussion with a member of a JST (October 2016), it became apparent that when the daily supervision reveals some inconsistencies, the JST and the supervised entity are likely to resolve it without sending the file to the ‘investigating unit’. The JST will give advice which the supervised entity will follow and thereby redress the inconsistency. Since reputation means a great deal to a bank, banks are therefore willing to cooperate with the supervisor. So far, this has been their practice. According to the member of the JST, the

investigates alleged breaches of directly applicable EU law, national law transposing EU directives or ECB decisions and regulations. It acts independently from the Supervisory Board members who adopt a final decision (Article 123 (3) SSM Framework Regulation). The Enforcement and Sanctions Division ‘may exercise the powers granted to the ECB under the SSM Regulation’ (Article 125 (1) SSM Framework Regulation).

#### 2.1.4.3 ESMA

This is when supervisory teams, as part of their investigations in a given case, find serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I or III of EMIR and the CRAR respectively.

#### 2.1.4.4 OLAF

OLAF does not have proper supervisory tasks. Its investigations start with the official decision which is made by the Director-General. However, before the initiation of the investigations, OLAF needs information to detect alleged fraud or other illegal activities, and to decide whether an official case has to be opened. The Decision establishing OLAF provides that it is also responsible for ‘ensuring the collection and analysis of information’.<sup>41</sup> In this regard, the ‘Investigation Selection and Review Unit’ can, ‘*inter alia*’, receive and analyse information, collect information within the framework of operational meetings, take statements from any person able to provide relevant information, carry out fact-finding missions in Member States, and consult information in databases held by the EU institutions, bodies, offices or agencies.<sup>42</sup>

### 2.1.5 Judicial control of the investigative measures

#### 2.1.5.1 DG Comp

In some cases *ex-ante* judicial authorisation may be necessary; namely in the case of inspections of ‘other premises’,<sup>43</sup> and when an undertaking opposes the inspection (only if judicial authorisation is necessary according to national rules).<sup>44</sup>

The *ex-ante* authorisation is issued only by national courts (their decisions are not subject to a review by CJEU). Article 20(8) (inspection of undertakings) and Art. 21(3) (inspection of other premises) of Regulation 1/2003 codifies the CJEU case law on the purpose and scope of the judicial control conducted by national courts: national courts cannot go beyond the examination to establish that the Commission’s decision is authentic and that the coercive measures are neither arbitrary nor excessive having regard to the subject matter of the inspection (with respect to the seriousness of the suspected infringement, the importance of the evidence sought and the likelihood that that evidence will be found). In other words, national courts assess proportionality/non-arbitrariness, but do not examine the lawfulness of the COM’s decision (in light of EU law) and its necessity (in light of the COM file): this is only reviewed by the EU courts, which have exclusive competence to consider whether acts of the COM are lawful or not.<sup>45</sup>

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threshold for sending the file to the investigating unit would be a very significant breach of the law or if the supervised entity would not follow the JST’s recommendations.

41 Art. 2(5)(b) Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) [1999], O.J. L 1360/20.

42 Art. 5 2013 Guidelines on Investigation Procedures for OLAF Staff.

43 Art. 21(3) Regulation (EC) No. 1/2003.

44 Art. 20(7) Regulation (EC) No. 1/2003.

45 Art. 265 TFEU (failure to act), Art. 263 TFEU (annulment) and Art. 261 TFEU (penalties).

The *ex-post* review of the DG COMP's investigative powers is only conducted by the EU courts (EGC and CJEU). Judicial review concerning the lawfulness of the adoption of an investigative measure<sup>46</sup> can be sought against formal decisions of DG COMP ordering the production of information,<sup>47</sup> inspections,<sup>48</sup> and inspections of other premises.<sup>49</sup> A review of the execution of an investigative measure (i.e. the manner in which it is carried out) can be sought as part of the appeal against the final decision on the substantive violation of competition law (in this case also the investigative measures not ordered by a formal decision – e.g. a simple request for information according to Art. 18(2) – can be reviewed before the EU courts).

A sort of internal (non-judicial) review mechanism is carried out by the 'hearing officer', which is attached to the Commission, but acts independently. Its functions and powers are provided by the Decision of the President of the EU Commission 2011/695/EU of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings. Although its main role is played after the statement of objections (namely, as regards the access to the file), the officer has some tasks also during the investigations (see Art. 4). In particular, they concern: (a) alleged violations of legal-professional privilege; (b) alleged violations of the privilege against self-incrimination; (c) the possibility to grant an extension of the time-limit to provide information; and (d) the right of undertakings to be informed about their procedural status, i.e. whether they are subject to an investigation and, if so, about the subject matter and purpose of the investigation (for further details, see below, 2.1.6 and 2.3.6).

### 2.1.5.2 ECB

For the purposes of on-site inspections of the business premises of legal persons and in cases where a person obstructs the inspection, the ECB is required, if national rules so oblige, to obtain an authorisation by a judicial authority according to national rules. In this case, 'the national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person who is subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information in the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU' (Article 13 SSM Regulation).

Any *decision* by the ECB can be submitted for review to the ECB's Administrative Board of Review established specifically for an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred upon it under Regulation (EU) No. 1024/2013 (ECB's Decision ECB/2014/16). Since launching investigations into alleged violations and making investigations and on-site inspections must be based on a *decision* of the ECB (Articles 11 and 12 of the SSM Regulation), these decisions can be submitted for review. The review can

46 Art. 263 TFEU and Art. 278 TFEU for suspension.

47 Art. 18(3) Regulation (EC) No. 1/2003.

48 Art. 20(4) Regulation (EC) No. 1/2003.

49 Art. 21(2) Regulation (EC) No. 1/2003.

be requested by ‘any natural or legal person to whom a decision of the ECB under Regulation (EU) No. 1024/2013 is addressed, or to whom such decision is of direct and individual concern’ (Article 7 of the ECB’s Decision). The scope of the internal administrative review shall cover the relevant decision’s procedural and substantive conformity with Regulation (EU) No. 1024/2013 and shall be limited to an examination of the grounds relied upon by the applicant as set out in the notice of review (Article 10 of the ECB’s Decision). The possibility to appeal before the Board (Article 24 SSM Regulation) is ‘without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties’ (Article 24 (11) SSM Regulation).

### 2.1.5.3 ESMA

The exercise of the power to request records of telephone or data traffic referred to in point (e) of Articles 23c(1) CRAR or 62(1) EMIR or any inspection powers regulated in Articles 23d CRAR or 63 EMIR requires a determination of whether the exercise of such powers (or the assistance provided by a national competent authority when a person opposes an inspection) requires authorisation from a judicial authority according to national rules. Where that is the case, such authorisation shall be applied for. The authorisation may also be applied for as a precautionary measure (Articles 23c(5) CRAR and 62(5) EMIR).

For both regulations, the national judicial authority shall verify that ESMA’s decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In controlling the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds that ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures<sup>50</sup> (Article 63(9) + 62(6) EMIR and Article 23d(9) + 23c(6) CRAR). It is the Court of Justice of the European Union which has the power to check the necessity of the inspection.

Furthermore, concerning judicial control at the EU level, any decision by ESMA can be appealed before the Board of Appeal (Article 60 ESMA Regulation), which is a joint body for ESMA and the other two EU financial supervisors (the European Banking Authority and the European Insurance and Occupational Pensions Authority) and reviewed by the CJEU (based on Articles 263 and 265 TFEU, Article 61 ESMA Regulation). This includes requests for information by a decision and decisions to submit to general investigations and on-site inspections. Such decisions have *to specify* the possibility to have the decision appealed before the Board of Appeal (*information requests*) and/or reviewed by the Court (*other decisions*) (Articles 23b(3) + 23c (3) + 23d(4) CRAR; 61 (3) + 62 (3) + 63 (4) EMIR). ‘Other acts could be the object of an ordinary action for annulment before the CJEU (with prior appeal to the BoA) if they can be considered to have binding legal effects for third parties.’<sup>51</sup>

50 From an informal discussion with an official from ESMA (October 2016), it became apparent that this phrase makes less sense (if at all) for the investigations performed by supervisors on a daily basis: ‘in case of supervisory investigations ‘suspected infringements’ cannot be a prerequisite for any such investigatory steps.’

51 From an informal discussion with an official from ESMA (October 2016).



#### 2.1.5.4 OLAF

Judicial control – both *ex ante* and *ex post* – is mostly carried out by national courts. Prior judicial authorisation has to be requested when it is provided in that sense by national law in relation to a specific investigative measure.<sup>52</sup> The *ex post* review is sought with regard to OLAF acts included in the national file once a criminal charge has been brought, or an administrative decision has been made.

In principle, the CJEU has exclusive competence to declare that an act taken by an EU institution is invalid. A suspect, therefore, could start an action for the annulment of Commission/OLAF acts (Art. 263 TFEU).<sup>53</sup> On several occasions, however, the CJEU has held that such actions are inadmissible, since OLAF investigations as such do not bring about a distinct change in the legal position of a person. They are considered to be akin to preparatory measures that do not compel national authorities to take specific action. Furthermore, the action for damages (Art. 268 and Art. 340 TFEU) is subject to strict conditions that make its exercise difficult in practice. As a consequence, the role of the CJEU with regard to OLAF's investigative powers seems to be limited to a preliminary ruling (Art. 267 TFEU).<sup>54</sup>

It is worth mentioning that a sort of internal (non-judicial) *ex ante* review mechanism is conducted by the OLAF Investigation Selection and Review Unit: where an investigative measure requires the Director-General's authorisation, the competent investigation unit submits a request to the Investigation Selection and Review Unit, which verifies 'the legality, necessity and proportionality of the proposed investigative activity and (...) provide an opinion to the Director-General on the basis of which he makes a decision'.<sup>55</sup> On the other hand, an *ex post* internal (non-judicial) review mechanism on respect for fundamental rights is performed by the OLAF 'legal advice unit'. Persons involved in investigations can submit a complaint concerning the handling of their procedural guarantees by OLAF. The 'legal advice unit' reviews the complaint and reports its findings to the Director-General, who takes appropriate action within two months of the registration date of the complaint, unless a longer period is justified by the complexity of the matter. Furthermore, at the end of the investigations the Investigation Selection and Review Unit conducts a 'final review' of the final report, the proposed recommendations and the decision to close the investigations (i.e., not of a specific investigative measure); in particular, it checks 'whether the investigation unit has complied with the legal requirements including the rights and procedural guarantees of the persons concerned, data protection requirements and reviews the legality, necessity and proportionality of the investigative activities undertaken'.<sup>56</sup> Also in this case, the Investigation Selection and Review Unit provides a (non-binding) opinion to the Director-General. In addition, the activity of OLAF is monitored by the Supervisory Committee, which can only issue opinions that are not binding and do not interfere with the ongoing

52 See Art. 3(3) Regulation (EU) No. 883/2013.

53 Art. 266(4) TFEU.

54 See K. Ligeti and G. Robinson, 'Transversal Report on Judicial Protection'.

55 Art. 12(2) GIP. Interviewees did not report any case in which the authorisation for an investigative measure had been denied because it was not necessary or proportional.

56 See Art. 21 GIP. Indeed, according to Art. 17(3) Regulation (EU) No. 883/2013, the Director-General is obliged to 'put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Member States concerned (...)'. See Opinion of the OLAF Supervisory Committee No. 2/2015 of 15 December 2015 on the 'legality check and review in OLAF'.

investigations. A proposal for the establishment of an independent ‘Controller of procedural guarantees’ is currently the subject of negotiation.<sup>57</sup>

## 2.2 ANALYSIS OF THE SPECIFIC POWERS

### 2.2.1 Interviewing of persons (oral/written questioning) and production orders

#### 2.2.1.1 Scope of the power

##### *DG Comp*

The Commission has the power to issue production orders (‘request for information’)<sup>58</sup> not only to undertakings under investigation, but also to those that may have information, in order to obtain ‘all necessary information’.

The Commission also has the possibility of interviewing persons (oral interviews), but its powers are limited. It is necessary to distinguish between two situations, depending on whether the interviews are conducted (a) in the course of an inspection (see below), or (b) as an autonomous measure, i.e. without having initiated an inspection:

- (a) During the course of an inspection: in this case, although not expressly labelled as an investigative measure, the Commission has a kind of a authority to summon the persons concerned. It can, indeed, ask ‘any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers’.<sup>59</sup> Furthermore, the Commission can impose penalties if the answers are incorrect or misleading.<sup>60</sup>
- (b) As an autonomous measure, outside the context of an inspection: in this case, although labelled as a ‘power to take statements’,<sup>61</sup> the Commission does not have a real power, since it can interview natural and legal persons who may be in possession of useful information concerning an infringement, but only with their consent. In other words, there are no sanctions for refusing to be interviewed, nor for providing incorrect or misleading information during an interview. Art. 3 of Com. Reg. 773/2004 specifies that at the beginning of the interview, the Commission must ‘state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview’.

##### *ECB*

During the investigations, the power to interview persons and issue production orders includes the following elements:

1. the ECB has the power to obtain information by a simple request (Article 10 SSM Regulation) and to require documents, books and records, as well as to make copies of those materials, and to obtain explanations by means of a decision (Article 11 SSM Regulation (on general investigations));

<sup>57</sup> See COM (2014) 340 final.

<sup>58</sup> Art. 18 Regulation (EC) No. 1/2003.

<sup>59</sup> Art. 20(2)(e) Regulation (EC) No. 1/2003.

<sup>60</sup> Art. 20(3) Regulation (EC) No. 1/2003.

<sup>61</sup> Art. 19 Regulation (EC) No. 1/2003.

2. the ECB has the right to obtain written and oral explanations from the supervised entities and relevant third parties which may perform outsourced tasks for the supervised person (Article 10 SSM Regulation provides a list of legal and natural persons to which Article 11 SSM refers);
3. those who are asked ‘shall supply the information requested. Professional secrecy provisions do not exempt those persons from the duty to supply that information’ (Article 10 SSM Regulation).

In light of the powers that the existing EU enforcement authorities have in this respect, the ECB does not seem to have been denied any powers in this respect.

#### *ESMA*

The IIO starts an investigation when there are ‘serious indications of the possible existence of facts liable to constitute one or more of the infringements’ of relevant EU law (Articles 23e CRAR and 64 EMIR). In order to exercise his/her tasks, the IIO may exercise the powers to require information and to conduct investigations and on-site inspections in accordance with Articles 23 a-d of CRAR and Articles 62-63 (Articles 23e (2) CRAR and 62 (2) EMIR)). The IIO may have the authority to request information by a simple request and by a decision and issue production orders.

Compared with other EU entities, ESMA has not been denied any powers in this respect.

#### *OLAF*

As regards interviews, Reg. 883/2013 provides for the possibility of interviewing persons, both witnesses and the persons being investigated.<sup>62</sup> OLAF can also take statements in the context of on-the-spot checks and inspections.<sup>63</sup> The 2013 Guidelines on investigation procedures specify that when interviewing the persons concerned and witnesses, members of the investigation unit need to have ‘the Director-General’s written act showing their identity and capacity, and the investigative activity they are authorised to carry out’.<sup>64</sup> An explicit duty to cooperate with OLAF staff is only provided for EU officials or other servants,<sup>65</sup> i.e. in the context of internal investigations (OLAF does not have a real power to summon other witnesses, but simply to invite them).<sup>66</sup> The EU legal framework provides for a period of notice between the invitation and the interview (if this involves outside on-the-spot checks); for some procedural rights (see below); for the possibility for the person interviewed to have access to the record in order to approve it or to add observations. Interviews may also be conducted by means of a video conference.<sup>67</sup> There is no sanctioning authority when incomplete or misleading answers are provided.

As regards production orders within internal investigations, Art. 4 of Regulation 883/2013 provides that OLAF may request oral and written information from officials, other servants, members of institutions or bodies, heads of offices or agencies, or staff members. On the other hand, as regards external investigations, the legal framework does not provide for OLAF powers to

62 Art. 9(2) Regulation (EU) No. 883/2013.

63 Art. 9(2) Regulation (EU) No. 883/2013.

64 Art. 11 2013 Guidelines on Investigation Procedures for OLAF Staff.

65 See Art. 4(7) Regulation (EU) No 883/2013; the Interinstitutional Agreement of 25 May 1999 [1999] OJ L 136/15; and Annex IX to the EU Staff Regulation.

66 Art. 16 2013 Guidelines on Investigation Procedures for OLAF Staff.

67 Art. 16 2013 Guidelines on Investigation Procedures for OLAF Staff.

send ‘autonomous’ requests for information/production orders to economic operators, but only to request information in the context of inspections and on-the-spot checks.<sup>68</sup> These powers depend on national law and on the assistance provided by national authorities. In practice, information is requested from economic operators even outside on-the-spot checks; however, no enforcement mechanisms are provided if incomplete or misleading information is provided.

### 2.2.1.2 Legal shape

#### *DG Comp*

Production orders (‘request for information’) can be issued by (a) a simple request or (b) by a decision:

- (a) In the first case, the Commission must state the legal basis and purpose of the request, specify what information is needed, fix the time-limit for providing it and explain the penalty for incorrect or misleading information; however, there is no obligation to comply with a simple request. Every case handler can issue a simple request for information.
- (b) If the request is made with a decision, the Commission must also state the legal basis for and the purpose of the request; specify what information is required and fix the time-limit within which it is to be provided; indicate that a penalty can be imposed for not supplying the required information; and that the undertaking may seek a judicial review of the decision (before the General Court). These production orders are often issued after the Commission has conducted inspections, in order to clarify some points. The adoption of a decision requires a longer internal procedure (it needs to be signed by the head of unit).

As regards interviews:

- (a) They are conducted in the course of an inspection: the power of summoning witness is exercised *de facto* during the inspection (the inspection may require a decision, see below), since it is included among the powers available during an inspection.
- (b) They are an autonomous measure: since they are voluntary measures, an official decision by the Commission is not needed.

#### *ECB*

It is a decision of the ECB (Article 11 (2) SSM). In the case of an investigation by the Enforcement and Sanctions Division, an initial decision is taken on allowing such an investigation to take place. ‘Such decision shall specify all of the following: (a) the legal basis for the decision and its purpose; (b) the intention to exercise the powers laid down in Article 11(1) of the SSM Regulation; (c) the fact that any obstruction of the investigation by the person being investigated constitutes a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation’ (Article 142 SSM Framework Regulation). The requests for information under Article 10 do not explicitly require a decision by the ECB.

Note the (language) difference with ESMA which has to specify the possibility of appealing against the decision to request information in its decision.

<sup>68</sup> Art. 5 Regulation (Euratom, EC) No. 2185/96.

*ESMA*

The legal shape is a decision by ESMA. In the case of an investigation by the IIO, it is the IIO who takes this decision.

There are two types of requests for information:

1. Concerning a simple request for information, ‘ESMA shall: (a) refer to this Article as the legal basis for the request; (b) state the purpose of the request; (c) specify what information is required; (d) set a time-limit within which the information is to be provided; (e) inform the person from whom the information is requested that there is no obligation to provide the information but that any reply to the request for information must not be incorrect or misleading; (f) indicate the fine provided for in Article 36a, in conjunction with point 7 of Section II of Annex III, where the answers to questions asked are incorrect or misleading’ (Articles 23b (2) CRAR and 61 (2) EMIR).
2. When requiring that information should be provided by decision, ‘ESMA shall: (a) refer to this Article as the legal basis for the request; (b) state the purpose of the request; (c) specify what information is required; (d) set a time-limit within which the information is to be provided; (e) indicate the periodic penalty payments provided for in Article 36b where the production of the required information is incomplete; (f) indicate the fine provided for in Article 36a, in conjunction with point 7 of Section II of Annex III, where the answers to questions asked are incorrect or misleading; and (g) indicate the right to appeal the decision before the Board of Appeal and to have the decision reviewed by the Court of Justice of the European Union in accordance with Articles 60 and 61 of Regulation (EU) No 1095/2010’ (Articles 23b (3) CRAR and 62 (3) EMIR).

Concerning production orders, the request to submit specific information and documents is an investigative power, which can be used upon a decision by an IIO to investigate a CRA/TR. Such a decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 36b, the legal remedies available under Regulation (EU) No. 1095/2010 and the right to have the decision reviewed by the Court of Justice of the European Union (Articles 23c (3) CRAR and 62 (3) EMIR).

*OLAF*

In order for OLAF staff to conduct interviews with witnesses or the persons concerned, a written authorisation by the OLAF Director-General suffices (for the previous legality check carried out by the ‘investigation selection and review unit’, see below). Such a written authorisation must show the staff’s identity and capacity, as well as the investigative activity they are authorised to carry out.

**2.2.1.3 Threshold***DG Comp*

A specific threshold for requesting information is not provided by the EU legal framework.



*ECB*

The ECB can request all information and production orders to carry out the tasks conferred upon it by the SSM Regulation; in the case of investigations into alleged breaches of EU law, this is ‘for the purpose of investigating alleged breaches’ (Article 125 (1) SSM Framework Regulation).<sup>69</sup>

*ESMA*

ESMA can request all information that is necessary in order to carry out its duties under the relevant regulations (CRAR and EMIR).

*OLAF*

In the EU legal framework there is no specific threshold for interviewing witnesses or the persons concerned that is different than the one already provided to open the investigation as such. The same applies to production orders in the context of internal investigations.<sup>70</sup> However, in order to obtain authorisation from the Director-General, the investigation unit submits the request to the Investigation Selection and Review Unit, which verifies the legality, necessity and proportionality of the proposed measure and provides an opinion to the Director-General (see above, 2.1.5.4).

**2.2.1.4 Purpose limitation***DG Comp*

As regards requests for information, Art. 18 states that the Commission may require ‘all necessary information’. As regards the interviews conducted during the inspections, any explanations of facts related to the subject-matter and purpose of the inspection can be requested. In both cases, either issuing the production order or ordering the inspection during which interviews may be conducted (see also below on inspections), the Commission must specify the subject-matter and purpose of the investigative measure.

The Commission enjoys a margin of appreciation in defining the scope of the request for information, i.e. in determining what information is necessary.<sup>71</sup> Nevertheless, the request must be proportionate; in this regard, the CJEU has determined that it is not sufficient to have a mere relationship between a document and the alleged infringement and that the relationship must be such that the Commission could reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place.<sup>72</sup>

Recently, the CJEU has addressed the content of the obligation to state the purpose of the request for information. In *HeidelbergCement AG v. Commission*, the Court annulled a Commission decision because the statement of reasons in order to justify the request for information was ‘excessively succinct, vague and generic – and in some respects, ambiguous’. In other words, although ‘the Commission is not required to communicate to the addressee of a decision requesting information all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements’, ‘[s]ince the necessity of the information must

69 From an informational discussion with a member of a JST (October 2016), one could conclude that the threshold for launching an investigation by the Enforcement and Sanctions Division is high as the JST and the supervised authority are likely to settle inconsistencies. The JST will generally provide advice on how to redress possible inconsistencies and the supervised entity is likely to follow this advice as reputation is very important for banks.

70 Art. 4(2)(b) Regulation (EU) No. 883/2013.

71 See para. 33 of the Commission Notice on best practices 2011.

72 Case C-36/92, *SEP v Commission* [1994] ECR I-01911, ECLI:EU:C:1994:205.

be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision, otherwise it will be impossible to determine whether the information is necessary and the Court will be prevented from exercising judicial review'.<sup>73</sup>

The burden of proving that the request is unjustified, however, is on the requested parties, who can challenge the decision before the Hearing Officer and, later, the CJEU. This seems to be quite difficult in practice.<sup>74</sup>

#### *ECB*

No purpose limitation is provided. ESMA can ask for 'all information that is necessary in order to carry out its duties under' the relevant regulations (Articles 23 (b)(1) CRAR and 61 (1) EMIR).

#### *ESMA*

The purpose is to carry out duties under the CRAR and EMIR.

#### *OLAF*

No purpose limitation is provided by the EU legal framework as regards interviews. Furthermore, nothing is specified concerning the content of the written authorisation of the Director-General. The same applies to production orders in the context of internal investigations.<sup>75</sup> The production orders during external on-the-spot checks follow the requirements of those measures (see below).

### **2.2.1.5 Ex-ante judicial authorisation**

#### *DG Comp*

No *ex ante* judicial authorisation is needed for oral interviews or requests for written information.

#### *ECB*

No judicial authorization is necessary for requests for information and production orders.

#### *ESMA*

No judicial authorization is necessary for requests for information and production orders.

#### *OLAF*

No *ex ante* judicial authorisation is needed for interviews, nor for production orders during internal investigations. For a request for information during external on-the-spot checks, see below.

### **2.2.1.6 Internal review mechanism**

#### *DG Comp*

The Hearing Officer is granted some tasks also during the investigative phase (see above, particularly Art. 4 of the Decision of the President of the EU Commission 2011/695/EU of 13 October 2011). Although not a proper internal review mechanism (there are no powers to overrule the Commission's decision), the Hearing Officer may issue a reasoned opinion to the

<sup>73</sup> Case C-247/14, *HeidelbergCement AG v European Commission*, [2016].

<sup>74</sup> N. Khan, *op. cit.* 114.

<sup>75</sup> Art. 4(2)(b) Regulation (EU) No. 883/2013.

Commissioner when the requested parties claim that legal-professional privilege or the privilege against self-incrimination has been violated.

Furthermore, the Hearing Officer decides whether an extension of the time limit to submit information should be granted, taking into account the length and complexity of the request for information and the requirements of the investigation.

### *ECB*

A production order in the course of an investigation is based upon a decision of the ECB to start such an investigation, although unlike the ESMA, the SSM Regulation does not prescribe an obligation for the ECB to inform the addressee of the possibility to appeal against the decision. A request for information according to Article 10 SSM does not require a decision by the ECB. However, if it is used in the course of an alleged breach of EU law, the ECB's decision to start that investigation would undoubtedly be present. However, the Administrative Board of Review conducts an internal administrative review of all decisions taken by the ECB (Article 24 SSM Regulation), not to mention the possibility of a review as regulated by Article 263 TFEU. The scope of the review by the Board is both procedural and substantive in conformity with the SSM Regulation on the ECB's decisions.

'A request for review pursuant to paragraph 5 shall not have suspensory effect. However, the Governing Council, on a proposal by the Administrative Board of Review may, if it considers that circumstances so require, suspend the application of the contested decision' (Article 24 (8) SSM).

'Any request for review shall be made in writing, including a statement of grounds, and shall be lodged at the ECB within one month of the date of notification of the decision to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be' (Article 24 (6) SSM).

Article 24 SSM governing the Administrative Board of Review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Article 24 (11) SSM).

### *ESMA*

The Boards of Appeal for three ESAs review appeals against the decisions of ESMA (Article 60 ESMA Regulation), including that of the request for information (Articles 23b (3) CRAR and 61 (3) EMIR) and the launching of an investigation (production orders) (Articles 23c (3) CRAR and 62 (1) EMIR).

'The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision' (Article 60 (2) ESMA Regulation).

'If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded' (Article 60 (4) ESMA Regulation). 'The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That

body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned' (Article 60 (5) ESMA Regulation).

The appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision (Article 60 (3) ESMA Regulation).

'Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU' (Article 61 (3) ESMA Regulation).

#### *OLAF*

As an *ex ante* review mechanism, in order to obtain an authorisation from the Director-General, the investigation unit submits a request to the Investigation and Selection Review Unit, which verifies 'the legality, necessity and proportionality of the proposed investigative activity and [provides] an opinion to the Director-General on the basis of which he makes a decision'. As a sort of *ex post* review mechanism on respect for procedural guarantees, the 'legal advice unit' may receive complaints from the persons concerned, and it then provides a report for the Director-General who will take appropriate action within two months.

#### **2.2.1.7 Enforcement of investigation powers**

##### *DG Comp*

As regards requests for information, the assistance of national authorities is not needed at all. The powers are entirely provided by EU law, and the Commission may also impose fines (a) in the case of a simple request: if undertakings supply incorrect or misleading information; (b) in the case of requests by a decision: if undertakings supply incorrect, misleading, or incomplete information, or if they do not supply information within the required time-limit.

As regards interviews: (a) Conducted in the course of an inspection (Art. 20): see below under inspections; (b) Conducted as autonomous measures (Art. 19): since they are only voluntary interviews, there is no mechanism for enforcement.

##### *ECB*

The ECB has the necessary powers to request information and explanations. The third question is less relevant. The legal provisions regulate more the opposite situation, i.e., the presence of national authorities during relevant activities:

1. Article 10 (3) SSM Regulation – an obligation for the ECB to make any obtained information available to the national competent authorities;
2. Article 12 (1) SSM Regulation – an obligation to notify the national competent authority about a forthcoming on-site inspection;
3. The ECB shall be in charge of establishing an on-site inspection as well as its composition, together with the involvement of NCAs (Article 144 SSM Framework Regulation).

*ESMA*

ESMA has the necessary powers to request information and to issue production orders (as laid down in CRAR and EMIR). Once an investigation by the IIO is concluded, he/she sends his/her report to the Board. If the Board concludes that an infringement has taken place, it can take one or more of the supervisory measures and impose a fine (see section 1 (c) on the differences between the measures and the fines).

The third question is a moot one since it is the IIO appointed by ESMA who conducts the investigation. Note that ‘in good time before the investigation, ESMA shall inform the competent authority of the Member State where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the competent authority concerned shall, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the competent authority concerned may also attend the investigations upon request’ (Articles 23c (4) CRAR and 62 (4) EMIR).

*OLAF*

In this context, the assistance of national authorities is only necessary as regards the request for information in the course of external on-the-spot checks. OLAF staff are allowed to be present during on-the-spot checks. Enforcement mechanisms, in this case, are provided by national law (see below).

As regards a request for information during internal investigations, there is no real enforcement mechanism for a violation of the duty of EU officials to cooperate with OLAF (except the disciplinary sanctions provided in the EU Staff Regulation).

Interviews, since they are conducted on a voluntary basis, do not have enforcement mechanisms and can be conducted autonomously by OLAF.

**2.2.1.8 Access to a lawyer***DG Comp*

Regulation 1/2003 does not provide for the right to have access to a lawyer following a production order/request for information. Art. 18(4) simply clarifies that lawyers are allowed to answer questions on behalf of their clients.

On the other hand, as regards voluntary interviews (Art. 19), the Commission’s Best Practices of 2011 provide that the Commission shall inform the interviewee of his/her right to consult a lawyer. From interviews with Commission officials, it emerges that legal counsel is normally admitted to the interviews.<sup>76</sup>

As regards interviews during inspections, see below.

*ECB*

‘The parties subject to investigation may be represented and/or assisted by lawyers or other qualified persons at the hearing’ (Article 126 (3) SSM Framework Regulation).

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76 Confirmed by the Report of the ECN working group cooperation of 31 October 2012, ‘Investigative powers report’, p. 41.



*ESMA*

Not explicitly regulated. Articles 23 (b) (4) CRAR and 61 (4) EMIR mention the possibility to be represented by a lawyer and that lawyers duly authorised to act may supply information on behalf of their clients.

*OLAF*

Art. 9 Regulation 883/2013 provides that the interview with the person concerned shall be preceded by an invitation informing him of his ‘right to be assisted by a person of his choice’.

**2.2.1.9 Privilege against self-incrimination***DG Comp*

A narrow version of the privilege against self-incrimination is recognised in EU competition law. On the one hand, it includes the right to silence but does not include a broader right not to cooperate with the Commission: there is no right to refuse to hand over (pre-existing) documents that may serve to prove the case.<sup>77</sup> In other words, the privilege only applies when undertakings are required to answer specific questions.<sup>78</sup>

On the other hand, also a limited version of the right to remain silent is recognised: undertakings may only refuse to answer questions that would require them to admit the very infringement that the Commission is trying to prove. Recital 23 of Regulation 1/2003 states that ‘undertakings cannot be forced to admit that they have committed an infringement’; however, ‘they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement’.<sup>79</sup>

*ECB*

Not regulated explicitly in the SSM legislative framework.

*ESMA*

Not regulated explicitly in the CRA and EMIR legislative frameworks.

*OLAF*

Art. 9(2) Reg. 883/2013 provides that any person interviewed ‘shall have the right to avoid self-incrimination’. The OLAF Investigation Unit should inform the person in question of such a right.<sup>80</sup> Furthermore, if ‘in the course of the interview, evidence emerges that a witness may be a person concerned, the interview shall be ended (...) That witness shall be informed forthwith of his rights as a person concerned and shall receive, upon request, a copy of the records of any statements made by him in the past. The Office may not use that person’s past statements against him without giving him first the opportunity to comment on those statements’.<sup>81</sup> The 2013

77 Case C-347/87, *Triveneta Zuccheri SpA and others v Commission*, [1990] ECR I-01083, ECLI:EU:C:1990:129; Case C-27/88, *Solvay & Cie v Commission*, [1989] ECR 989 -03355, ECLI:EU:C:1989:388; Case C-374/87, *Orkem v Commission*, [1989] ECR 03283, ECLI:EU:C:1989:387.

78 Case C-301/04, *Commission v. SGL Carbon AG*, [2006] ECR I-05915 ECLI:EU:C:2006:432, paras. 33-51.

79 See also Case T-112/98, *Mannesmannröhren-Werke AG*, [2001] ECR II-00729, ECLI:EU:T:2001:61.

80 Art. 16 2013 Guidelines on Investigation Procedures for OLAF Staff.

81 Art. 9(2) Regulation (EU) No. 883/2013.

Guidelines specify that the Investigation Unit ‘shall not use his past statements against him in any way’.<sup>82</sup>

### 2.2.1.10 Legal professional privilege and other forms of professional secrecy

#### *DG Comp*

Although legal professional privilege is not expressly regulated by Regulation 1/2003 (nor by the 2004 Implementing Regulation), the CJEU has developed a (limited) EU concept of the client-attorney privilege to be applied in competition cases. In *AM&S Europe Ltd* the CJEU held that only some correspondence is covered by the privilege, namely correspondence with external lawyers (but not with in-house lawyers or lawyers in third countries).<sup>83</sup> This is due to the fact that in many Member States employed/non-independent lawyers are not subject to the rules of the Bar Association. Furthermore, such correspondence must have been prepared for the purposes and in the interests of the client’s rights of defence and within the framework of obtaining legal advice in relation to the subject-matter of the procedure. In *Hilti v. Commission*, the CJEU held that the privilege extends to memoranda prepared by in-house lawyers which simply report what the independent lawyers have said.<sup>84</sup> This case law has been recently confirmed in *Akzo Nobel Chemicals Ltd*, which extended the privilege also to preparatory documents drawn up exclusively for the purpose of seeking legal advice from a lawyer in the exercise of the rights of defence. Furthermore, the Court held that, if the privilege applies, the Commission cannot read that document (i.e. it cannot be used neither as evidence nor for further investigations).<sup>85</sup>

#### *ECB*

Recital 48 of the SSM Regulation states that ‘legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)’.

SSM Regulation Article 10 (on a general request for information) states that ‘professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.’

#### *ESMA*

With respect to legal professional privilege, Articles 23a CRAR and 60 EMIR specify that ‘the powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d [requests for information, general investigations, on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege’.

#### *OLAF*

There is no reference to legal professional privilege in the EU secondary law concerning OLAF investigations.

82 Art. 16 of the 2013 Guidelines on Investigation Procedures for OLAF Staff.

83 Case C-155/79, *AM & S Europe Limited v Commission*, [1982] ECR 01575, ECLI:EU:C:1982:157.

84 Case T-30/89, *Hilti AG v Commission*, [1991] ECR II-01439, ECLI:EU:T:1991:70.

85 Case T-125/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, [2007] ECR II-03523, ECLI:EU:T:2007:287.

## 2.2.2 Monitoring of bank accounts (real time)

### 2.2.2.1 Scope of the power

#### *DG Comp*

The Commission does not have this power in competition law.

#### *ECB*

The ECB does not have this power unless the NCAs have it (in such a case the ECB can have the same additional powers that NCAs possess).

#### *ESMA*

ESMA does not have this power.

#### *OLAF*

OLAF does not have this power.

## 2.2.3 Right to enter premises ('droit de visite')

### 2.2.3.1 Scope of the power

#### *DG Comp*

Regulation No. 1/2003 provides for the Commission's powers to conduct 'all necessary' inspections of undertakings or associations of undertakings (Art. 20), or even of 'other premises, land and means of transport, including the homes of directors, managers and other members of the staff of the undertakings and associations of undertakings concerned' (Art. 21). The latter is a real novelty introduced by Regulation 1/2003 compared to its predecessor, Regulation 17/62.<sup>86</sup> However, so far it has rarely been exercised in practice.

During the inspection of undertakings, the Commission officials can:

- enter any premises, land, or means of transport;
- examine books and other records (irrespective of the medium on which they are stored);
- make a copy thereof;
- seal business premises and books or records 'for the period and to the extent necessary for the inspection'. This power is provided in order to prevent the destruction of important documents overnight;<sup>87</sup> its duration is up to 72 hours. Art. 23(1)(e) provides for the possibility to fine the undertaking in the event the seals are broken;<sup>88</sup>
- ask any representative or member of the staff questions in order to explain 'facts or documents relating to the subject-matter and purpose of the inspection', and record the answers (see above under interviews conducted during inspections).

According to Art. 21(4) of Regulation 1/2003, during the inspection of other premises, the Commission – just like in the inspection of undertakings – has the power to enter the premises,

<sup>86</sup> The rationale, according to Recital 26, is that '[e]xperience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking'.

<sup>87</sup> See Recital 25 Regulation (EC) No. 1/2003.

<sup>88</sup> In 2006 the Commission fined an undertaking a total of € 38 million for breaking the seals (and the CJEU upheld this decision).

examine books and other records and make a copy thereof; on the other hand, the Commission does not have the power to seal premises or to ask for explanations relating to facts and documents.

### *ECB*

The ECB does not seem to have been denied any powers in this respect, at least compared to other EU enforcement authorities:

1. The ECB (including its Enforcement and Sanctions Division) may undertake an on-site inspection at the business premises of the legal persons referred to in Article 10 SSM (Article 12 SSM). This differs from the Dutch system, for instance where the file goes to the department where a sanction can be imposed, that department does not have the power to repeat the investigation and on-site inspections on its own. It only deals with the file submitted by the relevant department which discovered the breach and investigated it.<sup>89</sup>
2. If necessary, the on-site inspection can be undertaken without announcing it to the person being supervised (note: there is nevertheless an obligation to notify the NCA).
3. ECB inspectors can enter any business premises and land and they possess those investigative powers under Article 11 (1) SSM – such as requiring the submission of documents, the right to examine books and records and to make copies of such documents and obtain explanations (Article 12 (2) SSM Regulation).
4. Where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records.

### *ESMA*

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

### *OLAF*

OLAF has wide powers of inspection as regards internal investigations. Regulation 883/2013 provides that the Office has the right of immediate and unannounced access ‘to any relevant information, including information in databases, held by institutions, bodies, offices and agencies, and to their premises’. This information, according to OLAF’s internal guidelines, also includes ‘private documents (including medical records) where they may be relevant to the investigation’.<sup>90</sup> Furthermore, OLAF can inspect the accounts of institutions, bodies, offices and agencies. OLAF can make a copy of any document held by EU bodies and, in addition, it has a power similar to that of seizure: if necessary, it may ‘assume custody of such documents or data to ensure

<sup>89</sup> From an informal discussion with an official from the Dutch Central Bank (October 2016).

<sup>90</sup> Art. 13 2013 Guidelines on Investigation Procedures for OLAF Staff.

that there is no danger of their disappearance'.<sup>91</sup> The Regulation provides for a duty to inform EU institutions, bodies, offices and agencies whenever OLAF conducts an internal investigation on their premises or consults a document or requests information held by them.<sup>92</sup> The OLAF Guidelines specify that the Investigation Unit shall inform the Secretary-General or an equivalent authority of the EU institution, body, office or agency concerned whenever it intends to conduct an inspection of its premises. Furthermore, if necessary, it will inform the head of security of that EU body prior to conducting an inspection of or on its premises.<sup>93</sup> At the end of the inspection, a report is drawn up and is then countersigned by the participants in the inspection.

As regards external investigations, the legal framework is more complex: Art. 3 of Reg. 883/2013 refers to Art. 9 of Reg. 2988/95 (which makes a further reference to sectoral rules) and to Reg. 2185/96. From these regulations, it emerges that on-the-spot checks and inspections of economic operators must be conducted 'in compliance with the rules and practices of the Member States concerned'. In other words, both EU law and national law define the powers available to OLAF staff. This often makes the scope of the available powers uncertain, such as, for example, in the case of forensic investigations.

As for the scope of the investigations, Art. 7 of Regulation 2185/96 provides that on-the-spot checks and inspections may concern, in particular: '– professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators, – computer data, – production, packaging and dispatching systems and methods, – physical checks as to the nature and quantity of goods or completed operations, – the taking and checking of samples, – the progress of works and investments for which financing has been provided, and the use made of completed investments, – budgetary and accounting documents, – the financial and technical implementation of subsidized projects.' On the other hand, EU law does not provide for the power to seal premises: '[w]here necessary, it shall be for the Member States, at the Commission's request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.'<sup>94</sup>

Both internal and external investigations may have the gathering of computer data as their aim. Internal rules implement Art. 4(2) of Regulation 883/2013 (as regards internal investigations) and Art. 7(1) of Regulation 2185/96 (as regards external investigations) by specifying rules for digital forensic operations conducted by OLAF specialists. The 2013 Guidelines provide that digital forensic operations may be carried out 'in accordance with the principles of necessity and proportionality'. Furthermore, if conducted in the context of external investigations, they must be carried out 'in compliance with national legal provisions'.<sup>95</sup> Interviewees reported that in many countries such forensic powers are not available and therefore it is not always clear whether OLAF can conduct such investigations during an inspection. When allowed by national law, these operations should be preceded by the 'preliminary identification of the digital media concerned'. On 15 February 2016 OLAF published more detailed 'Guidelines on Digital Forensic Procedures for OLAF Staff', which provide for some safeguards for economic operators.

91 Art. 4(2)(a) Regulation (EU) No. 883/2013.

92 This does not mean that the persons concerned are always informed before an inspection, which may also take place overnight ('unannounced').

93 Art. 13 2013 Guidelines on Investigation Procedures for OLAF Staff.

94 Art. 7 Regulation (Euratom, EC) No. 2185/96.

95 Art. 15 2013 Guidelines on Investigation Procedures for OLAF Staff.



### 2.2.3.2 Legal shape

#### *DG Comp*

The inspection of undertakings can be conducted either (a) by agreement or (b) by surprise (a ‘dawn raid’); the latter has become much more frequent in practice.<sup>96</sup> In the first case, officials conducting the inspection have to produce *written authorisation* by the Commission specifying the penalties if and when the production of books is incomplete or if the answers to questions are incomplete or misleading. There is no obligation to allow an inspection to take place, but if the undertaking in question agrees to this, it is under a positive duty to cooperate with officials in order to provide them with the information sought.<sup>97</sup> If the inspection is mandatory (by surprise), the Commission adopts a *decision*.<sup>98</sup>

#### *ECB*

It is a decision of the ECB to launch an investigation (Article 142 SSM Framework Regulation) or a decision allowing an on-site inspection to take place (Article 143 SSM Framework Regulation).

The decision to launch an investigation shall specify all of the following: ‘(a) the legal basis for the decision and its purpose; (b) the intention to exercise the powers laid down in Article 11(1) of the SSM Regulation; (c) the fact that any obstruction of the investigation by the person being investigated constitutes a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation’ (Article 142 SSM Framework Regulation).

The decision allowing an on-site inspection shall specify at least the following: ‘(a) the subject matter and the purpose of the on-site inspection; and (b) the fact that any obstruction to the on-site inspection by the legal person subject thereto shall constitute a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation’ (Article 143 (2) SSM Framework Regulation). In the case of an investigation, the officials and other persons authorised by the ECB and by an NCA shall be granted access to the business premises and land of the legal person subject to the investigation by the same decision (Article 143 (3) SSM Framework Regulation).

According to Article 145 SSM Framework Regulation, the ECB shall notify the supervised entity of its decision to inspect it. The ECB can also inspect without prior notification, ‘if the proper conduct and efficiency of the inspection so require’.

#### *ESMA*

This is the decision of ESMA (more specifically of an IIO). Persons under investigation ‘shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, specify the date on which it is to begin and indicate the periodic penalty payments provided for in Article 36b, the legal remedies available under Regulation (EU) No. 1095/2010 as well as the right to have the decision reviewed by the Court

<sup>96</sup> N. Khan, *op. cit.* 148.

<sup>97</sup> Case C-301/04, *Commission v. SGL Carbon AG*, [2006] ECR I-05915 ECLI:EU:C:2006:432

<sup>98</sup> Art. 20(4) Regulation (EC) No. 1/2003.

of Justice of the European Union. ESMA shall take such decisions after consulting the competent authority of the Member State where the inspection is to be conducted' (Articles 23d (4) CRAR and 63 (4) EMIR).

#### *OLAF*

This is a written authorisation issued by the OLAF Director-General which indicates the subject-matter and purpose of the investigation, the legal bases for conducting the investigation and the investigative powers stemming from those bases.<sup>99</sup>

### **2.2.3.3 Threshold**

#### *DG Comp*

The EU legal framework does not specify any threshold in order to conduct inspections of undertakings pursuant to Art. 20 of Regulation 1/2003. In practice, the decision to carry out an inspection is often based on only uncorroborated grounds of suspicion: 'it is increasingly the norm for the Commission to initiate its enquiries into serious infringements through a 'dawn raid' in cases where the Commission does not already have any firm evidence in its possession'.<sup>100</sup> On the other hand, inspections of other premises pursuant to Art. 21 of Regulation 1/2003 can only be ordered if there is a 'reasonable suspicion' that documents are kept on other premises, and those documents may be relevant to prove a 'serious violation' of competition law. The decision ordering the inspection must state the reasons that have led the Commission to conclude that a suspicion exists.

#### *ECB*

The formulation of the reason for conducting on-site inspections is quite broad, namely 'in order to carry out the tasks conferred on it by this Regulation [SSM], and subject to other conditions set out in relevant Union law' (Article 12 (1) SSM).

#### *ESMA*

The threshold is in order to carry out its duties under CRAR and EMIR.

#### *OLAF*

There is no indication of a specific threshold to enter business premises (above the one necessary to open OLAF investigations, i.e. a 'sufficient suspicion' as indicated in Art. 5 Regulation 883/2013: again, there is no difference between the threshold to open an investigation and the threshold to apply investigative powers). However, in order to obtain authorisation from the Director-General, the Investigation Selection and Review Unit verifies the 'legality, necessity and proportionality' of the proposed measure (see above, 2.1.5.4). The criteria of necessity and proportionality, however, are fairly vague and do not seem to represent a real higher threshold; it occurs very rarely that an investigation measure is not authorised because the proportionality check has failed. A sort of higher threshold seems to be provided for economic operators other than those directly concerned (third parties): on-the-spot checks may be conducted when it is

<sup>99</sup> Arts 3(3) and 7(2) Regulation (EU) No. 883/2013.

<sup>100</sup> N. Khan, *op. cit.* 151.

‘strictly necessary’ to have access to relevant evidence held on their premises.<sup>101</sup> According to the internal guidelines, also digital forensic operations are carried out ‘in accordance with the principles of necessity and proportionality’.

#### 2.2.3.4 Purpose limitation

##### *DG Comp*

As in the case of requests for information (see above), in order to prevent ‘fishing expeditions’, Arts 20(4) and 21(2) provide that the Commission specifies the subject-matter and purpose of the inspection. On several occasions the CJEU has stressed that this is a fundamental requirement, designed not merely to show that the proposed entry of the premises of the undertaking is justified, but also to enable those undertakings to understand the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence, including the right to seek a judicial review.<sup>102</sup> If, during the inspection, there is an accidental discovery of another infringement, the Commission must adopt a second decision in order to conduct a new inspection.<sup>103</sup>

##### *ECB*

See above. Based on Article 143 (3) SSM Framework Regulation<sup>104</sup> it can also be assumed that when an on-site inspection is conducted as part of an investigation, the inspection should have the same purpose and scope as the investigation.

##### *ESMA*

On-site inspections can be conducted in order to carry out the duties under CRAR and EMIR (Articles 23d (1) CRAR and 63 (1) EMIR).

##### *OLAF*

The written authorisation issued by the OLAF Director-General must indicate the subject-matter and purpose of the investigation. According to the internal guidelines, digital forensic operations should be preceded by the preliminary identification of the digital media concerned; in this kind of investigation, however, it is by nature more difficult to limit the scope of the investigation (accessing a computer provides the possibility to access all data contained therein).

#### 2.2.3.5 Ex-ante judicial authorisation

##### *DG Comp*

Regulation 1/2003 does not provide for *ex-ante* judicial authorisation for the inspection of undertakings (by means of a decision). The CJEU, although recognising that such measures have an impact on the right to private life, has held that a prior judicial authorisation is not necessary,

101 Art. 5 Regulation (Euratom, EC) No. 2185/96; Art. 14.7 2013 Guidelines on Investigation Procedures for OLAF Staff.

102 Case C-583/13, *Deutsche Bahn AG v Commission*, [2015], ECLI:EU:C:2015:404; Case C-37/13, *Nexans SA and Nexans France SAS v European Commission*, [2014], ECLI:EU:C:2014:2030, §34; Case C-94/00, *Roquette Frères SA*, [2002] ECR I-09011, ECLI:EU:C:2002:603, §44-50; Case T-340/04 *France Télécom SA*, [2007] ECR II-00573, ECLI:EU:T:2007:81.

103 Case T-288/11, *A+P Kieffer Omnitec Sàrl v European Commission*, [2013], ECLI:EU:T:2013:228.

104 ‘If the on-site inspection follows an investigation conducted on the basis of an ECB decision, as referred to in Art. 142, and provided that the on-site inspection has the same purpose and scope as the investigation, ...’.

since it is not the only element considered by the ECtHR to assess a violation of Art. 8 ECHR. According to the CJEU, other defence rights – including the possibility to have a post-inspection judicial review – suffice in order not to violate the right to private life.<sup>105</sup>

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

#### *ECB*

Judicial authorization is necessary if the national law so requires. 'The national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU' (Article 13(2) SSM).

#### *ESMA*

Judicial authorisation is necessary where the national law so requires. Such authorisation may also be requested as a precautionary measure (Articles 23d (8) CRAR and 63 (8) EMIR).

'The national judicial authority shall control that the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No. 1095/2010' (Articles 23d (9) CRAR and 63 (9) EMIR).

#### *OLAF*

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

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<sup>105</sup> Case C-583/13, *Deutsche Bahn AG v Commission*, [2015], ECLI:EU:C:2015:404 (appeal against a General Court's decision of 2013).

### 2.2.3.6 Internal review mechanism

#### *DG Comp*

There is no real internal review mechanism concerning the adoption of a measure. The Hearing Officer (see above, 2.2.1.6) plays a limited role as regards respect for legal professional privilege, in the sense that he can issue a reasoned opinion to the Commissioner when the requested parties claim that legal-professional privilege or the privilege against self-incrimination are being violated. Art. 4(2)(a) of the Decision of the President of the Commission 2011/695/EU applies also to inspections: the Hearing Officer may therefore communicate his/her views to the parties in question (and issue a reasoned recommendation if no mutually acceptable resolution is reached) when undertakings claim that certain pieces of information are covered by privilege. No time limits are provided by the legal framework. A sort of suspensive effect is provided in the 2011 Commission notice on best practices: the Commission does not read the document until it has adopted a decision on the undertaking's claim and has allowed the undertaking to refer the matter to the CJEU.

#### *ECB*

As mentioned before, a production order launching an investigation and an on-site inspection is the decision of the ECB. The Administrative Board of Review conducts an internal administrative review of the decisions taken by the ECB (Article 24 SSM Regulation). 'Any request for review shall be made in writing, including a statement of grounds, and shall be lodged at the ECB within one month of the date of notification of the decision to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be' (Article 24 (6) SSM).

The scope of the review is both procedural and substantive and this is in conformity with the SSM Regulation of the ECB's decisions.

Furthermore, 'a request for review pursuant to paragraph 5 shall not have suspensory effect. However, the Governing Council, on a proposal by the Administrative Board of Review may, if it considers that circumstances so require, suspend the application of the contested decision' (Article 24 (8) SSM).

Article 24 SSM governing the Administrative Board of Review is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties (Article 24 (11) SSM).

#### *ESMA*

The Boards of Appeal for three ESAs review appeals against the decisions of ESMA (Article 60 ESMA Regulation), including a request for information (Articles 23b (3) CRAR and 61 (3) EMIR), the launching of an investigation (production orders) (Articles 23c (3) CRAR and 62 (1) EMIR) and making an on-site inspection (Articles 23 9d) (4) CRAR and 64 (4) EMIR).

'The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision' (Article 60 (2) ESMA Regulation).



‘If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded’ (Article 60 (4) ESMA Regulation). ‘The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned’ (Article 60 (5) ESMA Regulation).

The appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision (Article 60 (3) ESMA Regulation).

‘Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU’ (Article 61 (3) ESMA Regulation).

#### *OLAF*

As an *ex ante* review mechanism, in order to obtain authorisation from the Director-General, the Investigation Unit submits a request to the Investigation and Selection Review Unit, which verifies ‘the legality, necessity and proportionality of the proposed investigative activity and [provides] an opinion to the Director-General on the basis of which he makes a decision’. As a sort of *ex post* review mechanism concerning respect for procedural guarantees, the ‘legal advice unit’ may receive complaints from the persons concerned and it provides a report to the Director-General who will then take appropriate action within two months. At the end of the entire investigation, the Investigation Selection and Review Unit conducts the ‘final review’ (see above, 2.1.5.4).

#### **2.2.3.7 Enforcement of investigative powers**

##### *DG Comp*

Normally the Commission enforces its powers by imposing fines when undertakings refuse to allow inspections.<sup>106</sup> However, the Commission cannot use force to enter premises. If undertakings oppose an inspection decision, therefore, the Commission can ask Member States for assistance (even using the police or an equivalent enforcement authority); and national authorities may require judicial authorisation according to national rules:<sup>107</sup> if judicial authorisation at the national level is required, this must be applied for.<sup>108</sup> The assistance of national authorities can also be sought when access to ‘other premises’ is obstructed.<sup>109</sup>

<sup>106</sup> Art. 23 Regulation (EC) No. 1/2003.

<sup>107</sup> Arts 20(6) and 20(7) Regulation (EC) No. 1/2003.

<sup>108</sup> Case C-94/00, *Roquette Frères SA*, [2002] ECR I-09011, ECLI:EU:C:2002:603 (the Court should ensure that the COM decision is authentic and that coercive measures are neither arbitrary nor excessive).

<sup>109</sup> Art. 21(4) Regulation (EC) No. 1/2003.

*ECB*

The ECB has the necessary powers to conduct an on-site inspection. However, if the supervised entities obstruct the conduct of the investigation, national assistance is necessary for the ECB to gain access to premises (Article 11 SSM Regulation) and to seal any business premises and books or records (Article 12 SSM Regulation). The third question is less relevant. The legal provisions regulate more the opposite situation, i.e., the presence of national authorities during relevant activities:

1. Article 10 (3) SSM Regulation – an obligation for the ECB to make any obtained information available to the national competent authorities;
2. Article 12 (1) SSM Regulation – an obligation to notify the national competent authority about any forthcoming on-site inspection;
3. The ECB shall be in charge of establishing an on-site inspection and the composition thereof, together with the involvement of NCAs (Article 144 SSM Framework Regulation);
4. ‘Officials of the national competent authority of the participating Member State concerned shall also have the right to participate in the on-site inspections’ (Article 12 (4) SSM).

*ESMA*

ESMA has the necessary powers to conduct an on-site inspection during daily supervision and when a special investigation is launched. In this latter case, the IIO conducts the investigation and prepares a report for the Board of Supervisors of ESMA, including the recommendation to adopt one or more supervisory measures and to impose fines (Articles 24 and 36 a CRAR and 65 and 73 EMIR). The Board takes the relevant decisions.

With respect to the third question, the situation is governed the other way around, namely when the NCAs can participate and be involved (Articles 23d CRAR and 63 EMIR):

1. In good time before the inspection, ESMA shall give notice of the inspection to the competent authority of the Member State where the inspection is to be conducted;
2. ESMA shall take decisions allowing on-site inspections after consulting the competent authority of the Member State where the inspection is to be conducted;
3. Officials of, as well as those authorised or appointed by, the competent authority of the Member State where the inspection is to be conducted shall, at the request of ESMA, actively assist the officials of and other persons authorised by ESMA. To that end, they shall enjoy the powers set out in those articles. Officials of the competent authority of the Member State concerned may also attend the on-site inspections upon request;
4. ESMA may also require the competent authorities to carry out specific investigatory tasks and on-site inspections on its behalf as provided for in this Article and in Article 23c(1) (on investigative powers). To that end, the competent authorities shall enjoy the same powers as ESMA as set out in those articles;
5. Where the officials of and other accompanying persons authorised by ESMA find that a person obstructs an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection.

*OLAF*

OLAF does not need any assistance from national authorities to conduct internal investigations, but relies on cooperation agreements with other EU institutions and bodies and on the duty of EU servants to cooperate.<sup>110</sup>

On the other hand, as regards the enforcement of on-the-spot checks in the context of external investigations, national authorities assist OLAF and ensure, ‘in accordance with Regulation No 2185/96, that the staff of the Office are allowed access, *under the same terms and conditions as its competent authorities and in compliance with its national law*, to all information and documents relating to the matter under investigations which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently’.<sup>111</sup> On-the-spot checks are, therefore, conducted both by OLAF and national officials: Regulation 2185/96 and the 2013 Guidelines provide that national authorities may participate in the on-the-spot check, or the on-the-spot check itself may be carried out jointly between OLAF and the competent national authority.<sup>112</sup> In practice, OLAF informs national authorities about any inspections and then it is up to them whether or not to accompany OLAF staff: according to the interviewees, the approach of national authorities can be very different in the Member States: normally they are present at least at the beginning of the inspection, in other countries (e.g. the UK) normally OLAF staff conduct the inspections on their own. Interviewees have not reported any cases in which an economic operator has refused to allow OLAF to enter its premises.

**2.2.3.8 Access to a lawyer***DG Comp*

Regulation No. 1/2003 does not expressly provide for the right to have access to a lawyer in relation to inspections. However, some clarifications can be found in a CJEU case whereby it was determined that there is a possibility to consult a lawyer before and during an inspection, but the lawyer’s presence is not a legal condition for the validity of the inspection.<sup>113</sup>

<sup>110</sup> Art. 4(7) Regulation (EU) No. 883/2013.

<sup>111</sup> Art. 3 Regulation (EU) No. 883/2013.

<sup>112</sup> Art. 4 Regulation (Euratom, EC) No. 2185/96; Art. 14.2 2013 Guidelines on Investigation Procedures for OLAF Staff. Art. 14.3 adds that, where necessary, experts who are not OLAF staff may assist the members of the Investigation Unit in carrying out on-the-spot checks.

<sup>113</sup> Case T-357-06, *Koninklijke Wegenbouw Stevin*, [2012] ECLI:EU:T:2012:488, § 232-233: ‘232. The Court therefore takes the view that the presence of an undertaking’s external or in-house lawyer is possible when the Commission carries out an investigation, but that the presence of an external or in-house lawyer cannot determine the legality of the investigation. When an undertaking so desires, and in particular when it does not have a lawyer at the investigation site, it can thus request the advice of a lawyer by telephone and ask that lawyer to go there as soon as possible. In order to ensure that the exercise of that right to legal assistance does not impair the proper conduct of the investigation, the persons charged with carrying out the investigation must be able to enter all the undertaking’s premises immediately, to notify it of the inspection decision and to occupy the offices of their choice, without waiting until the undertaking has consulted its lawyer. The persons charged with carrying out the investigation must also be put in a position to control the undertaking’s telephone and computer communications in order, in particular, to prevent the undertaking from contacting other undertakings which are also the subject of an investigation decision. Moreover, the time which the Commission is required to grant an undertaking to enable it to contact its lawyer before the Commission starts consulting the books and other records, taking copies, affixing seals on premises or documents or asking any representative or member of staff of the undertaking for oral explanations depends on the particular circumstances of each individual case and, in any event, can be only extremely limited and reduced to a strict minimum. 233. In the present case, by refusing to accede to the applicant’s request to await the arrival of its external lawyers in a waiting room before allowing the Commission to enter its premises, and in particular the office of its managing director, the Commission did

Furthermore, Art. 6 of the ‘Explanatory note’ of the Commission concerning the inspection ‘by decision’ (revised on 11 September 2015) provides that: (a) the undertaking may consult an external lawyer during the inspection. However, his/her presence is not a legal condition for the validity of the inspection; (b) the inspectors may enter the premises and notify the decision without waiting for the undertaking to consult a lawyer; (c) the inspectors may accept a short delay pending consultation before starting to examine the books and other records related to the business, taking copies etc. (any delay must be kept to a minimum).

*ECB*

Not regulated explicitly.

*ESMA*

Not regulated explicitly.

*OLAF*

There are no specific EU law provisions on the right to consult a lawyer during on-the-spot checks. Normally lawyers are allowed to be present, but no specific information in that sense is provided for economic operators.

### 2.2.3.9 Privilege against self-incrimination

*DG Comp*

As explained above as regards interviews and production orders, the CJEU has recognised a limited right to remain silent for undertakings and persons subject to the Commission’s investigations: they cannot refuse to hand over pre-existing documents that may serve to prove the case; and they are obliged to answer factual questions and provide documents even if this information may be used to establish against them or against another undertaking the existence of an infringement (they can only refuse to answer questions that would require them to admit the very infringement that the Commission is investigating). As regards inspections, it is worth mentioning that a lack of cooperation during an inspection has been considered as an aggravating factor in determining the final sanction for a substantial violation of competition law.<sup>114</sup>

*ECB*

Not regulated explicitly.

*ESMA*

Not regulated explicitly.

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not infringe its rights of defence. Consequently, the applicant’s refusal to grant the Commission’s inspectors access to its building before its lawyers arrived, which caused a delay of 47 minutes in the carrying out of the investigation, must be classified as refusal to submit to an investigation decision within the meaning of the provisions of Art. 15(1)(c) of Regulation No. 17’.

114 A fine imposed on *Sony* in 2007 was increased by 30 % because its employees had refused to answer questions and had shredded documents. See Commission Decision of 20 November 2007, C(2007) 5469 final, para. 219 et seq.

*OLAF*

There are no specific provisions on the right to remain silent during on-the-spot checks in the context of external investigations.

**2.2.3.10 Legal professional privilege and other forms of professional secrecy***DG Comp*

As explained above as regards interviews and production orders, the CJEU has clarified that only correspondence with an external lawyer (i.e. not with in-house lawyers) is covered by the client-attorney privilege. It is up to the undertaking claiming protection under the privilege with regard to a given document to provide the Commission with appropriate justification and relevant material to substantiate its claim, while not being bound to disclose the content of such document. As regards the privilege during inspections, the 2011 Commission notice on best practices further specifies that:<sup>115</sup>

- Normally the Commission can take a cursory look at the documents to assess the undertaking's claim; however, undertakings can give appropriate reasons as to why such a cursory overview would jeopardise the privilege;
- If the Commission considers the undertaking's claim to be unfounded, it can immediately read the document and make a copy; on the other hand, if the Commission cannot exclude that the document may be protected, it places the document in a sealed envelope and takes it to the Commission's premises, with a view to the subsequent resolution of the dispute (which involves the Hearing Officer);
- Fines can be imposed on undertakings for clearly unfounded claims, which can also be considered as aggravating circumstances in the determination of the final sanction for a violation of competition law.

*ECB*

Recital 48 of the SSM Regulation states that 'legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU)'.

SSM Regulation Article 10 (on a general request for information) states that 'professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.'

*ESMA*

'The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d [requests for information, general investigations, on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege' (Articles 23a CRAR and 60 EMIR).

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<sup>115</sup> Art. 2.7 Commission notice on best practices for the conduct of proceedings concerning Arts. 101 and 102 TFEU, 2011/C 308/06.



*OLAF*

There are no provisions on legal professional privilege in EU secondary law concerning OLAF investigations. Some indications can be found as regards digital forensic external investigations in the 2016 Guidelines on Digital Forensic Procedures for OLAF staff: if the representatives of economic operators claim that a device contains data of a ‘legally privileged nature’, Art. 6 provides for a meeting before the OLAF Digital Evidence Specialist aimed at ‘resolving the issue’. During this meeting, representatives of economic operators ‘may be assisted by a person of their choice’.

**2.2.4 Access to traffic data and recording of telecommunications****2.2.4.1 Scope of the powers***DG Comp*

Normally the Commission does not have this power, since the only available investigative measures are inspections of business and non-business premises, the request for information, and the interviews. It is worth mentioning, however, that in a recent case (*Goldfish BV v. Commission*, T-54/14, 8 September 2016, not yet available in English) the General Court held that the Commission may rely on recordings seized lawfully in a dawn raid even if those recordings were made illegally by a third party.

*ECB*

The ECB does not have this power unless the NCAs have it.

*ESMA*

ESMA has the power to request records of telephone and data traffic (Articles 23c (1e) CRAR and 62 (1e) EMIR).

*OLAF*

OLAF does not have this power.

**The following answers from section 2.2.4 concern the case of ESMA.**

**2.2.4.2 Legal shape**

The power to request records of telephone and data traffic is an investigative power (Articles 23c CRAR and 62 EMIR). Investigative powers can be used based on a decision by ESMA to start an investigation (Articles 23c (3) CRAR and 62 (3) EMIR).

**2.2.4.3 Threshold**

Not regulated explicitly. ESMA can use this power in order to carry out its duties.

**2.2.4.4 Purpose limitation**

The purpose is in order to carry out duties under CRAR and EMIR.

**2.2.4.5 Ex-ante judicial authorisation**

Judicial authorisation is necessary where the national law so requires. Such authorisation may also be requested as a precautionary measure (Articles 23c (5) CRAR and 63 (8) EMIR).

‘The national judicial authority shall control that the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on ESMA’s file. The lawfulness of ESMA’s decision shall be subject to review only by the Court of Justice of the European Union following the procedure set out in Regulation (EU) No. 1095/2010’ (Articles 23c (6) CRAR and 63 (9) EMIR).

#### **2.2.4.6 Internal review mechanism**

The Boards of Appeal for three ESAs review appeals against the decisions of ESMA (Article 60 ESMA Regulation), including a request for information (Articles 23b (3) CRAR and 61 (3) EMIR) and the launching of an investigation (production orders) (Articles 23c (3) CRAR and 62 (1) EMIR).

‘The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision’ (Article 60 (2) ESMA Regulation).

‘If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded’ (Article 60 (4) ESMA Regulation). ‘The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned’ (Article 60 (5) ESMA Regulation).

The appeal shall not have suspensive effect. However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision (Article 60 (3) ESMA Regulation).

‘Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU’ (Article 61 (3) ESMA Regulation).

#### **2.2.4.7 Enforcement of investigative powers**

ESMA has the power to request records of telephone and data traffic. It does not require any assistance by NCAs except for judicial authorization when the national law so obliges or as a precaution.

#### **2.2.4.8 Access to a lawyer**

Not regulated explicitly.

#### **2.2.4.9 Privilege against self-incrimination**

Not regulated explicitly.

#### **2.2.4.10 Legal professional privilege and other professional secrecy**

‘The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 23b to 23d [requests for information, general investigations, on-site inspections] shall not be used to require the disclosure of information or documents which are subject to legal privilege’ (Articles 23a CRAR and 60 EMIR).

### **2.3 CONCLUSIONS**

The analysis of the legal framework in the ‘books’ and in action concerning four different European enforcement authorities (EEAs) has led to the following findings, both as regards the extent of the investigative powers available to OLAF, and the procedural safeguards recognised for the persons concerned.

The following are the main findings as regards OLAF’s investigative powers from a comparative perspective:

1. A preliminary remark concerns the legal framework. Despite the recent Regulation No. 883/2013, there is still a great deal of uncertainty – even among interviewees – concerning the exact extent of OLAF’s autonomous investigative powers. In most cases, these depend on the powers granted to its national counterparts (the administrative authorities), which results in a ‘variable geometry’. Minor differences are present also in internal investigations, depending on the content of the decisions adopted by EU institutions and bodies. When certain powers are not available in one Member State, alternative solutions are sought in practice, for example by opening a judicial investigation at the national level (‘mixed inspections’) and exchanging the related information; even when there is no specific legal basis, such arrangements depend on the willingness of the national authorities, and on their ‘creativity’ in order to foresee a role for the OLAF staff;
2. Contrary to all other EEAs, OLAF does not have a real power to issue production orders in external investigations, outside the context of an ongoing inspection, accompanied by the possibility to sanction a refusal to provide information or the provision of misleading information. Furthermore, OLAF has no power to summon witnesses, a power which is accorded (at least to some extent) to the other three EEAs. The reasons for such a lack of authority is not easy to find; according to the interviewees this is only due to ‘political reasons’, i.e. to the resistance of Member States to grant more investigative powers to an EU body;
3. OLAF does not have the power to monitor bank accounts; however, none of the EU investigated authorities has such authority;
4. During external investigations, OLAF has the power to visit premises, but the content of this power is defined by national law. Therefore, its extent may be different in the Member States

(see the national reports). This is not the case with the other three EU authorities where EU law regulates this autonomous power for the EEAs. Furthermore, OLAF has no autonomous power to seal premises or to seize documents which the other EEAs have. Finally, the Commission is the only EEA which can inspect non-business premises;

5. OLAF has no power to request records of telephone and data traffic, which ESMA has;
6. In general, unlike other authorities, OLAF has no sanctioning mechanisms in relation to a refusal to cooperate with its investigations. This is probably perceived by the interviewees as the great weakness of the existing legal framework;
7. Concerning the purpose limitation of investigative powers, in the field of competition law the CJEU has elaborated case law whereby the Commission has to indicate the clear purpose of the investigative measure. Also the written authorisation issued by the OLAF Director-General must indicate the subject matter and purpose of the investigation. It is not clear, however, to what extent in practice OLAF applies the same principles as those developed by the CJEU in the field of competition law, and to what extent it follows the national rules when conducting on-the-spot checks (i.e., whether the authorisation actually limits the scope of the investigation);
8. As is the case for the other EEAs, also for OLAF there is normally no threshold for adopting an investigative measure (OLAF has a threshold for opening investigations as such, but there is no a different higher threshold for adopting investigative measures). A sort of legality and proportionality check is conducted before authorising an investigative measure: this is done through a sort of *ex ante* internal review mechanism concerning legality, necessity and proportionality, whereby the Investigation Selection and Review Unit provides an opinion for the Director-General. Interviewees reported that this is often merely a formal control.

The following are the main findings as regards the safeguards provided by OLAF's legislative framework from a comparative perspective:

1. Only the EU legal framework which is applicable to the Commission in competition law specifies in which cases it is necessary to obtain judicial authorisation before adopting a certain investigative measure; for the other EEAs, including OLAF, the necessity of prior judicial authorisation depends on the applicable national law;
2. OLAF, similar to the Commission in the field of competition law, does not have a real internal review mechanism; at least not yet (see COM (2014) 340 final). The current system provides only for non-binding opinions for the Director-General issued either by the OLAF Investigation Selection and Review Unit or the Legal Advice Unit. ESMA and the ECB both have internal review/appeal boards to review decisions taken by these entities;
3. Probably because of strong criticism being directed against the unclear previous legal framework, as well as because of the difficulties in ensuring the admissibility of evidence in national proceedings, the new OLAF Regulation provides for a level of safeguards during the interviews which is higher than that provided in the context of other EEAs' interviews (particularly as regards the right of access to a lawyer and the privilege against self-incrimination). These safeguards in the area of competition law derive largely from the case law, rather than legislation. Since the ECB and ESMA are relatively still in their infancy, no specific case law on these matters is so far available for these authorities; the legislative framework is not very elaborate on these issues.

4. On the other hand, with respect to the right to enter premises, similar to ECB and ESMA, OLAF's legislative framework does not regulate the right of access to a lawyer or the privilege against self-incrimination; the case law of the CJEU in the field of competition law also applies to inspections, and it is unclear to what extent OLAF adheres to such case law during its on-the-spot checks. Even the interviewees did not fully clarify what safeguards apply to on-the-spot checks and inspections; the general belief is that OLAF is much more respectful of procedural guarantees than national administrative authorities;
5. There is similar uncertainty concerning the protection of legal professional privilege, which is not explicitly regulated by the OLAF legislative framework. This does not mean that it is neglected in practice: in the case of the ECB, for example, in a recital the SSM Regulation refers to it as a fundamental principle of Union law, where the CJEU has laid down conditions on how it should be afforded;
6. Other forms of professional secrecy are not regulated as a limit to investigation powers.