5

The Exchange of Operational Information between EU and National Authorities

KOEN BOVEND'EERDT AND IRO KARAGIANNI

I. Introduction

Exchange of information is a difficult concept to define in the abstract.[1] In terms of scope it is seemingly boundless. 'Information', after all, encompasses any type of communicated knowledge that reduces uncertainty concerning some type of fact, subject or event.[2] The conjoined term 'exchange' does very little to shrink the terrain that 'information' covers. To speak about an exchange presupposes the existence of at least two parties that are bound together by some kind of reciprocal relationship. Contrary to transfer, exchange is a two-way street. Exchange is at least as much about giving as it is about receiving.[3] There are many reasons to exchange information, or something else for that matter, but if we reduce all these reasons to their bare bones, they are all essentially expressions of supply and demand: you have something that I need. While exchange of information is premised on a relationship between sender and receiver,[4]

[1] While the etymology of the respective terms does not raise too many questions, its meaning in relation to law enforcement, of interest in this chapter, in particular by European Union (EU) authorities, is unclear. A search for definitions in the existing body of literature leaves the authors unsatisfied. See F Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice: Towards Harmonised Data Protection Principles for Information Exchange at EU-level* (Springer 2012) 12–15; Á Gutiérrez Zarza, *Exchange of Information and Data Protection in Cross-Border Criminal Proceedings in Europe* (Springer 2015) 3–7. In specific contexts, such as horizontal judicial cooperation, authors do, but also can, define the meaning of 'exchange of information'. See M Simonato, 'The "Spontaneous Exchange of Information" between European Judicial Authorities from the Italian Perspective' (2011) 2 *New Journal of European Criminal Law* 221, 222–23.

[2] Cf R Losee, 'A Discipline Independent Definition of Information' (1997) 48 *Journal of the American Society for Information Science* 254, 255–56.

[3] The reciprocal nature of the relationship expresses itself through contingency and equivalence. With respect to the first, reciprocity implies that an action is conditional on a rewarding action. With respect to the second, there needs to be a rough equivalence between the respective actions. On these dimensions of reciprocity as a general concept, see R Keohane, 'Reciprocity in International Relations' (1986) 40 *International Organization* 1, 5–6. In the exchange of information, reciprocity, in both its dimensions, is ensured through legal obligation.

[4] Both positions that, due to the reciprocal nature of exchange, all parties to the transaction take.

as a generic term, it specifies little in terms of the content of this relationship. It does not define who the parties involved are, when they exchange information, what information they may exchange, and for what purpose, or how they do so. The net cast by the term 'exchange of information' consequently is wide.

The net we cast – or, depending on your perspective, the pond we fish in – is smaller. In this chapter we are concerned solely with the exchange of information in law enforcement. Law enforcement is the process through which violations of substantive norms are monitored, investigated and sanctioned.[5] The parts of the process with which most are familiar are the direct gathering of information by authorities (see chapter 4) and the later use thereof in punitive proceedings against those to which the substantive norm in question is addressed (see chapter 6). The exchange of information is considered the juncture or hinge between the gathering of information by one authority and the use thereof by another. Whenever one authority is in need of information not directly available to it,[6] the exchange of information is the necessary link through which authorities can connect to chains or channels (i) in different policy areas (eg, exchange between the tax authority and the public prosecution service), (ii) in different Member States (eg, exchange between public prosecution services of two Member States), and (iii) in the EU legal order (eg, the exchange between national competition authorities and the Directorate-General for Competition ('DG Competition')).[7] Information sharing between authorities allows law enforcement to better respond to threats: it allows for 'intelligence-led policing' and makes it possible for authorities to build up information positions.[8]

This chapter focuses on the third strand: the exchange of information between EU law enforcement authorities (hereinafter ELEAs) – in particular the European Anti-Fraud Office (OLAF), DG Competition and the European Central Bank (ECB) – and the competent national authorities.[9] The need for legal frameworks that regulate the

[5] J Vervaele, 'Shared Governance and Enforcement of European Law: From Comitology to a Multi-Level Agency Structure?' in C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999) 131.

[6] The reasons for this can be various, but can roughly be grouped into one of the following categories: no competence in a particular policy area; no power; or no jurisdiction to obtain the information in question.

[7] This list is in no way meant to be exhaustive. The exchange of information could also link up different chains. Think, for instance, of transversal exchanges at the EU-level between, eg, Eurojust and Europol, or between the EU and international organisations (eg, between Eurojust and Interpol). On the former, see Regulation (EU) 2018/1727 on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2018] OJ L295/138, Art 49; Regulation (EU) 2016/794 on the European Agency for Law Enforcement Cooperation (Europol) [2016] OJ L135/53, Art 21. On the latter, see, eg, Regulation (EU) 2018/1727, Arts 52, 56–59; more specifically, we refer the reader to the 'Memorandum of understanding on cooperation between Eurojust and the International Criminal Police Organisation (ICPO-Interpol)', Arts 3 and 4. What is more, multiple 'channels' can coincide. Think, for instance, of the exchange of information between national members through Eurojust. See Regulation (EU) 2018/1727, Arts 7(8), 8(1)(b) and 21(3). On the exchange of information in the EU between administrative and judicial authorities in a horizontal setting, see M Luchtman, *European Cooperation between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities* (Intersentia 2008).

[8] Intelligence-led policing is 'the application of criminal intelligence analysis as an objective decision-making tool in order to facilitate crime reduction and prevention through effective policing strategies and external partnership projects drawn from an evidential base'. See J Ratcliffe, 'Intelligence-led Policing in Crime and Criminal Justice' [2003] *Trends and Issues in Crime and Criminal Justice* 1, 3.

[9] To be clear – if it was not already – this chapter deals only with the vertical exchange of information between EU authorities and their national counterparts. We do not consider the exchange of information within Member States, between Member States (horizontal) or between EU authorities (transversal).

exchange of information is evident. Due to the composite system of enforcement in the respective fields in which these authorities operate, as a result of which tasks and mandates are spread across legal orders, the relevant actors in these respective orders depend, in some way, on each other for the provision of information to ensure effective enforcement.[10] How do the legal frameworks of the four authorities address and regulate this informational dependence and, particularly, how do they compare? From a top-down perspective, how are exchange of information frameworks of EU authorities integrated into national legal systems? In turn, how do these national legal systems accommodate EU systems on the exchange of information? And, in line with the overarching topic of this book, do the EU authorities' frameworks recognise the needs of criminal justice *sensu stricto*, which is also the topic of ch 8 of this volume, where Allegrezza et al discuss the specifics of the relationships between EU enforcement authorities and national criminal justice authorities?

As stated above, while the concept of 'exchange of information' is premised on the existence of a relationship, it leaves, without further definition, the content of this relationship wide open. To try to fill in this relationship, we make a distinction between an inner circle of authorities (EU authorities' institutional partners) and an outer circle (which consists of other administrative authorities and judicial authorities that are not institutionally linked to an EU authority).[11] To answer the questions posed above we propose, in line with what was mentioned before, the following four objects of comparison: the authorities involved in the exchange of information; when exchange takes place (ie the enforcement phase); the type and purpose of the information exchanged; and the modalities of exchange.

The above also informs the structure of this chapter, which proceeds in the following fashion. Having discussed the tasks and mandates of the examined ELEAs (section II), we proceed with a comparative analysis of the four ELEAs along the lines of the above-mentioned objects of comparison both from a top-down (ELEA-Member State) (section III) and bottom-up (Member State-ELEA) point of view (section IV).[12] Whereas the former (top-down) section solely concerns the transfer of information from ELEAs to national authorities, the latter (bottom-up) section deals only with the transfer of information from national authorities to ELEAs. To avoid confusion, we wish to make clear that, irrespective of the direction of transfer (ie top-down or bottom-up), we discuss how the ELEA legal frameworks regulate the exchange between the ELEA and national authorities in question (the 'EU-perspective'), and how this is accommodated by national law and authorities (the 'Member State-perspective'). In short, to answer the questions posed in the previous paragraph we analyse the transfer to and from ELEAs from the point of view of EU and national law.

[10] For the definition, see ch 1 of this volume (Luchtman).

[11] M Luchtman, M Simonato and J Vervaele, 'Comparative Analysis' in M Simonato, M Luchtman and J Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities. Improving OLAF legislative framework through a comparison with other EU authorities (ECN/ESMA/ECB)* (Utrecht University 2018) 166.

[12] The national systems considered in this chapter coincide with those of the study by Simonato, Luchtman and Vervaele: Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom (UK). See Simonato, Luchtman and Vervaele (n 11).

In both sections III and IV we distinguish further between inner-circle national partners (section III.A and section IV.A respectively) and outer-circle authorities that can either be administrative and/or judicial authorities (section III.B and section IV.B respectively). This means that we examine top-down and bottom-up information flows between ELEAs and a variety of authorities by looking at EU law and corresponding national law provisions. We make this distinction between inner- and outer-circles to try and establish whether ELEA legal frameworks on the exchange of information recognise the (potential) punitive dimension of ELEAs' work and, if so, how they, individually, deal with this recognition. In the penultimate section (section V), prior to some concluding remarks (section VI), we consider the regimes on the exchange of information, their differences and their similarities, and – where possible – try to explain how and why they are different, especially in light of the ELEAs' linkages with criminal justice and the needs that sprout therefrom.

Note that our analysis is limited to legal problems: we do not assess, as such, practical problems related to information exchange (although, of course, the latter can be the result of the former).[13] Furthermore, we do not touch upon issues of data protection, which nevertheless is hugely important.[14] Legal protection and the exchange of information are dealt with in chapter 3 by Ligeti and Robinson.

Before dealing with the EU authorities, it is appropriate to issue a caveat here. The way in which we, somewhat rigidly (and even arbitrarily), position the exchange of information in this chapter likens law enforcement to a linear and successive process. Information is gathered; where necessary this information is transmitted or received, in order to put it in the hands of the authority that can make use of it in punitive proceedings against the person suspected of violating the substantive norm in question. The exchange of information is so much more than that and is better conceived of not as merely the link between the gathering and use of information, but as a continuous process that transcends or overarches the triptych put forward here ('gather', 'exchange', 'use'). We are aware that, so to speak, the map is not the territory.[15] That does not mean that maps are useless. Instead, just like our analytical grid here, they promote an understanding, albeit a partial one, of a very complex reality. Having said that, to try and nestle the exchange of information in between the gathering and use of information as best as we possibly can, this chapter only considers what we call, 'operational information': case-specific information that can be of (potential) use in ongoing punitive proceedings. Operational information, in this sense, should be distinguished from, amongst others, strategic information or information exchanged for policy-making purposes.[16] Strategic

[13] On practical problems with respect to the exchange of information between OLAF and, amongst others, national authorities, see Ecorys, 'Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests' JUST/A4/2011/EVAL/01, 14–19.

[14] EU authorities also take measures to ensure that exchanges of information are in line with data protection regulations. See, for instance, OLAF's appointment of its own data protection officer, which is to ensure that OLAF correctly applies the rules protecting individuals' personal data. See Decision of the Director General of OLAF adopting implementing rules concerning the Data Protection Officer for OLAF and the Secretariat of the Supervisory Committee. The decision is based on Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L248/1 ('OLAF Regulation'), Art 10(4).

[15] A phrase used by A Korzybski, *Science and Sanity: An Introduction to non-Aristotelean Systems and General Semantics* (The International Non-Aristotelian Library Publishing Company 1933) 747–61.

[16] See, eg, Art 1(2) OLAF Regulation.

information is information not associated with a specific case but used for identifying often large-scale and/or long-term trends. Policy information is, as the name suggests, information exchanged with the purpose of developing, making or evaluating policies.

For a good understanding of what this chapter does and does not do, we must make some important distinctions. While some, rightfully, distinguish between 'information' and 'intelligence',[17] the latter being the product of raw information that has been evaluated and given purpose (for instance, providing knowledge about a particular criminal threat through analysis), we conflate the two because this distinction is not recognised in the frameworks of the four authorities studied.[18] When the authors refer to 'information', we mean to include the subset of 'intelligence', unless specifically stated.

With an eye on chapter 6, on the admissibility of evidence, there is a further distinction that should be made between 'information'/'intelligence' on the one hand and 'evidence' on the other. Evidence is data on the basis of which proof can be established in punitive proceedings. While there is certainly some overlap between the notions – information can function as evidence or as a prelude to evidence gathering – the primary purpose is different. The purpose of information and intelligence is first and foremost to help law enforcement, particularly investigators, take decisions by identifying information gaps and bring focus to supervision or an investigation; it is not, or at least not initially, to establish proof.[19] Whether information or intelligence, as such, constitutes or can be used as evidence in punitive proceedings is a separate question altogether.[20]

[17] MAP Willmer, *Crime and Information Theory* (Edinburgh University Press 1970) 24–34; J Sheptycki, 'Organisational Pathologies in Police Intelligence Systems: Some Contributions to the Lexicon of Intelligence-led Policing' (2004) 1 *European Journal of Criminology* 307, 310; UNODC, *Criminal Intelligence: Manual for Front-Line Law Enforcement* (United Nations 2010) 1. That does not mean, of course, that information is not turned into intelligence by the four authorities (or their national counterparts), or that they do not exchange intelligence.

[18] According to Cocq, 'the EU has not yet provided any clear and distinct definition of either "information" or "intelligence"'. See C Cocq, '"Information" and "Intelligence": The Current Divergences between National Legal Systems and the Need for Common (European) Notions' (2017) 8 *New Journal of European Criminal Law* 352, 359.

[19] D Plecas et al, 'Evidence-Based Solution to Information Sharing between Law Enforcement Agencies' (2010) 34 *Policing: an International Journal of Police Strategies & Management* 120, 121.

[20] J Spencer, 'The Green Paper on Obtaining Evidence from one Member State to another and Securing its Admissibility: The Reaction of one British Lawyer' (2010) 5 *Zeitschrift für Internationale Strafrechtsdogmatik* 602, 604–05. While some EU authorities, like OLAF and the European Public Prosecutor's Office (EPPO), contain rules on the admissibility of evidence, they do not dictate what is (or in any case ought to be) evidence under national law. Art 11(2) OLAF Regulation, for example, states that OLAF investigation reports 'constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors'. While the provision forces national authorities to treat OLAF reports as if they were national (administrative) reports with respect to their admissibility, it says nothing about the possibilities of the latter's use. If, hypothetically, national law would not allow for the use of administrative reports as evidence in punitive proceedings, an OLAF report would, in like manner, not be admissible. Its European origins do not affect what materials are to be considered evidence under national law. The EPPO rules on the admissibility of evidence are different and reflect the body's (relatively) decentralised architecture and the (subsequent) transnational nature of its investigations. Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the EPPO [2017] OJ L283/1, Art 37, which deals with the issue of the admissibility of evidence, is essentially a rule of non-discrimination. It holds that evidence shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State. Here too, EU law does not state what materials can serve as evidence under national law. This is left to the discretion of each respective legal system.

The principal functions of rules that govern the exchange of information and (admissibility of) evidence, understandably, also differ. Rules on the exchange of information seek to facilitate decision-making of law enforcement 'elsewhere' (in our case at the EU or the national level). Rules on information exchange establish formalised channels that bring into contact authorities in different policy areas, Member States, or EU legal order so that – through these channels – information can be transported to where it is necessary. The rules on evidence serve to establish whether the accused has committed the offence for which he has been indicted. Both sets of rules do (at the EU and the national levels), in different ways, also fulfil an important fundamental rights function, in that they allow for the exercise of control on the exchange of information and the (subsequent) use thereof as evidence in punitive procedures.[21]

Now, without further ado, let us press forward to section II on ELEAs' tasks and mandates.

II. ELEAs' Tasks and Mandates

A. OLAF

OLAF is a Commission service whose mandate is to fight fraud, corruption and any other illegal activity that affects the financial interests of the Union (hereinafter 'PIF'), that is, all expenditure, revenues, assets, and the budgets managed and monitored by the EU.[22] OLAF thereby operates on the basis of a broad mandate that encompasses all areas of Union activity in so far as PIF are affected.

To carry out its mandate, OLAF primarily conducts administrative investigations that consist of measures undertaken by OLAF with the purpose of gathering evidence to establish whether illegal activities affecting PIF have occurred.[23] OLAF conducts internal and external investigations.[24] This chapter focuses solely on the exchange of operational information in OLAF's external investigations, that is, those carried out in the Member States.[25] OLAF's investigative task is by no means exclusive; national (punitive) investigations can run in parallel with or consecutive to OLAF investigations.[26]

While OLAF's investigations are administrative in nature, they often concern acts that are punishable by punitive administrative penalties or, as the case may be, criminal law penalties. OLAF's tasks however, are limited strictly to carrying out investigations:

[21] F Giuffrida, 'Comparative Analysis' in F Giuffrida and K Ligeti, *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (University of Luxembourg 2019) 227.

[22] Art 1 OLAF Regulation.

[23] Decision 1999/352 establishing the European Anti-fraud Office [1999] OJ L 136/20, Art 2(1); OLAF Regulation, Art 1(1) and 2(4); Guidelines on investigations procedures for OLAF staff (Ref Ares(2013)3077837) (hereinafter GIP 2013), Art 8(1).

[24] Arts 3 and 4 OLAF Regulation.

[25] In practice the distinction between internal and external investigations is at times artificial, as the presence of evidence concerning a particular illegal activity prejudicing the Union's financial interests may necessitate investigations in both the Member States and the Union's institutions, bodies, offices and agencies.

[26] Art 2(4) OLAF Regulation.

OLAF does not fulfil monitoring, prosecutorial or sanctioning functions. For (punitive) follow-up to its investigations, OLAF relies on national authorities (or, increasingly, the EPPO).[27] Evidence gathered by OLAF, where this is to result in punitive sanctions, is therefore to end up as evidence before national courts (for more on this see chapter 6).[28] So, while OLAF is, without a doubt, an administrative authority that conducts administrative investigations, it can – and does – operate at the interface of administrative and punitive law. OLAF's legal framework clearly recognises, as we demonstrate later, the possible (national) criminal law dimension of its work.

An important consequence of OLAF's circumscribed set of tasks is that, as we show in section IV, OLAF depends largely on national authorities to supply it with the information necessary to counter acts that prejudice the Union's budget.[29] This applies not only prior to, but also during and after an investigation.[30] After all, OLAF needs information for it to detect behaviour worth investigating and to decide whether or not to open an investigation (pre-investigation). Because of OLAF's limited operational capacity and strong integration in national legal orders, it also requires information during its investigations (investigation). Last, to see whether OLAF's investigations have had any impact (or further action needs to be taken), OLAF also needs input from national authorities (post-investigation).[31] The Member States, on the other hand, will depend on information in the hands of OLAF, especially in transnational cases, to take effective action against EU fraud. This chapter concerns only the exchange of information between OLAF and national authorities in OLAF's investigations, excluding the pre- and post-investigative exchanges of information on the basis of OLAF's horizontal legal framework.[32] It also excludes the exchange of information with the EPPO. Whereas the limited tasks allocated to OLAF require it to cooperate with national authorities, its broad mandate requires the Office to cooperate *with an array of different national authorities* depending on the policy area affected. For example, while in the area of structural funds, the European Regional Development Fund (ERDF) in particular, OLAF needs to cooperate and exchange information with management, certifying, and audit authorities, in the area of customs OLAF needs to cooperate with national customs authorities.

[27] Art 11(2) OLAF Regulation.

[28] ibid.

[29] Other important sources of information are whistle-blowers and EU institutions, bodies, offices and agencies. Whistle-blowers can directly report to OLAF via its website at https://fns.olaf.europa.eu/. The EU's institutions, bodies, offices, and agencies are under an EU duty to transfer information to OLAF. For the extent of this duty, see Regulation (EU, Euratom) 2020/2223 as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations [2020] OJ L437/49 ('New OLAF Regulation'), Art 8.

[30] This is reflected in Art 8(2) and (3) OLAF Regulation.

[31] M Simonato, 'Introduction' in Simonato, Luchtman and Vervaele (eds) (n 11) 1–2.

[32] OLAF's horizontal legal framework ought to be distinguished from its sectoral legal framework. Whereas the first applies generally, irrespective of the policy area affected, the latter offers – more specific – rules on the exchange of information in a particular policy area, for instance customs of structural funds. Given that the structure and set-up of this chapter is already dense and complex, we avoid even further complication and do not deal with OLAF's sectoral legislation on the exchange of information, regardless of how interesting this is.

B. DG Competition

The Directorate-General for Competition is a European Commission Directorate-General responsible for the application of EU competition law, that is, Articles 101 to 109 TFEU. In this chapter, however, we limit ourselves to discussing the exchange of information between DG Competition and national competition authorities for the purposes of the enforcement of Articles 101 and 102 TFEU, which prohibit – respectively – agreements that restrict competition and abuses of dominance in a given market.[33]

To carry out its mandate, DG Competition primarily conducts administrative investigations, which consist of measures undertaken by the Directorate with the purpose of gathering evidence to establish whether violations of the aforementioned provisions have occurred. To this end, DG Competition has been entrusted with direct investigating[34] and sanctioning powers.[35]

The fact that such extensive powers are vested in DG Competition does not, however, mean that national authorities do not play a role in the application of antitrust rules. In 2003, the enforcement of EU antitrust rules underwent decentralisation. From that time, DG Competition has enforced the substantive EU provisions in parallel with the national competition authorities of the EU Member States, which together form the European Competition Network (ECN), a '*de facto* organization, devoid of legal personality'.[36] Indeed, the ECN as such does not have enforcement powers at its disposal; rather, it constitutes a forum for coordination of EU antitrust enforcement. Given that a system of parallel competence requires clear rules as to the allocation of tasks, the ECN Notice[37] provides certain criteria governing which authority or authorities can be considered to be well placed to deal with a particular case.[38]

Concerning the system of (punitive) administrative law enforcement of EU antitrust rules and its relation to national systems of criminal justice *sensu stricto*, the following can be said. Various national laws foresee the imposition of criminal law sanctions for the violation of Articles 101 and 102 TFEU.[39] As a result, there are strong links between administrative enforcement and criminal law enforcement, and it is not inconceivable that information initially obtained for purposes of administrative law enforcement may at a certain stage also reach criminal justice authorities.

[33] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ('Regulation 1/2003'), Art 12(1).

[34] Arts 17–21 Regulation 1/2003.

[35] Arts 23 and 24 Regulation 1/2003.

[36] D Gerard, 'Public Enforcement: The ECN – Network Antitrust Enforcement in the European Union' in I Lianos and D Gerardin (eds), *Handbook on European Competition Law – Enforcement and Procedure* (Edward Elgar 2013) 194.

[37] Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' [2004] OJ C 101/043 ('ECN Notice').

[38] ECN Notice, paras 8 et seq.

[39] See P Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71 *Cambridge Law Journal* 677; W Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117.

C. The ECB

The ECB is an EU institution that has a dual mandate: to ensure price stability, a monetary policy objective; and to contribute to the stability of the financial system, by carrying out prudential supervision over the credit institutions operating in the euro area.[40] In essence, the latter mandate consists of overseeing banks' compliance with the applicable banking regulation. In this chapter, we focus only on the ECB's supervisory mandate.

The ECB does not exercise its supervisory mandate completely autonomously. The ECB directly supervises significant banks, while national competent authorities (NCAs) carry out the day-to-day supervision of less significant ones. However, it should be kept in mind that even though enforcement largely takes place through composite procedures, the overall responsibility for the functioning of the Single Supervisory Mechanism (SSM) rests with the ECB. Indeed, according to the CJEU, the SSM system can be seen as a mechanism that allows the exclusive *competences* given to the ECB to be implemented within a decentralised framework.[41]

Concerning the system of (punitive) administrative law enforcement of banking supervision law and its relation to national systems of criminal justice *sensu stricto*, the following links may be identified. In many Member States, violations of prudential requirements are sanctioned (also) through criminal law.[42] As a result, it may often be the case that national judicial authorities responsible for the investigation and prosecution of these types of offences have an interest in receiving information initially obtained by an SSM authority for purposes of ongoing supervision.

III. Transfer of Information from ELEAs to National Authorities

A. Transfer of Information from ELEAs to their Inner-Circle National Partners

i. ELEAs' Inner-Circle National Partners

OLAF's inner-circle partner in the Member States is the anti-fraud coordination service (AFCOS). The function of the AFCOS is, amongst other things, to facilitate effective cooperation and exchange of information, including information of an operational

[40] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 ('SSM Regulation'), Art 1.

[41] Case C-450/17 P *Landeskreditbank Baden-Württemberg v European Central Bank* ECLI:EU:C:2019:372, para 49.

[42] See A Karagianni, *The Protection of Fundamental Rights in Composite Banking Supervision Proceedings* (Europa Law Publishing 2022); S Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (Wolter Kluwer 2020).

nature, with OLAF.[43] The AFCOS was created because it was often very difficult for OLAF to address the competent authority in a given Member State for two interrelated reasons. The first is that, because of the vast range of illegal activities that could potentially detriment the Union's financial interests – and, as a result, the large number of policy areas OLAF must protect – there is a wide array of national authorities with which OLAF must cooperate. The situation is exacerbated, and this is the second reason, by the fact that each and every Member State appoints different authorities in these policy areas, each of which operates under its own set of rules and under a different structure. At the most basic level, the AFCOS, resolves this by serving as a first point of contact for OLAF in each Member State, and in that sense facilitates effective cooperation and exchange of information with OLAF.[44]

OLAF's legal framework regulates only the exchange of information between OLAF and 'national competent authorities'.[45] The legal framework does not have a regime in place tailored specifically to institutional partners (the inner circle) or other administrative or judicial authorities (the outer circle).[46] OLAF therefore only transfers information to national authorities that are considered competent. Whether these national authorities are in fact competent is largely left for the Member States to decide, and in practice is often unclear.[47] More on that in section IV.

The inner-circle partner of DG Competition in the EU Member States is the national competition authority. According to Recital 35 of Regulation 1/2003, Member States should designate and empower authorities to apply Articles 101 and 102 TFEU as public enforcers. Unlike the OLAF legal framework, DG Competition has 27 institutional national counterparts.[48] In that respect, wherever the EU legal framework makes reference to information transmissions or exchanges between the European Commission and national competition authorities, it is clear that DG Competition can only transmit to or receive information from its 27 national counterparts. The EU legal framework foresees the exchange of information between DG Competition and the 27 national competition authorities. According to the relevant legal provision,[49] DG Competition and national competition authorities retain the power to provide one another with, and use in evidence, any matter of fact or law, including confidential information.

The ECB's inner-circle partners in the euro area Member States are the 19 national competent authorities.[50] Besides being responsible for the supervision of less significant

[43] Art 12a(1) New OLAF Regulation.

[44] V Covolo, 'Regulation 883/2013 Concerning Investigations Conducted by OLAF: A Missed Opportunity for Substantial Reforms' (2017) 2 *European Criminal Law Review* 151, 157. See also ch 8 of this volume (Allegrezza et al), section II.A.

[45] Art 12 OLAF Regulation.

[46] In section V we clarify why that is the case. I can already divulge here that it has to do with OLAF's broad mandate.

[47] ICF, 'Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)' 90 available at https://op.europa.eu/nl/publication-detail/-/publication/d6926554-b2e6-11e7-837e-01aa75ed71a1/language-en/format-PDF/source-65845507 (accessed 29 September 2020).

[48] See at https://ec.europa.eu/competition-policy/antitrust/national-competition-authorities_en (accessed 17 April 2022).

[49] Art 12(1) Regulation 1/2003. See also ch 8 of this volume (Allegrezza et al), section II.B.

[50] Most of the NCAs, albeit not all, are the national central bank of the respective Member State. For an overview of the specific NCAs, see www.bankingsupervision.europa.eu/organisation/nationalsupervisors/html/index.en.html (accessed 17 April 2022).

credit institutions, NCAs' pivotal function in relation to the supervision of significant credit institutions is to assist the ECB in the preparation and implementation of any acts relating to the exercise of the ECB's supervisory tasks. This includes, in particular, the ongoing day-to-day assessment of a credit institution's situation and on-site verification activities.[51] Unlike the OLAF legal framework and similarly to the legal framework of DG Competition, it is quite clear who are the ECB's 19 institutional partners (inner circle). In that respect, wherever the EU legal framework makes reference to information transmissions or exchanges between the ECB and NCAs, it is unambiguous that the ECB can only transmit to or receive information from the 19 national counterparts. The ECB legal framework foresees specifically the exchange of information between the ECB and NCAs. According to the relevant legal provision, the ECB and NCAs are subject to a duty of cooperation in good faith and an obligation to exchange information.[52]

ii. The Types and Purposes of Information Transfers

The types of information that OLAF can transfer to the AFCOS, or more generally the Member States' competent authorities, and the purposes for which transfer is allowed, are regulated in OLAF's EU-level legal framework. OLAF can transmit information obtained 'in the course' of an investigation to the AFCOS.

The goal or purpose of an OLAF investigation is, from the outset, not always clear. OLAF's investigation can be the lead-up to civil recovery, administrative action or punitive (administrative criminal) follow-up at the national level. While the purpose for which information transferred by OLAF may serve therefore differs, OLAF's legal framework does not, at least not on paper, distinguish between the transfer for any of these punitive or non-punitive purposes.[53]

OLAF's legal framework imposes only a few limits on the transfer of information obtained in the course of an external investigation, particularly information gathered by OLAF in the context of an on-the-spot check.[54] Professional secrecy is one such limit. Information covered by professional secrecy falls under the heading of either (i) business secrets or (ii) other confidential information, which includes material the

[51] Regulation (EU) 468/2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), Recital 37.

[52] Art 6(2) SSM Regulation. See also ch 8 of this volume (Allegrezza et al), section II.B.

[53] The original Council Proposal was not much clearer in this respect. See Commission, 'Proposal for a Council Regulation concerning on-the-spot checks and inspections by the Commission for the detection of frauds and irregularities detrimental to the financial interests of the European Communities' COM (95) 690 final, Art 6(1). This provision holds that all information collected in connection with on-the-spot inspections and checks shall be covered by the rule of confidentiality and by the Community's provisions on data protection. It may not be communicated to anyone except those persons within the institutions of the Community or the Member States who are, by the nature of their duties, required to be acquainted with it, nor may it be used for any purpose other than to ensure that the relevant rules are applied uniformly and effectively, to forestall or detect irregularities, to recover or collect the sums involved and to ensure that penalties are applied. This provision did however, include a purpose limitation – albeit a broad one – on the exchange of information.

[54] Arts 12(1) and 10(1) OLAF Regulation. We refer here to purposes other than for AFCOS to take appropriate action in accordance with their national law.

disclosure of which would significantly harm a person.[55] In practice this limit does not seem to pose a real obstacle to OLAF's work. The reason for this is that, while information transmitted to OLAF or obtained in the course of investigations, in whatever form, must be treated as confidential and is subject to professional secrecy, this information may still be communicated to persons in the Member States whose functions 'require them to know it'.[56] OLAF's legal framework does not define – and probably could not, even if it wanted to – what this term means. Because of OLAF's broad mandate (see section II.A), which extends to all areas of EU activity whenever the Union's financial interests are prejudiced, OLAF must operate in a large number of policy areas and must cooperate with an even larger number of national actors active in those policy areas. In turn, all these actors, including the AFCOS, fulfil – more often than not – multiple functions, each of which may 'require them to know' a piece of information in OLAF's possession for the execution of their own tasks, which in all likelihood, but not necessarily, have to be in line with those of OLAF. We argue, therefore, that it is not for OLAF to decide whether a national authority is required to know certain information. If anything, the national authority in question is in a better position to decide on this. As a result, OLAF's legal framework thereby allows for the transfer of information gathered by OLAF during an on-the-spot check to, theoretically, just about any national authority, as long as it is plausible that this national authority 'requires to know it' (or the national authority makes a plausible case why it needs the information in question for the fulfilment of its tasks).

That there are no real limitations on the *transfer of information* by OLAF in OLAF's legal framework, does not mean, however, that there are no limits imposed on national authorities. The first of these is that OLAF's legal framework requires that information received by national authorities from OLAF is 'protected in the same way as similar information is protected by the national legislation'.[57] It is it not entirely clear what is meant by this assimilation obligation. We assume it refers, in particular, to the application of national rules with respect to data protection to the further transfer or dissemination of the information received from OLAF. The second limit is that OLAF's legal framework imposes some kind of purpose limitation, not on OLAF but on the Member State that wishes to use the information for purposes other than for which it was obtained. The scope of the purpose limitation is relatively confined, however. It applies only to those situations in which OLAF conducts an on-the-spot check in one Member State and observers from another Member State are present at that check, and these observers, in that guise, have received information from OLAF. In such, rather exceptional, circumstances, the Member State wishing to use the information for 'other purposes' must seek the agreement of the Member State in which the information was

[55] Case T-353/94 *Postbank v Commission* ECLI:EU:T:1996:119, para 86.

[56] Art 12(1) OLAF Regulation in combination with Council Regulation (Euratom, EC) 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L292/2, Art 8(1). The OLAF investigator's duty of confidentiality stems from Regulation 31 (EEC), 11 (EAEC) laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 45/1385, Art 17, and Art 339 TFEU.

[57] Art 8(1) Regulation (Euratom, EC) 2185/96.

obtained.[58] It is obvious that this is not an outright ban on the use of information for purposes other than for which they were obtained; it merely imposes a (horizontal) obligation to obtain the approval of the Member State in which the information in question was obtained.

The types of information and the purposes for which DG Competition can transfer to the national competition authorities are regulated in the EU-level legal framework. In Regulation 1/2003 we find the broadly-formulated articulation that ECN authorities may exchange with each other 'any matter of fact or of law',[59] which may include documents, statements and digital information.[60] In the second place, we also find a number of more specific legal provisions that further elaborate upon the types of information that may be transferred to national competition authorities. For instance, DG Competition shall transfer copies of the most important documents it has gathered[61] that concern the finding of an infringement, the adoption of interim measures, the adoption of commitment decisions, the finding of inapplicability of Articles 101 and 102 TFEU and the fact that given conduct benefits from an exemption. In addition to that, whenever DG Competition addresses a request for information to an economic undertaking, it shall also forward a copy of that request to the relevant national competition authorities.[62]

As far as the purpose of information transfers is concerned, DG Competition transfers to the national competition authorities information for the purpose of applying Articles 101 and 102 TFEU.[63] In that respect there is one, overarching purpose, namely, the enforcement of EU antitrust law; and within that context information can be transferred at different points in time. The EU legal framework does not impose any noteworthy limits on top-down information transfers. Even though professional secrecy is mentioned in Regulation 1/2003,[64] it does not concern the relationship between the national competition authorities and DG Competition, since no limit is imposed on the exchange of information within the ECN; professional secrecy thus only imposes limits on information transfers outside the ECN.

As far as the ECB is concerned, the EU-level legal framework fails to distinguish between different purposes for which information can be transferred from the EU to the national level; information can be transferred for virtually any purpose, ranging from monitoring the compliance of all credit institutions with the applicable laws, to carrying out investigations and opening sanctioning proceedings.

For instance, the ECB must transfer to the NCAs any information that is necessary for NCAs to carry out their role in assisting the ECB.[65] Furthermore, the ECB must transfer to NCAs any information that is necessary for NCAs to carry out their tasks related to prudential supervision.[66] When a significant bank is later classified as being

[58] Art 8(1) Regulation (Euratom, EC) 2185/96.
[59] Art 12(1) Regulation 1/2003.
[60] Commission, 'Antitrust Manual of Procedure – Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU' (November 2019) 4.2.2 available at https://ec.europa.eu/competition/antitrust/antitrust_manproc_11_2019_en.pdf (accessed 24 February 2022).
[61] Art 11(2) Regulation 1/2003.
[62] Art 18(5) Regulation 1/2003.
[63] Art 12(1) Regulation 1/2003.
[64] Art 28(2) Regulation 1/2003. See also ch 8 of this volume (Allegrezza et al), section III.
[65] Art 21(1) SSM Framework Regulation.
[66] Art 21(3) SSM Framework Regulation.

less significant, there is an additional obligation on the part of the ECB to provide the NCA concerned with all necessary information in respect of the particular bank.[67]

Finally, the ECB may transmit information to NCAs so that the latter may open sanctioning proceedings vis-à-vis natural persons and/or the opening of sanctioning proceedings against legal or natural persons for breaches of national law transposing Union directives.[68]

The EU legal framework does not impose any limits on the transfer of information from the ECB to the national level.[69] All persons working for NCAs or acting on behalf of NCAs are under an obligation to retain professional secrecy, but that obligation exists only in relation to third parties and not within the SSM inner circle.[70]

iii. The Enforcement Phase in Which Information Transfers Take Place

OLAF transmits information obtained 'in the course' of an investigation to the AFCOS. The reference to information obtained 'in the course' of an investigation does not limit the time of transfer but puts in place a limit on the information eligible for transfer (ie information obtained during an investigation). OLAF can therefore transfer information to the AFCOS not only during an investigation, but also prior or after such an investigation. Keep in mind, however, that the timing of transfer does not affect the type of information that can be transferred: the type of information remains that obtained by OLAF in the course of an investigation.

With respect to DG Competition, the European Commission Directorate and the national competition authorities have a shared database, and the opening of a new case, the intention to adopt a decision and the fact that a case has been closed shall be registered on that database.[71] It may thus be deduced that information is shared on a continuous basis and not only in the course of investigations.

In similar vein, with respect to the ECB, the EU legal framework does not set any limits as to the timing of a potential transfer. It is immaterial whether an NCA has launched an investigation or a sanctioning procedure. The ECB can transfer information to the national level before, during and after the conclusion of an investigation, for any purpose, as long as that relates to prudential banking supervision.

iv. The Modalities of Information Transfers

OLAF has a discretionary competence to transmit information obtained in the course of external investigations to the AFCOS. It is therefore for OLAF to decide how – and also

[67] Art 48(1) SSM Framework Regulation.

[68] Art 18(5) SSM Regulation; Art 134(1)(b) SSM Framework Regulation.

[69] EU law does, however, impose limits on the use of transferred confidential information. NCAs receiving confidential information may only use it in the course of their duties and only for supervisory purposes, for the imposition of penalties and in court proceedings. See Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338 ('Directive CRD IV'), Art 54.

[70] Art 53(1) Directive CRD IV. See also ch 8 of this volume (Allegrezza et al), section III.

[71] Antitrust Manual (n 60), 2.3.1.

when – to transfer information to the AFCOS. In practice, OLAF can transfer information through shared databases, at the request of the AFCOS, and spontaneously. With respect to the first, OLAF can make use of the Union's Anti-Fraud Information System (AFIS) – an umbrella system clustering a set of applications in particular policy areas, facilitating the exchange of anti-fraud information between OLAF and national competent authorities, not only the AFCOS. Under this umbrella, there are various layers of sectoral legislation that put in place different modalities of transfer, each reflecting the various sectoral needs of the actors operating therein. The OLAF Regulation recognises this by saying little with respect to the modalities of information transfer: OLAF 'may' transfer information, thereby keeping open all doors for sectoral legislation to fill in exactly how OLAF is to transfer information in each policy area in particular.

As far as DG Competition is concerned, the Commission has designated an Authorised Disclosure Officer (ADO). That person retains the key to the secure e-mail system, and is therefore responsible for receiving from and sending messages to the national competition authorities, whenever the use of that encrypted system is necessary.[72] In other words, whenever DG Competition wishes to transfer sensitive information to a national competition authority, such as business secrets or other confidential information, that information is transferred with encryption, through the ADO.[73]

With respect to the ECB, it is for the EU authority to decide when and how to transfer information to the NCAs. In practice, supervisory information is shared through a database, DARWIN, which is the ECB's IT tool for the management of documents and records.[74] The EU legal framework requires that information is transferred 'in a timely and accurate manner'[75] and that the ECB shall provide to the NCAs regular access to the necessary information so that they can carry out their supervisory tasks.[76] From these provisions, it can be deduced that the ECB may upload such information on the shared database either ad hoc or at recurring intervals.

B. Transfer of Information from ELEAs to the Outer-Circle National Authorities

As stated previously, OLAF's legal framework regulates only the exchange of information between OLAF and 'national competent authorities'. As such, the qualification of an authority as inner-circle (AFCOS) or outer-circle (other administrative or judicial authority) is therefore immaterial for the transfer of information from OLAF to the national level. What does matter is when these outer-circle authorities become relevant in the context of an OLAF investigation and when OLAF may want to transfer information to them. This depends, first of all, on the policy area affected. If an OLAF investigation

[72] ibid 4.1.

[73] ibid.

[74] European Central Bank, 'Audit and user content creation functionalities of the ECB Document and Records Web-based Interface (DARWIN)' (February 2020) available at www.ecb.europa.eu/ecb/access_to_documents/data_protection/shared/pdf/ecb.dpr.dgse_management_DARWIN_user_data20200224.en.pdf (accessed 24 February 2022).

[75] Art 21(2) SSM Framework Regulation.

[76] Art 21(3) SSM Framework Regulation.

concerns customs irregularities, the national customs authority is, in all likelihood, the authority to which OLAF will want to transfer information. In case of an irregularity in the area of structural funds, this will be the affected Member State's management, certifying or audit authority (whichever that may be). It depends, second of all, on the Member State(s) affected. Each Member State appoints different authorities in each policy area. For instance in the ERDF (one of the structural funds), the Netherlands has appointed four geographically dispersed management authorities. In Germany, because ERDF subsidies are implemented at the *Länder*-level, OLAF has to deal with 16 management authorities. In North Rhine Westphalia, for instance, the management authority is *Referat V 1* of the state's Ministry of Economic Affairs, Innovation, Digitalisation and Energy. Which outer-circle authority is relevant depends, third and last, on the purpose of an OLAF investigation. Where OLAF investigates customs or subsidy fraud, it may be necessary for OLAF to transfer information to national judicial authorities, most likely the national competent public prosecutor, rather than any of the above-mentioned administrative outer-circle authorities, because of the ultimate punitive purpose OLAF's investigation may serve. All in all, however, there are no hard rules in OLAF's EU-level legal framework that dictate to which authority it is to transfer information (ie, which authority is 'competent') or how such an authority is to be identified.

Regardless of authority relevance, because of OLAF's 'one size fits all' regime on the transfer of information, what is said in section III.A.i with respect to the AFCOS (ie, on the types of information that may be transferred, on the enforcement phase in which transfer may take place, and on the modalities of information transfer) applies mutatis mutandis to OLAF's outer circle of authorities, irrespective of the administrative or judicial nature of these national authorities.

With respect to DG Competition, as stated in section III.A.i, the EU-level legal framework regulates only the exchange of information between DG Competition and the national competition authorities. Information transfers directly from DG Competition to other administrative authorities do not take place, at least not formally, but may not be excluded either, especially in view of the principle of sincere cooperation. As we have noted elsewhere,[77] if such transfers were to take place, that would likely happen via the relevant national competition authority.

On the other hand, transfers to national judicial authorities do take place, especially in view of the fact that national courts have the power to apply EU antitrust law.[78] In that respect, the judicial authorities mentioned in Regulation 1/2003 are not criminal courts or public prosecutors, but rather those courts or tribunals within each Member State that are competent to enforce EU antitrust law.[79] Observations may be submitted to national courts by DG Competition on its own initiative,[80] or at the request of the competent national court.[81] Such observations are limited to an economic and legal

[77] A Karagianni, M Scholten and M Simonato, 'EU Report' in Simonato, Luchtman and Vervaele (eds) (n 11) 7.

[78] Art 6 Regulation 1/2003.

[79] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54 ('Cooperation Notice'), para 1.

[80] Art 15(3) Regulation 1/2003; Case C-429/07 *Inspecteur van de Belastingdienst v X BV* ECLI:EU:C:2009:359, para 27.

[81] Art 15(1) Regulation 1/2003.

analysis of the facts surrounding the case before the national court.[82] Lastly, observations are provided in accordance with national procedural rules.[83] On the other hand, the EU legal framework does not foresee interactions with criminal justice authorities. We are of the opinion, that – similarly to other administrative authorities – should that be necessary, information transfers would take place via the national competition authorities and in accordance with their national law, within the limits set by the general principles of EU law, such as the principles of effectiveness and of sincere cooperation.

As far as the ECB is concerned, the EU-level legal framework states that, where necessary, the ECB should conclude memoranda of understanding (MoUs) with national competent authorities responsible for markets in financial instruments.[84] For instance, the ECB and the Netherlands authority for the financial markets (AFM) have entered into such an MoU, which, inter alia, lays down the modalities pertaining to exchange of information.[85]

With respect to outer-circle judicial authorities, due to the fact that several Member States utilise both administrative and criminal law enforcement to punish violations of prudential legislation,[86] the ECB may often need to interact with national judicial authorities whose tasks revolve around the enforcement of prudential regulation. The EU legal framework recognises these likely interactions and provides for the following two modalities.

First, information transfers from the ECB to national judicial authorities – via the NCAs – may take place at the latter's request. The modalities applicable to information requests addressed to SSM authorities by national criminal investigating authorities, and the circumstances in which such information can be transferred to them, are laid down in ECB Decision 2016/1162.[87] It is worth noting that national judicial authorities requesting information from the ECB do not liaise directly with the ECB. Any request by, for instance, a public prosecutor should first be addressed to the local NCA. The NCA in turn 'commits to acting on behalf of the ECB in responding to such a request'.[88] Transmission of requested information takes place only if the following conditions are met: either (i) there is an express obligation to disclose such information to a national criminal investigation authority under Union or national law;[89] or (ii) the relevant legal framework permits the disclosure of such confidential information. However, in this case, if the ECB considers that transmission may jeopardise the accomplishment of its tasks or its independence, or may undermine the public interest, transmission can be refused.[90] In any case, the NCA in question must commit itself to asking the requesting

[82] Cooperation Notice (n 79), para 32.
[83] Cooperation Notice (n 79), para 34.
[84] Art 3(1) SSM Regulation.
[85] Memorandum of Understanding on cooperation between the European Central Bank and the Netherlands Authority for the Financial Markets (2017) available at www.bankingsupervision.europa.eu/legalframework/mous/html/ssm.mou_2017_afm~9aa14b7f26.en.pdf (accessed 24 February 2022).
[86] S Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (Wolter Kluwer 2020).
[87] Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) [2016] OJ L192/73, Arts 2 and 3.
[88] Art 2(1)(a) Decision (EU) 2016/1162.
[89] Art 2(1)(b)(i) Decision (EU) 2016/1162.
[90] Art 2(1)(b)(ii) Decision (EU) 2016/1162.

outer-circle authority to guarantee that the confidential information provided will be protected from public disclosure.[91]

Second, the ECB may transfer information to national judicial authorities – through the NCAs – spontaneously. According to Article 136 of the SSM Framework Regulation, if the ECB – while carrying out its supervisory powers – comes across facts that could potentially give rise to a criminal offence, it must transfer that information to the *relevant* NCA and request it to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.[92] The EU legal framework does not specify whether that obligation exists only with respect to 'prudential offences', or more generally with respect to any criminal offence.[93]

IV. Transfer of Information from National Authorities to ELEAs

A. Transfer of Information from the Inner-Circle National Partners to ELEAs

There is no specific legal regime governing the transfer of information from Member States' AFCOSs to OLAF. OLAF's legal framework states that the competent authorities of the Member States shall, at OLAF's request or at their own initiative, transmit to OLAF any document or information they hold that relates to an ongoing investigation.[94] In other words, also with respect to bottom-up transfers of information, OLAF's legal framework regulates only the exchanges between OLAF and national competent authorities. Obligations with respect to the transfer of information from the national level to the EU level apply, therefore, only with respect to these authorities.

According to OLAF's legal framework, the AFCOS *may*, not must, be regarded as a competent authority.[95] If the AFCOS is not designated as competent authority, it does not fall within the ambit of the rules. If, however, the AFCOS is considered a competent authority, EU rules click into place and the AFCOS must, at the request of OLAF or on its own initiative, transmit to OLAF any document or information it holds that relates to an ongoing OLAF investigation. The possibilities to transfer information therefore depend on whether or not the AFCOS is designated a 'competent authority'. It is left to national law to decide on this matter.

[91] Art 2(1)(c) Decision (EU) 2016/1162.

[92] Art 136 SSM Framework Regulation.

[93] See in that respect Allegrezza, who distinguishes between 'financial crime', under which she groups market abuse, money laundering, terrorism financing and insider dealing, and 'crimes that protect fair banking as Rechtsgut', which coincides with what we term here 'prudential offences', examples of which are false supervisory disclosure, carrying out banking activities without an authorisation, etc. S Allegrezza, 'Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies' *eucrim* 4/2020, 302.

[94] Art 8(2) OLAF Regulation.

[95] Art 12a(1) New OLAF Regulation.

It is a devil of a job to ascertain whether Member States' AFCOSs are considered competent. As a rule, 'competent' is a qualifier that is not the result of any such designation by national authorities; rather, it must be deduced from practice and/or the regulation of the transfer of information to and from these authorities. For example, there is no national law that appoints the Dutch AFCOS as the competent authority under OLAF's legal framework. Nevertheless, one can conclude that it is competent in the area of customs, because there is a legal framework in place that allows it to transfer information to OLAF. The situation in Italy is slightly different. There are no provisions in Italian law that regulate transfers from the *Guardia di Finanza* and OLAF. There is, however, an MoU between OLAF and the *Guardia di Finanza*, not available to the public, that sets out obligations with respect to information exchange. An AFCOS is not necessarily competent in all policy areas. The Dutch AFCOS, because it is part of the customs authority, is only competent with respect to this area of law. In the area of structural funds, the Dutch AFCOS refers OLAF to the national authorities in charge of implementing and enforcing structural funds law. Wholly contrary to the Dutch and Italian position, the German and Luxembourgish AFCOSs, to give just two examples, have not been the subject of any regulation whatsoever. Their AFCOSs function as nothing more than letterboxes to help OLAF connect to the authorities that are competent in the respective policy areas in which an OLAF investigation takes place.

But even where an AFCOS is considered competent, the obligation to transfer information – and the types of information to be transferred, the modalities and the timing thereof – exists only in so far as national law allows for such a transfer (at least until the 2020 revision of OLAF's legal framework discussed below).[96] If and, if so, how an AFCOS exchanges information with OLAF is thereby subject entirely to national law. This gives rise to the often-mentioned *géométrie variable*. While Member States are under an EU obligation to establish an AFCOS, the status and competence to exchange information with OLAF differs from Member State to Member State. In section III.A.i we stated that the AFCOS, at the most basic level, is OLAF's first point of contact in each and every Member State.[97] What the AFCOS does beyond that depends on what role Member States have allocated to it. Thus EU law leaves it to national law to decide whether to dub an existing authority an AFCOS or to create an AFCOS anew, to decide in which administrative structures the AFCOS is embedded, and to rule on the competences and powers of the AFCOS. This results in considerable diversity in the roles, profiles, and effectiveness of cooperation and exchange of information between OLAF and the Member States' AFCOSs.[98]

[96] Art 8(2) and (3) OLAF Regulation.

[97] Covolo (n 44) 157; ICF (n 47) 161.

[98] OLAF, *The OLAF Report 2015* (Publications Office of the European Union 2016) 22; Commission, 'Evaluation of the application of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999' (Commission Staff Working Document) SWD (2017) 332 final, 23–24; Commission, 'Assessment: Accompanying the document Proposal for a Regulation amending Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' (Commission Staff Working Document) SWD (2018) 251 final, 10; K Bovend'Eerdt, 'The Commission Proposal Amending the OLAF Regulation' *eucrim* 1/2018, 73, 73; Simonato (n 31) 2; ICF (n 47) 14, 161.

How the level of support changes from Member State to Member State, and even from policy area to policy area (or sometimes both), may be illustrated through two examples. In Germany, for instance, the AFCOS is embedded in the Federal Ministry of Finance, and its function is limited to that of a point of contact to help OLAF to find the national authority with which it wishes to establish cooperation.[99] In the Netherlands, the AFCOS is placed under the customs authority's wing and functions as the competent authority in the area of customs, but not in the area of structural funds. As a result, in customs cases, OLAF cooperates directly with the AFCOS; in cases involving structural funds, the AFCOS refers OLAF to the competent national authority that is charged with the implementation or supervision of the fund in question.[100]

We expected that where an AFCOS is indeed competent, there would be a (specific) basis in national law that would connect to this EU law provision. Nothing is further from the truth. National law is often lacking. The transfer of information from the AFCOS to OLAF is not regulated by Italy, nor was it regulated by the UK. While a legal basis is missing altogether in Italy, the transfer of information in the UK was based on a general statutory gateway provision that applied to all public bodies engaged in the fight against fraud. That does not mean that transfer of information does not take place – it does – but it obscures when and what information may be transferred, under what conditions, the limitations to which such transfer is subject or the modalities of transfer. A notable exception in this regard is the Netherlands. The Dutch AFCOS, which is competent only in the area of customs, deems a national basis for the transfer of information unnecessary when an EU legal basis is at its disposal. The Dutch AFCOS transfers information directly on the basis of EU law,[101] irrespective of national law to the contrary.

In short, the AFCOS offers little in terms of strong institutional embedment or a regulated regime for the transfer of information. Both are delegated largely to the national level. In the 2020 Regulation amending OLAF's legal framework, the AFCOS's organisation and powers remain the competence of each Member State, and there has been no specification of minimum standards in terms of the role and powers of an AFCOS.[102] What did change, however, was the phrasing of the provisions that regulate the bottom-up transfer of information from the AFCOS, or more generally the 'national competent authorities', to OLAF. Whereas the old provision states that the AFCOS, and other competent authorities, must transfer information 'in so far as their national law allows', the new Regulation amends it by providing that transfer must take place 'unless prevented by national law'.[103] This seemingly semantic adjustment can have considerable consequences for the flow of information from the national to the EU level. As demonstrated, most Member States have no legislation in place to regulate the transfer of information to OLAF. In the worst situation, the absence of such bottom-up legislation means that there is no legal basis in national law and, as a result, transfer is not

[99] M Böse and A Schneider, 'Germany' in Simonato, Luchtman and Vervaele (eds) (n 11) 47.
[100] K Bovend'Eerdt, 'The Netherlands' in Simonato, Luchtman and Vervaele (eds) (n 11) 123, 123–24.
[101] Regulation 515/97 to be precise.
[102] ICF (n 47) 14; Commission, 'Proposal for a Regulation of The European Parliament and of The Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' COM (2018) 338 final, 11.
[103] Art 8(2) and (3) New OLAF Regulation.

allowed. The Regulation flips the situation: unless there is a national law or provision that explicitly forbids transfer, the AFCOS – if it is a competent authority – must transfer information to OLAF.

With respect to EU antitrust law enforcement, the EU legal framework regulates the transfer of information from the 27 national competition authorities to DG Competition. According to Article 12 of Regulation 1/2003, ECN authorities are under an obligation to exchange information for the purpose of applying Articles 101 and 102 TFEU. In light of the fact that this provision is laid down in an EU Regulation, in our view, it comprises a sufficient legal basis for bottom-up information transfers. Notwithstanding that view of ours, it is worth noting that various Member States, such as Germany and Luxembourg, Hungary and the Netherlands, 'implement' Article 12(1) of Regulation 1/2003 by designating and authorising the national competition authorities to transfer information to the EU level.[104]

As far as limits imposed by national laws to bottom-up information transfers are concerned, due to the strong institutional embedment of national competition authorities, the only potential limit is that of purpose limitation, as is the case, for instance, with German law.[105] But even where national laws, like the law of Luxembourg, do provide for a purpose limitation, such a purpose limitation may only apply as a limit to the future *use* of information by DG Competition, rather than as a limit on the transfer itself.

In short, we observe that, unlike the OLAF situation, the enforcement of EU antitrust law is premised upon a regulated regime for information transfers and a strong institutional embedment of the 27 national counterparts in the EU legal framework. The national competition authorities and DG Competition form a closed network, without any noteworthy limits being imposed by EU or national laws on bottom-up information transfers.

Concerning the ECB, as already explained (section III.A.i), the ECB's inner-circle national counterparts are the NCAs of the 19 euro area Member States. Similar to the DG Competition situation discussed above, ascertaining the national competent authority of each SSM participating Member State is no hard task. One can see, in the case of the SSM as well, a strong institutional embedment of NCAs, similar to the ECN.

With respect to limits on the transfer of information from NCAs to the ECB, EU law imposes a duty of cooperation in good faith and an obligation of mutual exchanges of information between the ECB and the NCAs, without any specific limits as regards the types of information to be transferred, modalities and timing.[106] Given that this provision is contained in an EU Regulation, it is – in our view – by and of itself a sufficient legal basis for bottom-up information transfers, without a need for further implementation in national law. While certain national legal orders, including the German[107] and the Greek, have indeed not introduced additional national provisions to regulate information transfers from the national to the EU level, other Member States, such as the Netherlands[108] and Luxembourg,[109] have introduced specific national legal bases to

[104] Simonato, Luchtman and Vervaele (n 11) 184.
[105] Böse and Schneider (n 99) 60.
[106] Art 6(2) SSM Regulation.
[107] Simonato, Luchtman and Vervaele (n 11) 190–91.
[108] Dutch Financial Supervision Act (*Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop, Stb* 2006, 475), Art 1:90(8) in combination with Art 1:90(1–3).
[109] V Covolo, 'Luxembourg' in Simonato, Luchtman and Vervaele (eds) (n 11) 117.

facilitate information transfers to the ECB in particular. The Netherlands is quite unique in that it imposes limits on bottom-up transfers.[110] These limits range from a specialty rule[111] to a prohibition on transmissions that are incompatible with Dutch law or public order.[112] We can see that even though the SSM Regulation implies an unconditional obligation on the part of NCAs, to transmit information to the ECB that is relevant for the performance of the latter's supervisory tasks,[113] Dutch law does not embrace such unconditional transfers, which goes as far as to question the compatibility of these national provisions with EU law.[114]

Concerning the point in time at which NCAs transmit information to the EU level, as well as the type of information to be transmitted, neither EU law nor any of the national legal orders covered in earlier studies by Luchtman et al shed additional light.[115] It may thus be concluded that there is no requirement that NCAs may only – for instance – transfer information to the ECB after the latter has launched an investigation. The fact that, from a temporal point of view, information can be transferred at any time ties in with the prudential supervisory mandate of the ECB, which consists mostly of monitoring banks' compliance with the applicable laws. We can also conclude that EU law, that is, the SSM Regulation and Directive CRD IV, have created a closed system consisting of the ECB and the 19 NCAs, characterised by a constant flow of information relevant for prudential supervision. In the second place, all these authorities are bound by a purpose limitation as regards the use of transferred information.[116]

B. Transfer of Information from the Outer-Circle National Authorities to ELEAs

The EU rules on the transfer of information from 'competent authorities' to OLAF also apply to the transfer from other administrative authorities and judicial authorities (ie, the outer circle) to OLAF. These authorities must, like the AFCOS, at OLAF's request or on their own initiative, transmit to OLAF any document or information they hold that relates to an ongoing OLAF investigation. Again, under OLAF's old legal framework, this obligation to transfer information existed only in so far as national law allowed for such a transfer.[117]

First, the role of other administrative authorities is contingent on the role played by the AFCOS and the positioning of the latter in a particular Member State's legal

[110] Bovend'Eerdt (n 100) 147.
[111] Art 1:90(1)(f) Dutch Financial Supervision Act.
[112] Art 1:90(1)(c) Dutch Financial Supervision Act.
[113] Art 6(2) SSM Regulation.
[114] Simonato, Luchtman and Vervaele (n 11) 191.
[115] See, in order: MJJP Luchtman et al, *Investigatory Powers and Procedural Safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (Utrecht University 2017); M Simonato, M Luchtman and J Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF legislative framework through a comparison with other EU authorities (ECN/ESMA/ECB)* (Utrecht University 2018); F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019).
[116] Art 54 Directive CRD IV.
[117] Art 8(2) and (3) OLAF Regulation.

system. In certain Member States, such as Hungary, the AFCOS operates as a central unit, charged with the exchange of all information between national administrative authorities and OLAF. In those instances, other administrative authorities, regardless of their competence in a specific policy area, do not transfer information to OLAF. In other Member States, the Netherlands for instance, the AFCOS is also competent in additional policy areas, such as customs. In those cases, the AFCOS is competent in one policy area but not another, and transfers information to OLAF only with respect to the substantive fields for which it is competent. In yet even other Member States, Germany for instance, the AFCOS is nothing more than a letterbox. In these Member States, it is only the administrative authorities competent in a particular policy area that transfer information to OLAF.[118]

Second, regardless of this contingency, the rules on the transfer of information are the same, irrespective of the authority's qualification as an AFCOS or other administrative authority: information must be transferred only in so far as national law allows. As may be expected by now, the problems we encounter here are similar to those of OLAF's inner-circle authorities. The most pressing problem is that there is often no national law linking the competent administrative authority to OLAF. As a result, there are no legal grounds on the basis of which information can be transferred to OLAF. Again this does not mean that no information is exchanged, but that it may be done on an informal basis, as is the case in Italy, for instance. In other Member States, such as the Netherlands, the transfer of information, in the areas of customs and structural funds, takes place directly on the basis of Union law. In Luxembourg, the fact that Union law refers back to national law results, in the absence of that national law, in loopholes that can hinder the transfer of information to OLAF. In Germany, in the field of customs, it is clear that transfers require a basis in national law, but it is unclear which law could serve as a legal basis.

With respect to judicial authorities, the question of competence, particularly difficult to answer with respect to the AFCOS (and at times also for the other administrative authorities), is of only minor importance. In a criminal investigation it is generally clear-cut which authorities are competent. Nevertheless, the reference to national law requires that, to get a full picture of information flows from judicial authorities to OLAF, we also need to examine connecting national provisions, if any. Here again, the Member States' legal systems are a mixed bag and it is difficult to discern a common thread.

The Hungarian Criminal Code, for example, provides for a national provision that neatly links up to OLAF's legal framework. Article 71/B(2) BE states that 'upon the request of a body established by … Union law,' such as OLAF, 'the court, the prosecutor, the investigating authority or the national member of Eurojust shall provide the respective body with information, access to files and with authentic copies of criminal records to the extent necessary for the performance of its tasks'. Information is transferred to OLAF on request or spontaneously, and is limited to the specific purposes of such requests. It matters not at what point OLAF requires information (pre-, during or post-investigation). In principle all information gathered in criminal proceedings can be transferred to OLAF, and there are no limits imposed by national law that ban the

[118] Simonato, Luchtman and Vervaele (n 11) 174.

transfer from judicial authorities to OLAF or that put in place limitations with respect to the use of the transferred information.

In Luxembourg and Germany, on the other hand, national law does not provide for the requisite legal basis to transfer information to OLAF. In Luxembourg there is no legal basis whatsoever and transfers cannot take place. In German law there is a guideline on the cooperation between judicial authorities and OLAF, but this guideline is not matched by the necessary statutory law. A basis in statute is deemed necessary, because of the interference with fundamental rights – in particular the right to respect for private life – a transfer of (private) information from judicial authorities to OLAF would entail.

Does Regulation 2020/2223 amending OLAF's legal framework address this *géométrie variable*? Again, the new provision states that Member States' competent authorities must transfer information to OLAF 'unless prevented by national law'. While this amendment circumvents situations in which the absence of a legal basis as such prevented the transfer of information – as is the case in structural funds in Germany – it does not render national law obsolete. Where there are limits in national law, it is still within the realm of possibilities that transfer will not take place. This is the case in Luxembourg, for example, in which the secrecy of criminal investigations prohibits national law enforcement and judicial authorities from disclosing information relating to ongoing investigations to persons who are not parties to the criminal proceedings. The variable geometry OLAF faces in its investigations therefore remains, at least partly, intact.

Neither EU nor national legal provisions[119] regulating bottom-up information transfers to DG Competition by administrative authorities other than competition authorities exist. Such transfers do not seem to be taking place informally either. If deemed necessary, DG Competition's national counterparts would likely be the ones transferring information to the EU level.[120]

Concerning outer-circle administrative and civil judicial authorities applying Articles 101 and 102 TFEU, which transfer information to the EU level, we may discern two main trends. First, judicial authorities like the ones in Luxembourg,[121] relying solely on the EU legal provision (Article 15 of Regulation 1/2003). Second, judicial authorities like the ones in Germany and the Netherlands, which rely on national legal bases restating the EU provisions and enabling national courts to transmit to the EU level a copy of judgments deciding on the application of Articles 101 and 102 TFEU.

Rules concerning bottom-up transfers to the ECB by administrative authorities other than the ECB's institutional counterparts, such as financial markets and tax authorities, are not foreseen in the EU legal framework. If we take a look at national laws, we will see that the Netherlands Authority for Financial Markets (AFM) and the Italian Authority for Financial Markets (Consob) may (but not must) transfer information to the ECB;[122] while in Luxembourg, the Central Bank can transfer information to the NCA (*Commission de Surveillance du Secteur Financier*), which may in turn

[119] To be more precise, this statement concerns the jurisdictions that were included in the Hercule II study, ie, the Netherlands, UK, Italy, Hungary, Luxembourg and Germany.

[120] Simonato, Luchtman and Vervaele (n 11) 186.

[121] Covolo (n 109) 116.

[122] Simonato, Luchtman and Vervaele (n 11) 193.

further transmit it to the ECB.[123] In short, the extent to which bottom-up transfers by outer-circle administrative authorities are allowed is an issue that depends solely on national law.

Regarding the issue of information transfers to the ECB by national judicial authorities, even though EU law does recognise the potential links of the SSM with national systems of criminal law enforcement,[124] the general trend that may be discerned is that national laws are generally silent on that issue and not generally aware of the relationship between national criminal law enforcement and SSM prudential supervision. Certain Member States, like the Netherlands and Italy, do not a priori exclude the possibility. However, any potential transfers would need to take place in accordance with ordinary rules of national criminal procedure. And even if transfers from judicial authorities to the ECB were to take place, an overarching observation is that national judicial authorities do not liaise directly with the ECB. Should it be necessary, the transfer of information would take place only indirectly, via the relevant NCA, that is, the institutional partner of the ECB.

V. Synthesis

In this section we consider the ELEA regimes on the exchange of information, their differences and their similarities, and – where possible – try to explain how and why they are different, especially in light of the ELEAs' linkages with criminal justice and the needs that sprout therefrom.

On the basis of our top-down and bottom-up analysis of the rules regulating information transfers in sections III and IV respectively, it is, at this point, clear that – in the enforcement of PIF, EU competition law and EU banking supervision – there exists informational dependence between the ELEAs and the national authorities involved: all authorities, in one way or another, depend on each other for the provision of information. The reason for this informational dependence (ie, why they need to transfer information back and forth) lies in the fact that enforcement in each of these individual areas is composite. The exact composite nature of enforcement in a particular policy area, in turn, is a product of the (circumscribed) mandate and tasks of the EU enforcement authority in question. Therefore, we contend that the differences between the legal frameworks that regulate the transfers to and from OLAF, DG Competition and the ECB can be explained, at least in part, with reference to their (different) individual mandates and tasks. The ELEAs' mandates and tasks, in turn, can also help explain the linkages between the ELEAs and (national) criminal justice, and the way in which information exchange takes – or does not take – place between ELEAs and criminal justice actors.

The subsections following adopt the same approach we have taken thus far in this chapter. In section V.A we explain the differences between the regimes for the transfer of information from ELEAs to national authorities in light of the different tasks and mandates – and thereby their composite nature – of the respective ELEAs.

[123] ibid.
[124] Decision (EU) 2016/1162.

We conduct the same exercise in section V.B, which deals with the transfer of information from national authorities to ELEAs. Both of these sections are divided into further subsections, each of which deal with the exchange of information between ELEAs and inner-circle and outer-circle authorities respectively.

A. Transfer of Information from ELEAs to National Authorities

i. Transfer of Information from ELEAs to the Inner Circle

The need to transfer information to national authorities stems from OLAF's limited set of tasks. OLAF is only an investigatory body. When it wishes to see things done outside the confines of investigation (eg, prosecution, fining, etc) it needs to cooperate with, and transfer information to, national authorities.

OLAF's EU-level legal framework regulates the transfer of information from OLAF to the 'national competent authorities'. This implies first of all that, for the purpose of top-down information transfer, OLAF's legal framework neither distinguishes between OLAF's inner circle (ie, AFCOS) or its outer circle (ie, other administrative and judicial authorities), nor confines itself to a closed circuit of authorities: the OLAF Regulation only refers to 'national competent authorities'. What is said here, therefore, also applies to section V.A.ii on the transfer of information from ELEAs to the administrative and judicial outer circle. This is not a normative judgement, but merely a statement based on our distinction between ELEAs' inner and outer circles drawn up for analytical purposes. Second of all, it is EU law, rather than national law, that determines the timing of transfers, the modalities of transfer, and what information may be transferred to OLAF's inner- and outer-circle/national competent authorities. There is no room for national law in regulating top-down transfers of information; rather, OLAF transfers information on the basis of a uniform EU-based set of rules.

With respect to *which authorities* OLAF transfers information to, the most plausible explanation for OLAF's one-size-fits-all EU approach to top-down information transfer lies in the sheer breadth of its mandate. OLAF's investigations can theoretically concern any area of Union activity, as long as the Union's finances are at stake. Moreover, unlike the ECB, the subject of its investigations can be any natural or legal person on which national law has conferred legal capacity.[125] The activities OLAF investigates can be criminal and/or administrative in nature. As a result, OLAF's mandate explains why OLAF's legal framework does not have in a place a specific network of institutional partners but relies on the more open-ended term 'competent authorities of the Member States'.

With respect to *what* information OLAF can transfer (ie, the scope *ratione materiae*), OLAF's legal framework poses no real obstacles: OLAF can transfer almost all information as long as it is obtained 'in the course of external investigations'.[126]

[125] Regulation (EC, Euratom) 2988/95 on the protection of the European Communities financial interests [1995] OJ L312/1, Art 7.

[126] Art 12(1) OLAF Regulation.

The motive for this no-holds-barred approach lies in the many purposes an OLAF investigation may serve, none of which is necessarily known at the onset of an investigation. It is possible that an investigation will result in the recovery of irregularly spent money out of the Union's ERDF; it is equally possible that in that same case – or another – OLAF transfers information for the purpose of a criminal prosecution in relation to fraudulently tinkering with time sheets. In short, the punitive (administrative or criminal) or non-punitive purpose that the information obtained by OLAF may serve is not always a known variable, while it always remains a possibility. OLAF, since it is only an investigatory body, exercises little control over what happens with its information once transferred. The avenues for follow-up to OLAF's work are plenty. The needs of all these avenues – be they punitive or non-punitive – differ wildly. Hence, the scope of information OLAF must be able to transfer is very broad and subject to no real substantive legal limits. It is clear that, also and especially here, the criminal law dimension of OLAF's work is evident.

All in all, from the 'transfer' side, OLAF's legal framework imposes no substantial limits. As established, OLAF may transfer information gathered during its on-the-spot checks and that falls within the ambit of professional secrecy to Member State authorities whose functions 'require them to know it'.[127] Because of the eventual purpose of OLAF investigations, which Member State authorities are 'required to know' is not confining in the least. OLAF's legal framework seems to recognise the risks inherent in such a system and imposes restrictions not on OLAF's regime of *information transfer*, but on the Member States that wish to *use this information* for a purpose other than for which it was obtained. Not only are they bound to treat the information received from OLAF in the same way as similar information protected by the national legislation, but, more importantly, when a Member State – whose officials took part in an OLAF check – wish to use information received from OLAF for a purpose other than that for which it was obtained, it must get permission from the Member State where the check took place. As said, this EU-imposed purpose limitation is not an outright ban and applies only in very exceptional cases. With respect to information that is not gathered by OLAF in the context of on-the-spot checks, OLAF's legal framework poses no limits on the use thereof by national authorities whatsoever. Again, we wish to state, at the risk of repeating ourselves, that this is understandable in light of the open-ended purpose that OLAF investigations, and the information obtained and transferred therein, can potentially serve. Having said that, it is problematic that once information is in the hands of OLAF, the origins of this information and the means and purpose by and for which it has been obtained are concealed. OLAF's legal framework in a way, then, can operate as a 'clearing house' in the sense that it imposes few to no limits on how, for instance, information gathered and transferred to OLAF by one Member State for a particular (non-punitive) purpose can be used in another Member State for a different (punitive) purpose, thereby circumventing – often national – safeguards that aim to prevent such abuse.

With respect to *when* OLAF can transfer information (ie, the scope *ratione temporis*), OLAF's top-down regime of information transfer equally imposes few to no limitations.

[127] ibid, in combination with Art 8(1) Council Regulation (Euratom, EC) 2185/96. The OLAF investigator's duty of confidentiality stems from Art 17 Regulation 31 (EEC), 11 (EAEC), and Art 339 TFEU.

OLAF can transfer information prior to, during or after its investigation, as long as the information in question was obtained 'in the course of external investigations' (without specifying any investigation in particular). The absence of any temporal limits lies in the non-exclusive task OLAF fulfils. National investigations (again, punitive or non-punitive in nature) and prosecutions can run prior to, in parallel with or consecutive to an OLAF investigation. Considering that these investigations are not always connected, in the sense that they are aware of each other, let alone that they are coordinated, for OLAF's fight against fraud to pack any punch at all in this loose-knit constellation of PIF-protectors, it is indispensable that OLAF can transfer information without any limits regarding the time.

With respect to *how* OLAF transfers information, OLAF enjoys a great deal of discretion. Its horizontal legal framework merely states that OLAF 'may' (not must!) transfer information, without thereby specifying precisely how this is to be done. In theory OLAF can therefore transfer information through shared databases, spontaneously or on request. In reality, how OLAF transfers information is often dictated in sectoral legislation (not discussed in this chapter). Without going into detail, we can say that each policy area has in place its own modalities reflecting the various sectoral needs of the actors operating therein. OLAF's horizontal legal framework seems to recognise this and captures all possible modalities through refrainment: it says very little, aside from the fact that OLAF 'may' transfer information, thereby keeping open all doors for sectoral legislation to fill in exactly how OLAF is to transfer information in each policy area in particular. Again, our explanation for this is the scope of OLAF's mandate. There are many fields in which OLAF is to act, and (at least) an equal number of authorities with which it must cooperate and to which it must transfer information. It would be unworkable to pour all of this into one and the same mould of transfer modalities.

With respect to the system of EU antitrust law enforcement, the need for information transfers from DG Competition to national competition authorities stems from the fact that enforcement of EU antitrust law is based on a system of parallel competences: both DG Competition and national competition authorities are competent to enforce EU antitrust rules.[128] When a case has been allocated to a single national competition authority or to several national competition authorities acting in parallel,[129] DG Competition may need to cooperate and transfer information to those national competition authorities.

The EU-level legal framework regulates the transfer of information from DG Competition to the national competition authorities. It explicitly foresees that the Directorate and national competition authorities have the power to provide one another 'with any matter of fact or of law, including confidential information'.[130] Therefore, the EU-level legal framework clearly foresees a closed circle of authorities within which information can be exchanged. Furthermore, EU law dictates the modalities of transfer and what information may be transferred between the ECN authorities. There is no room for national law in the regulation of top-down information transfers.

[128] Arts 4 and 5 Regulation 1/2003.
[129] ECN Notice (n 38), para 5.
[130] Art 12(1) Regulation 1/2003.

With respect to *which authorities* DG Competition transfers information to, the EU-level legal framework foresees almost unconditional transfers to the national competition authorities. The most plausible explanation lies in the fact that the national authorities potentially able to enforce EU antitrust rules are the 27 national competition authorities.[131] Furthermore, the activities DG Competition investigates are clear at the outset: anticompetitive agreements and abuses of a dominant position. As a result, DG Competition's mandate explains why the EU-level legal framework lays down a specific network of institutional partners. This is in sharp contrast with OLAF, whose investigations can theoretically concern a broad range of Union activities and therefore whose potential national counterparts can vary.

With respect to *what information* DG Competition can transfer, again, the EU-level legal framework poses no real obstacles: DG Competition can transfer all information, namely documents, statements and digital information,[132] the only limit being that information should be transferred for the purpose of applying Articles 101 and 102 TFEU.[133] However, the latter limit ties in well with the fact that ECN investigations serve a very specific purpose, that is, the enforcement of EU antitrust rules.

With respect to *when* DG Competition transfers information, the EU-level legal framework poses no limitations. The absence of temporal limits can be justified by the fact that ECN authorities have at their disposal all enforcement powers, that is, monitoring, investigating and sanctioning. The transferred information may thus be utilised – by the national competition authorities – at any time in the enforcement process.

Concerning the system of banking supervision, the fact that the ECB may need to transfer information to NCAs stems from the fact that enforcement of prudential banking supervision law is shared between the ECB and the NCAs. For instance, often the ECB does not have direct sanctioning powers and may thus need to request the opening of sanctioning proceedings from the competent NCA.[134] Logically, that also presupposes transfers of evidence.

The EU-level legal framework regulates the transfer of information from the ECB to the NCAs. It is explicitly foreseen that the ECB and the NCAs are under an obligation to exchange information.[135] Similarly to DG Competition and unlike the OLAF legal framework, the ECB EU-level legal framework clearly foresees a closed circle of authorities within which information can be exchanged. Furthermore, EU law dictates the modalities of transfer and what information may be transferred between the SSM authorities. There is no room for national law in the regulation of top-down transfers information transfers.

That the ECB often needs to transfer information to the NCAs can be justified by the fact that the NCAs actively assist the ECB in that day-to-day implementation of the latter's exclusive tasks under the SSM Regulation.[136] In other words, while an exclusive

[131] Commission, 'National Competition Authorities' available at https://ec.europa.eu/competition-policy/antitrust/national-competition-authorities_en (accessed 24 February 2022).
[132] ECN Notice, para 26.
[133] ibid para 25.
[134] Art 18(5) SSM Regulation.
[135] Art 6(2) SSM Regulation; Art 21 SSM Framework Regulation.
[136] *Landeskreditbank Baden-Württemberg* (n 41) para 49.

competence has been vested in the ECB, at the same time the EU legislator also took into account the long-lasting experience of national supervisory authorities in supervising the credit institutions established within their jurisdiction. That explains why the SSM Regulation has in place a specific network of institutional partners, consisting of the ECB and the NCAs of the euro area Member States, and why the ECB, even though it does have extensive information-gathering powers, often needs the assistance of NCAs for the execution of its mandate.

With respect to what information the ECB can transfer, the EU-level legal framework poses no notable obstacles. The ECB can transfer any information. Limitations apply only to the use of the information transferred.[137]

With respect to when and how the ECB transfers information, given that the EU-level legal framework does not pose any limitations, the ECB can transfer information at any time during the enforcement process. The absence of any temporal limits lies in that NCAs' assistance to the ECB is not limited to a particular enforcement stage. To the contrary, the NCAs assist the ECB in the monitoring, in the investigating and in the sanctioning stages of law enforcement, hence information can be transferred at any point in time. The ECB mostly transfers information through shared databases, but it may also be the case that the ECB transfers information spontaneously[138] or at the NCAs' request.[139]

ii. Transfer of Information from ELEAs to the Outer Circle

As follows from the foregoing analysis, only the EU-level legal frameworks of DG Competition and of the ECB foresee the transfer of information from the EU authority to 'outer-circle' administrative and judicial authorities.

With respect to the system of antitrust law enforcement, the need for information transfers from DG Competition to national judicial authorities stems from the fact that national courts have the power to apply Articles 101 and 102 TFEU.[140] A logical corollary of that is that DG Competition may often need to transfer relevant information that is in its possession.[141]

As to the type of information that may be transferred to national courts, this mostly relates to written and oral observations. While written observation may also be submitted on the Commission's initiative,[142] oral observations may only be submitted if the national court so permits or requires.[143] The Cooperation Notice explains that national courts may request from the EU Commission documents or information of a procedural nature, which may help them determine whether a case is already pending

[137] See, for instance, Art 54 Directive CRD IV.
[138] See, for instance, Arts 92 and 139(3) SSM Framework Regulation.
[139] See, for instance, Art 134(2) SSM Framework Regulation.
[140] Art 6 Regulation 1/2003; see also, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 ('Directive ECN+'), Art 30(1).
[141] Art 15(1) Regulation 1/2003.
[142] Art 15(3) Regulation 1/2003; Cooperation Notice (n 79) para 31.
[143] Art 15(3) Regulation 1/2003; Cooperation Notice (n 79) para 31.

before the Commission. Furthermore, the Commission may – at the national court's request – give its non-binding opinion on economic, factual and legal matters.[144]

The EU-level legal framework does not specify when DG Competition can transfer information to national courts. However, from the foregoing it may be deduced that – from a temporal point of view – the Commission/DG Competition would transfer necessary information to national courts at the point in time in which a case is pending before a national court. Of course, that is a rather broad timeline; it covers any moment, ranging from the investigative stage to the sanctioning stage.

All in all, we can see that DG Competition can transfer a wide range of information to national courts, while it may also participate as *amicus curiae* in national court proceedings for the enforcement of EU antitrust law. The only limit set by EU law is that national courts must use the transferred information for the purpose for which it was acquired (purpose limitation).[145] The fact that EU law does not set any significant limits on the transfer of information from DG Competition to national courts is certainly justifiable; national courts have a clear role to play in the enforcement of EU law. In turn, this necessitates unconstrained access to any information at the Commission's disposal and that can serve the purpose of effective EU competition law enforcement by the national courts.

Concerning the system of banking supervision, the need for information transfers from the ECB to national judicial authorities stems from the fact that certain Member States impose criminal law sanctions for violations of prudential requirements.[146] Given that the ECB oversees credit institutions' compliance with the same rules, it is not inconceivable that often, national judicial authorities may receive information obtained by the ECB in the course of its supervisory mandate.

The EU-level legal framework does not specify which national judicial authorities may receive information in the ECB's possession. Article 136 of the SSM Regulation merely refers to 'appropriate' authorities. At the same time, ECB Decision 2016/1162 explains that confidential information may be transferred to 'national criminal investigation authorities', meaning national authorities with competence in criminal law matters.[147] As can be seen, the EU-level legal framework leaves the determination of the receiving authority to national law.

Concerning the question of what information may be transferred by the ECB to the aforementioned national judicial authorities, the SSM Regulation refers to 'evidence of facts potentially giving rise to a criminal offence'. Decision 2016/1162 refers to 'confidential information', meaning information covered by data protection and professional secrecy rules, and to documents that, under the ECB's confidentiality regime, have been classified as 'ECB-CONFIDENTIAL' or 'ECB-SECRET'.[148] The EU-level legal framework does not set any temporal limits on when the ECB may transfer such information to national judicial authorities. We may therefore conclude that the ECB has discretion in determining when it will proceed with such information transfers. Lastly, it is worth

[144] Cooperation Notice (n 79) paras 28 and 29.
[145] Art 28(1) Regulation 1/2003.
[146] Art 65 Directive CRD IV.
[147] Art 1(b) Decision EU/2016/1162.
[148] Art 1(a) Decision EU/2016/1162.

noting that the EU-level legal framework does not specify any modalities regarding how the aforementioned information is to be transferred. However, given that information transfers from the ECB to national judicial authorities always take place via the NCAs,[149] we are of the opinion that the ECB's IT tool for the management of documents and records, to which both the ECB and the NCAs have access, is most likely the platform through which such information transfers take place.

Finally, it is worth noting that, as already mentioned in section III.B, EU law, and more specifically Decision 2016/1162, does impose certain conditions on the transfer of information by the ECB to national judicial authorities. For example, information may be transferred as long as there is no other overriding reason for refusing to disclose such information 'relating to the need to safeguard the interests of the Union'.[150] In our view, that EU law imposes such limits can be attributed to the fact that the national judicial authorities are not institutionally embedded in the SSM. Unlike the system of EU competition law enforcement and Regulation 1/2003, which explicitly specifies the role of national courts in the enforcement of EU competition law (Articles 6 and 15), in the case of banking supervision, national judicial authorities are not institutionally linked to the ECB. As a corollary, unlike the field of EU competition law enforcement, in the field of banking supervision, EU law does not foresee unconditional information transfers to national judicial authorities.

B. Transfer of Information from National Authorities to ELEAs

We have already stated a number of times throughout this chapter that OLAF's tasks are limited: it is only an investigatory body. This statutory restriction explains why OLAF needs information from national authorities prior to, during and after its investigations. OLAF's broad mandate then explains why its legal framework, unlike those of the ECB or DG Competition, which operate within regulated, tight-knit and relatively uniform networks of single national authorities (ie, the national supervisors and the national competition authorities respectively), only regulates the bottom-up transfer from 'national competent authorities' to OLAF. This reasoning applies not only to the top-down transfer of information, but also, here, to the bottom-up transfer of information. Precisely because OLAF can investigate in areas ranging from structural funds to customs and from the common agricultural policy to VAT, OLAF's legal framework needs to apply to different administrative and judicial authorities in every policy area where PIF is at stake. Given that, furthermore, there are different authorities in each and every one of the 27 Member States, the sheer number of authorities with which OLAF must cooperate increases exponentially. To try to capture all the authorities, fragmented across both policy and Member State lines, on which OLAF can possibly depend for the provision of information, its legal framework must resort – almost by necessity it seems – to the rather hollow or empty-sounding term 'national competent authority'.

[149] Art 2 Decision EU/2016/1162; Art 136 SSM Framework Regulation.
[150] Art 2(1) Decision EU/2016/1162.

Considering the above, it may come as no surprise that OLAF's legal framework on the bottom-up transfer of information does not distinguish between an inner or an outer circle: it refers only to 'national competent authorities'. Hence what is said here, in this section on the transfer of information from the inner circle to ELEAs, also applies mutatis mutandis to bottom-up transfers originating from the outer circle. OLAF's legal framework brought the AFCOS into existence to help deal with the plethora of national authorities in and across policy areas and Member States: EU law obliges Member States to establish an AFCOS. However, to say that, as a result of this obligation, Union law created an OLAF inner circle in the same way as DG Competition or the ECB would be a gross misrepresentation. OLAF's legal framework states that the AFCOS is 'to facilitate effective cooperation and exchange information with the office', but it says nothing with respect to the AFCOS's architecture, powers or general functioning.[151] This is left entirely to national law. For the purpose of the transfer of information to OLAF, the AFCOS 'may' be considered a national competent authority, thereby demonstrating that, exactly, OLAF's legal framework does not differentiate between inner-circle or outer-circle authorities. In many instances, the institution of the AFCOS, though noble in its intentions, added just another layer of authorities of which OLAF must take cognisance when exchanging information. This is different in those Member States in which the AFCOS was installed as a central unit through which all information coming from national (administrative) authorities must pass before being transmitted to OLAF.

OLAF's legal framework (i) neither determines whether a Member State' s AFCOS must be considered a 'national competent authority', (ii) nor does it determine when a national authority is to be qualified as 'competent' for the purpose of bottom-up information transfers. One would expect that, in the absence of an EU qualifier of sorts, national law would step in and offer designations of 'competence' under national law and would (clearly) appoint the state's AFCOS as the competent authority. This, as demonstrated in section III.A.i, is hardly ever the case. National law does not reach upwards to connect to OLAF's legal framework by appointing particular authorities. We think part of the issue lies in the fact that the use of the 'competent authority' runs the risk of conflating two different but interrelated terms. Whether an authority is competent to act in and enforce a particular policy area is usually determined by national law.[152] However, that designation of competence does not also automatically render that authority competent to transfer information to OLAF. The general competence to enforce ought not to be confused with the more specific competence to transfer information, which national law often fails to confer on national authorities competent to act in a particular policy area. Based on our analysis, it seems that national law is not cognisant of or fails to recognise the EU/OLAF dimension that many of its authorities have or can have. As a result, it is extremely difficult, especially for an outsider, to establish which national authorities transfer information to OLAF. The new Regulation (EU, Euratom) 2020/2223 does little

[151] Art 12a(1) New OLAF Regulation.

[152] For example, Dutch legislation appoints the *Autoriteit Consument en Markt* as competent competition authority for the purpose of EU competition law enforcement. See Art 88 *Mededingingswet*. Likewise, the 'inspector' (*inspecteur*) is the competent authority for the purpose of the application of EU customs law in the Netherlands. See *Algemene douanewet*, art 1:3(c).

to clarify matters with respect to the question 'which authorities transfer information to OLAF'. Under the new Regulation, the designation of national authorities, including the AFCOS, as 'competent' remains within Member States' procedural autonomy. All the while, from the national level, we have thus far not witnessed any significant change.

Consequently, similar difficulties – that can also be traced back to OLAF's mandate – arise when considering the types of information and the purpose for which they may be transferred; the enforcement phase in which transfer to OLAF takes place; and the modalities national authorities use when transferring information. Under OLAF's old legal framework, EU law offered little clarification with respect to the above-mentioned three factors. Instead, national competent authorities had to transfer information to OLAF, at OLAF's request or on their own initiative, in so far as national law allowed. Prior to OLAF's new legal framework, which we get back to in a bit, the 'what, when, and how' of bottom-up information transfers was entirely subject to national law; national law that, in turn, often did not reach up and connect to OLAF's legal framework, resulting in, amongst other things, transfers of information without a legal basis in national law.[153]

Are these issues resolved by the amendments made by Regulation (EU, Euratom) 2020/2223? We think the answer is yes, but with a number of important caveats. Under the new Regulation, national competent authorities must transfer 'unless prevented by national law'. This turns the rules on the transfer of information upside-down and reduces the role allocated to national law, from allowing information transfers when such allowance is given by national law to only preventing information transfers where national law poses an obstacle. Surely the amendment allows for bottom-up transfers of information considered impossible before – for reasons of a lack of a legal basis or otherwise – but the legislative adjustment side-steps the real issue, which is that national law does not reach up and connect to OLAF's legal framework. Regulation (EU, Euratom) 2020/2223 thereby brushes over the fact that, in terms of scoping, bottom-up transfers of information need national law for guidance and direction.

Unlike OLAF, DG Competition and the ECB operate within uniform networks of single national authorities (the ECN and the SSM respectively). That is why, in our opinion, the EU-level legal frameworks make reference to the different authorities' 'obligation to exchange information', rather than one-way information transfers. In other words, the EU-level legal framework not only regulates top-down information transfers, but – by introducing mutual obligations to exchange information – essentially also regulates bottom-up information transfers. Unlike the OLAF legal framework, Regulation 1/2003 and the SSM Regulation capture all the inner-circle national authorities that can potentially transfer information to DG Competition and the ECB respectively.

Considering the above, one would expect that, owing to the fact that – in the case of DG Competition and ECB – EU Regulations lay down a mutual obligation for exchanges of information, there would no longer be room for national law to regulate bottom-up transfers. While this generally holds true and the majority of the national legal orders studied in the second Hercule project do not provide for additional legal

[153] Though, it should be said, some Member States circumvented this pitfall by simply transferring information on the basis of European law. See for instance Bovend'Eerdt (n 100) 124–25.

bases in national law, it is worth referring to the Netherlands as an example of a Member State that – notwithstanding the explicit provision in the SSM Regulation – imposes certain limits on unconditional information transfers. According to the Dutch Financial Supervision Act (*Wet op het financieel toezicht*),[154] the Dutch Central Bank – the national supervisory authority – may only transfer confidential information to other supervisory authorities – thus to the ECB too – if, amongst other things, the provision of such confidential data or information is not incompatible with Dutch law or public order.[155] The compatibility of that provision with EU law is, in our view, debatable.

To sum up, unlike OLAF's legal framework, which – as already discussed – obliges the AFCOS to transfer information to the EU level 'unless prevented by national law', the EU-level legal frameworks of DG Competition and the ECB make it clear that national competition authorities and NCAs respectively are obliged to transfer information to their EU partners, and there is, at least in principle, no room for contradicting national law.

VI. Conclusion

To conclude, due to the composite system of enforcement in the respective fields in which OLAF, DG Competition and the ECB operate, EU and national authorities depend, in some way, on one another for the provision of information to ensure effective enforcement.

Our first overarching conclusion is that the ECB and DG Competition operate in a closed-circuit type of network, meaning that they cooperate with specific national counterparts, with whom they exchange information almost unconditionally: as long as the information is exchanged and used for the purposes that fall under the relevant authorities' mandates, there are no noticeable limits. On the other hand, OLAF, because of its broad mandate, cannot depend on a tight-knit network of national authorities with which to exchange information. While top-down there are no substantial limits that restrict OLAF's transfer of information, bottom-up, national law can prevent transfers – or in any case certain transfers – from taking place.

From a bottom-up perspective, we may conclude that when it comes to DG Competition and to the ECB, the respective EU Regulations seem – in principle – to form a sufficient legal basis for bottom-up transfers. On the other hand, OLAF's legal framework struggles in making EU law a basis for information transfer: national competent authorities must transfer information to OLAF 'unless prevented by national law'. While the phrasing under OLAF's legal framework circumvents earlier problems, in which the absence of a legal basis in national law prevented transfers from taking place, bottom-up transfers of information still need national law for guidance and direction.

Lastly, in line with the overarching topic of this book, and the question of whether the EU authorities' frameworks recognise the needs of criminal justice *sensu strictu*, we arrive at the following conclusions. OLAF's legal framework definitely recognises this

[154] Art 1:90(1) Dutch Financial Supervision Act.
[155] Art 1:90(1)(c) Dutch Financial Supervision Act.

dimension of its work. This features prominently in its mandate, which encompasses both criminal and non-criminal activity that affects the Union's financial interests. With respect to the exchange of information, this is reflected in the undifferentiated use of the term 'national competent authorities', which is to include authorities active in both the punitive field (administrative authorities that impose punitive administrative penalties and judicial authorities) and the non-punitive field. Besides Article 12(3) of Regulation 1/2003, which stipulates that the receiving authority may not use the received information for the imposition of custodial sanctions, the legal framework of DG Competition does not clearly foresee the links that exist with criminal justice *sensu stricto*. On the other hand, the ECB EU-level legal framework does foresee such interactions, in the sense that the need for information *transfers* from the ECB to national judicial authorities is recognised and regulated. To what extent the ECB EU-level legal framework sufficiently deals with the *use* of ECB information as evidence for the imposition of *sensu stricto* criminal sanctions at the national level is, however, questionable at the moment.[156]

[156] Karagianni (n 42).