Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings

Fabio Giuffrida and Katalin Ligeti (eds.)

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Prof. Peter Alldridge
Prof. Martin Böse
Koen Bovend'Eerdt
Prof. Michele Caianiello
Dr. András Csúri
Aart de Vries
Prof. Ton Duijkersloot
Fabio Giuffrida
Argyro Karagianni
Dr. Giulia Lasagni
Prof. Katalin Ligeti
Prof. Michiel Luchtman
Prof. Anne Schneider
Prof. Juliette Tricot
Prof. John Vervaele
Prof. Rob Widdershoven

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University of Luxembourg

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LIST OF ABBREVIATIONS AND ACRONYMS

AC	Appeal cases
ACPR	Autorité de contrôle prudentiel et de résolution (French Prudential Supervision and Resolution Authority)
ADCRIM	'Admissibility of OLAF final reports as evidence in criminal proceedings' (name of the present project)
ADLC	Autorité de la concurrence (French Competition Authority)
AFCOS	Anti-Fraud Coordination Service
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AIDP	Association Internationale de Droit Pénal
AMF	Autorité des marchés financiers (French Financial Market Authority)
AMR	Avis de mise en recouvrement (notice of recovery)
AO	Abgabenordnung (Fiscal Code)
APA	Hungarian Act on Administrative Procedure
AW-Prax	*Außenwirtschafts-Praxis*
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht (German Federal Financial Supervisory Authority)
BB	*Betriebsberater*
BFH	Bundesfinanzhof (Federal Fiscal Court, Germany)
BGHSt	Bundesgerichtshof (German Federal Court of Justice)
BKartA	Bundeskartellamt (German Competition Authority)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
CCP (or CPP)	Code of Criminal Procedure (or Code of Penal Procedure)
CEPS	Centre for European Policy Studies
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMF	Code monétaire et financier (French Monetary and Financial Code)

COM	Communication
CONT	Committee on Budgetary Control (European Parliament)
CRD IV	Capital Requirements Directive (Directive 2013/36/EU)
CRvB	Centrale Raad van Beroep (Central Appellate Court, the Netherlands)
CSSF	Commission de Surveillance du Secteur Financier (Luxembourgish Financial Sector Supervisory Commission)
DAR	*Deutsches Autorecht*
DCPJ	Direction centrale de la Police judiciaire (French Central Directorate of the Judicial Police)
DDHC	Déclaration des droits de l'homme et du citoyen de 1789 (Declaration of the Rights of the Man and of the Citizen of 1789)
DE	Germany
DG COMP	European Commission's Directorate General for Competition
EAEC (Euratom)	European Atomic Energy Community
EAW	European Arrest Warrant
EC	European Community
ECA	European Court of Auditors
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECtHR	European Court of Human Rights
EDP	European Delegated Prosecutor
EIO	European Investigation Order
ELEA	European law enforcement authorities
ELI	European Law Institute
EPPO	European Public Prosecutor's Office
ERA	Academy of European Law
ESMA	European Security and Market Authority
EU	European Union
Eurojust	European Union Agency for Criminal Justice Cooperation

Europol	European Union Agency for Law Enforcement Cooperation
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*
EWCA (Civ)	England and Wales Court of Appeal (Civil division)
FG	Finanzgericht (Fiscal Court, Germany)
FIOD	Fiscale inlichtingen- en opsporingsdienst (Fiscal Information and Investigation Service, the Netherlands)
FR	France
GALA	Dutch General Administrative Law Act (Algemene wet bestuursrecht or Awb)
GG	Grundgesetz (German Basic Law)
GVG	Gerichtsverfassungsgesetz (German Courts Constitution Act)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Act against Restraints of Competition)
HMRC	Her Majesty's Revenue and Customs
HR	Hoge Raad (Supreme Court of the Netherlands)
HU	Hungary
IBOA	Institution, body, office or agency
IT	Italy
JA	*Juristische Arbeitsblätter*
JHA	Justice and Home Affairs
JLD	Juge des libertés et de la détention (French Liberty and Custody Judge)
KWG	Kreditwesengesetz (German Banking Act)
LPP	Legal professional privilege
LU	Luxembourg
MS	Member State
NCA	National competition authorities (but also national competent authorities for ECB-related matters)
NJOZ	*Neue Juristische Online-Zeitschrift*
NJW	*Neue Juristische Wochenschrift*
NL	The Netherlands
NZV	*Neue Zeitschrift für Verkehrsrecht*

OJ	Official Journal of the European Union
OLAF	European Anti-Fraud Office
OLG	Oberlandesgericht (Higher Regional Court, Germany)
OM	Openbaar Ministerie (Dutch Public Prosecutor's Office)
OSCOLA	Oxford Standard for the Citation Of Legal Authorities
OTC	Over-the-counter
OWiG	Ordnungswidrigkeitengesetz (German Act on Regulatory Offences)
PIF	Protection des intérêts financiers
PPU	Urgent preliminary ruling procedure
QB	Queen's Bench
QPC	Question prioritaire de constitutionnalité
RENFORCE	Utrecht Centre for Regulation and Enforcement in Europe
SEC	Staff Working Documents (prior to 2012)
SSM (FR)	Single Supervisory Mechanism (Framework Regulation)
StGB	Strafgesetzbuch (German Criminal Code)
StPO	Strafprozessordnung (German Code of Criminal Procedure)
SWD	Staff Working Document
TEC	Treaty of the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TUB	Testo Unico Bancario (Italian Banking Act)
TUF	Testo unico delle disposizioni in materia di intermediazione finanziaria (Italian Financial Intermediation Act)
UCLAF	Unité de coordination de la lutte anti-fraude
UK	The United Kingdom
UKFTT (TC)	United Kingdom First-tier Tribunal (Tax Chamber)
UKHL	United Kingdom House of Lords
USA	United States of America
VAT	Value Added Tax
VwVfG	Verwaltungsverfahrensgesetz (German Act on Administrative Proceedings)

WpHG	Wertpapierhandelsgesetz (German Securities Trading Act)
ZollVG	Zollverwaltungsgesetz (German Customs Administration Law)

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1. INTRODUCTION

F. Giuffrida and K. Ligeti

1. BACKGROUND

The European Anti-Fraud Office (OLAF) is a main actor in the domain of the protection of the Union's financial interests (PIF).[1] Among other tasks, OLAF carries out administrative investigations on matters affecting the Union budget either within EU institutions, bodies, offices and agencies ('internal investigations') or in the Member States and third countries ('external investigations'). At the end of its investigations, OLAF draws up a report in accordance with the rules laid down in Article 11 of Regulation 883/2013.[2] The admissibility of such reports as evidence in national proceedings, especially criminal ones, is crucial for the effective protection of EU financial interests. According to Article 11(2) of Regulation 883/2013, OLAF final reports shall constitute admissible evidence in national administrative or judicial proceedings 'in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors'.[3] OLAF reports shall also be subject to the same evaluation rules as those applicable to national administrative reports and shall have the same evidentiary value as such reports.[4] Like Article 8(3) of Regulation 2185/96 on reports drafted at the end of OLAF on-the-spot checks and inspections,[5] Article 11(2) of the OLAF Regulation enshrines therefore an *assimilation* rule: OLAF final reports shall be treated in the same way as national reports by administrative inspectors.

Such an assimilation rule, however, poses problems. First, it can apply only if there is, at the national level, an administrative authority with a mandate and powers that can be considered 'equivalent' to those of OLAF. Finding such an 'equivalent' authority may not always be a straightforward task. Second, national rules and practices on the admissibility of administrative reports in criminal proceedings vary across Member States, in this way hampering a coherent judicial follow-up to OLAF investigations conducted in them. Third, national judicial authorities, once they have received OLAF reports, sometimes end up repeating the investigative activities already performed by the

[1] PIF stands for '*protection des intérêts financiers*'.
[2] 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) [2013] OJ L 248/1 (hereinafter also 'OLAF Regulation').
[3] Art 11(2) of Regulation 883/2013.
[4] ibid.
[5] Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 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 L 292/2.

Office in order to obtain admissible evidence. The duplication of investigative activities is nonetheless contentious from different perspectives. It violates the principle of procedural economy, as human and technical resources are deployed twice to obtain the same result. It prolongs the elapsed time since the commission of the alleged crimes, with the consequence that there are higher risks of their becoming statute-barred before any decision on the merits can be taken. At the same time, persons under OLAF investigation would undergo the ordeal of an investigation for a second time. Finally, the element of surprise that is needed for some investigative activities – eg, inspections and searches – is lost when suspects are already aware of investigations concerning them.[6]

Already in 2011, the Commission noted that the 'results of EU administrative investigations frequently remain unused by national criminal courts'.[7] According to an OLAF study of Member States' follow-up to OLAF's judicial recommendations issued between 1 January 2008 and 31 December 2015, 169 out of 317 recommendations were dismissed, 94 of them on grounds of 'insufficient evidence'.[8] OLAF reported that Member States' authorities repeatedly take the view that Article 11(2) of Regulation 883/2013 'is not always a sufficient legal basis to allow Member States' judicial authorities to use OLAF reports as evidence in trial',[9] so that national authorities often 'perform investigation activities again in order to acquire admissible evidence'.[10]

As the Commission acknowledged in May 2018 when tabling the proposal for an amendment of Regulation 883/2013, the recent OLAF Regulation's evaluation revealed that the rules on the admissibility of OLAF-collected evidence in national judicial proceedings turned out to be 'the most important factor affecting the follow-up to OLAF recommendations'.[11] The Commission thus suggests abolishing the assimilation clause for national administrative proceedings, as well as 'judicial proceedings of a non-criminal nature before national courts'.[12] In these cases, the admissibility of OLAF reports would be subject only to the simple verification of their authenticity. Nothing would change, however, for criminal proceedings. In April 2019, the European Parliament instead suggested that the assimilation principle should no longer apply to criminal proceedings either and that OLAF reports should 'constitute admissible evidence in judicial proceedings',[13] including criminal ones, upon simple verification of their authenticity.

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[6] Katalin Ligeti, 'The Protection of the Procedural Rights of Persons Concerned by OLAF Administrative Investigations and the Admissibility of OLAF Final Reports as Criminal Evidence' (Study for the European Parliament's Committee on Budgetary Control 2017) 27–28.

[7] Commission, 'On the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money' COM(2011) 293 final, 26 May 2011, 8.

[8] OLAF, 'Analysis on Member States Follow-Up to OLAF's Judicial Recommendations Issued between 1 January 2008 and 31 December 2015', Ref Ares(2017)461597 – 27/01/2017 (2017) 1.

[9] ibid 2.

[10] ibid.

[11] Commission, 'Proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' COM(2018) 338 final, 23 May 2018, 5.

[12] ibid, Art 1(10)(b).

[13] European Parliament, 'Legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning

The fate of this proposed amendment is uncertain at the time of writing. In addition, it is not even clear whether a rule such as that envisaged by the Parliament would truly change the status quo, as it would apply in a context where there is no harmonisation of national rules on national criminal proceedings.

The admissibility of OLAF final reports in criminal proceedings, therefore, will arguably remain problematic in the future, and not even the establishment of the European Public Prosecutor's Office (EPPO)[14] will alleviate all concerns about the coherence and effectiveness of PIF enforcement. OLAF will still be able to conduct investigations entailing a potential criminal law follow-up vis-à-vis PIF cases beyond the EPPO's competence, including those concerning Member States that do not participate in the EPPO enhanced cooperation.[15]

The issues connected with the admissibility of OLAF-collected evidence should also be assessed within the broader landscape of EU law enforcement. OLAF is not the only EU administrative authority that may forward reports and evidence to national authorities with a view to a punitive follow-up. Transmission of evidence with an 'EU origin' can also occur in European Central Bank (ECB) frameworks regarding the Single Supervisory Mechanism (SSM),[16] the European Securities and Markets Authority (ESMA) regarding the supervision of trade repositories,[17] and the European Commission's Directorate General for Competition (DG COMP).[18]

In 2016 and 2017, Utrecht University led two EU co-funded research projects that proved the relevance of comparing OLAF's legal framework with the ECB, ESMA and DG COMP with respect to investigatory powers and exchange of information between these entities and national enforcement authorities.[19] The present project ADCRIM

investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations (COM(2018)0338 – C8-0214/2018 – 2018/0170(COD))', amendment 85.

[14] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] OJ L 28/1.

[15] Namely, Denmark, Ireland, the United Kingdom, Hungary, Poland, and Sweden. It seems however that Sweden will soon join the other 22 Member States that already participate in the EPPO enhanced cooperation (<https://ec.europa.eu/commission/commissioners/2014-2019/oettinger/blog/sweden-open-join-european-public-prosecutors-office_en> accessed 4 June 2019).

[16] According to Art 136 ('Evidence of facts potentially giving rise to a criminal offence') of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L 141/1, 'Where, in carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA [national competent authorities] to refer the matter to the appropriate authorities for investigation and possible criminal prosecution…'.

[17] 'ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties … it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences …' (Art 64(8) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1).

[18] Art 12 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 concerns the exchange of information between DG COMP and national competition authorities, and the use of such information.

[19] Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017); Michele Simonato, Michiel Luchtman and John

('Admissibility of OLAF final reports as evidence in criminal proceedings') aims to complement these two studies by delving further into issues raised by the admissibility of evidence collected by EU law enforcement authorities, and especially OLAF, in national criminal proceedings.

2. AIM AND SCOPE OF THE RESEARCH

ADCRIM is a comparative study involving seven EU Member States: France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom.[20] It aims to analyse national provisions and case law on the admissibility of evidence and reports drawn up by administrative authorities in punitive administrative and criminal proceedings, with a focus on the latter. This review of national legislation, case law, and practices led to identifying some obstacles and limits to the admissibility of OLAF-collected evidence in national proceedings. Along the lines of the previous two Hercule III studies,[21] the seven countries have been chosen because of their ideal geographical distribution and their different approaches to the interplay between criminal and administrative law.[22] Among these seven Member States, there are common law and civil law systems, as well as adversarial and inquisitorial criminal justice systems.

The analysis of national administrative and criminal justice systems also assessed whether and to what extent OLAF can learn lessons from the other three above-mentioned EU law enforcement authorities. Following up on the findings of the two previous Hercule III studies led by Utrecht University, ADCRIM inquired whether the issue of the admissibility of evidence would also benefit from a comparison between OLAF, the ECB, ESMA, and DG COMP.

Finally, drawing on the seven national reports, as well as two 'transversal' reports that deal with the relationship between admissibility of evidence and fundamental rights and the transmission of evidence from the EU to the national level, recommendations to strengthen the admissibility of OLAF reports in national criminal proceedings have been put forward. This has been done taking into account the competing interests in the field, namely the need to ensure adequate and effective protection both of the EU budget and, at the same time, procedural safeguards and fundamental rights under the EU Charter of Fundamental Rights.

A few clarifications on the scope of the research are appropriate. First, for the purpose of this study, 'punitive administrative proceedings' refers to national proceedings for applying administrative sanctions, and more precisely fines,[23] that would qualify as having a criminal nature according to the so-called *Engel* criteria established by the

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).

[20] The United Kingdom is still part of the EU at the time of writing. Any reference to the UK should be understood as referring to the English and Welsh legal system.

[21] See n 19 above.

[22] See Michiel Luchtman, 'Introduction' in Luchtman and Vervaele (eds) (n 19) 4.

[23] The scope of the administrative facet of this study will therefore be limited to proceedings leading to the imposition of administrative fines and not include other possible sanctions, unless otherwise specified.

European Court of Human Rights (ECtHR),[24] which the Court of Justice of the European Union (CJEU) has recently endorsed.[25] Throughout this study, the reference to 'punitive administrative proceedings' thus encompasses proceedings before administrative authorities but not before administrative courts, unless otherwise specified. References to 'punitive proceedings' shall instead be understood as referring to both punitive administrative and criminal proceedings.

Second, the scope of the comparison between OLAF, ESMA, the ECB, and DG COMP is limited to the 'vertical' dimension of admissibility, ie admissibility of evidence collected by these EU bodies and forwarded to national authorities for punitive administrative or criminal follow-up. ADCRIM does not address the horizontal transfer of evidence under the frameworks for mutual legal assistance and mutual administrative assistance.

Third, the working definition of 'admissible evidence' is relevant evidence that may be shared with administrative sanctioning authorities or criminal courts and that may contribute to findings of fact in criminal or punitive administrative proceedings. The study group acknowledged that this project focuses on 'evidence' rather than on 'intelligence' or 'information', which instead refer to pieces of information that, as such, could not contribute to findings of fact in domestic punitive proceedings. As the dividing line between the two notions is blurred, some contributions within ADCRIM refer, when needed, to the exchange of information between EU law enforcement entities and national authorities. The second Hercule III project focused much more intensely on such exchanges of information.[26]

Finally, the study refers to 'OLAF-collected evidence' and 'OLAF reports' mostly interchangeably, unless otherwise specified. The former concept seems however broader than the latter. In laying down the above-mentioned assimilation rule, Article 11(2) of Regulation 883/2013 refers to OLAF 'reports'. These reports are complex legal products that can be accompanied by other relevant documents (such as records of the interviews performed according to Article 9 of the OLAF Regulation, reports of the on-the-spot checks or of digital forensics operations, etc). The term 'OLAF-collected evidence', which the Commission also uses in its recent Proposal for the reform of Regulation 883/2013,[27] includes therefore both OLAF final reports and these items of evidence.

3. METHODOLOGY AND PLAN OF THE STUDY

Coordinated by the University of Luxembourg and carried out by an international team of experts from seven European universities,[28] the ADCRIM project lasted between 1 April 2018 and 31 March 2019. Building on background research carried out by the University of Luxembourg staff, a questionnaire was prepared to guide national

[24] See *Engel and Others v The Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).
[25] See, for instance, Case C-489/10 *Bonda*, EU:C:2012:319.
[26] Simonato, Luchtman and Vervaele (eds) (n 19).
[27] COM(2018) 338 final, 5 and 11.
[28] See Annex II for further details.

rapporteurs in the analysis of the relevant national rules and procedures. Included in Annex I to this study, the questionnaire was discussed and amended during the project's first meeting, which took place in Luxembourg on 5 and 6 June 2018 and was attended by one OLAF representative.

The questionnaire was divided into five parts: i) general framework on the collection and admissibility of evidence in national proceedings; ii) admissibility of OLAF-collected evidence in national punitive administrative proceedings; iii) admissibility of evidence collected by the ECB, ESMA, and DG COMP in national punitive administrative proceedings; iv) admissibility of evidence collected by national and EU law enforcement authorities in national criminal proceedings; and v) focus on the admissibility of OLAF-collected evidence in national criminal proceedings. In addition to desk research, national rapporteurs interviewed, when needed, national experts and practitioners to gain a better understanding of problems and practices connected with the admissibility of OLAF reports in domestic procedures.

A draft version of the national reports was discussed during the project's second meeting, which the University of Luxembourg hosted on 28 February and 1 March 2019. Two representatives from OLAF were present at this meeting, during which the study group's members also discussed the preliminary findings of the comparative report as well as of the two 'transversal' reports on 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' and 'Lawful and Fair Use of Evidence from a European Human Rights Perspective'.

The final text of the two transversal reports is to be found, respectively, in chapters 2 and 3 of this study, while chapters 4–10 include the seven national reports (France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom). Chapter 11 offers a comparative analysis that draws upon the national and transversal reports. On the basis of such reports, and the comparative one as well, policy recommendations to strengthen the admissibility of OLAF-collected evidence in national criminal proceedings have been formulated in chapter 12.

All reports use the OSCOLA referencing system.[29] The members of the study group, as well as OLAF staff who were involved in ADCRIM either by attending one of the meetings or accepting to be interviewed in the framework of the project, are listed in Annex II. The study was finalised in June 2019.

[29] The current edition of the OSCOLA guidelines (2012), which the authors have followed with a few deviations, can be found at <www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf> accessed 4 June 2019.

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

M. Luchtman, A. Karagianni and K. Bovend'Eerdt

1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Diverging standards II: From one legal order to another

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

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

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

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

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

[9] ibid, para 27.

[10] ibid, para 35.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. THE EU FRAMEWORK FOR THE ADMISSIBILITY OF EVIDENCE

3.1 An overview of the general EU principles

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

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

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

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

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

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

On this basis, the Court held that:

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

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

That implies that,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.6 Interim conclusions

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

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

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

[65] cf supra n 25.

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

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

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

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

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

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

4. DG COMP

4.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.3 Dealing with diverging standards of defence rights of natural persons

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

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

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

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

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

4.4 Parallel and consecutive proceedings

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

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

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

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

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

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

5. ECB

5.1 Introduction

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

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

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

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

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

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

5.2 Follow up by the ECB's national counterparts

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

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

[137] For an analysis of the ECB's sanctioning powers, see inter alia Christos Gortsos, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: Analysis of Article 19 of the SSM Regulation' (2015) ECEFIL Working Paper 2015/11; Valentina Felisatti, 'Sanctioning Powers of the European Central Bank and the *Ne Bis In Idem* Principle within the Single Supervisory Mechanism' (2018) 8 *European Criminal Law Review* 378.
[138] Art 18(1) of the SSM Regulation.
[139] Art 18(7) of the SSM Regulation.
[140] Art 53(1) of the CRD IV.
[141] Art 53(2) of the CRD IV.
[142] Art 54(b) of the CRD IV.
[143] Art 53(1) of the CRD IV.
[144] Art 18(5) of the SSM Regulation.
[145] Laura Wissink, Ton Duijkersloot and Rob Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection' (2014) 10 *Utrecht Law Review* 92, 103.

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

5.3 Punitive follow up by national criminal investigative authorities

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

5.4 Parallel proceedings at the EU and national levels

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

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

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

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

6. OLAF

6.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[174] See Michiel Luchtman, 'Introduction' in Luchtman and Vervaele (eds) (n 11) 2, and Luchtman and Vervaele, 'Comparison of the Legal Frameworks' (n 11) 247–253.
[175] For instance when OLAF conducts investigations in the area of customs on the basis of sectoral legislation, ie, Arts 18 and 4–8 of Regulation 515/97/EC on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [1997] OJ L 82/1.
[176] Luchtman and Vervaele, 'Comparison of the Legal Frameworks' (n 11) 247–253.
[177] This is particularly salient in case of an external investigation.
[178] The decision to start punitive follow-up proceedings is a national decision. OLAF recommendations do not entail an obligation to start proceedings or to start a specific type of proceedings (administrative, criminal, etc).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.5 Proposed Amendment to the OLAF Regulation

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

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

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

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

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

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

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

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

[193] SWD(2017) 332 final 20–21.

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

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

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

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

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

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

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

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

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

7. CONCLUSIONS

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

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

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

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

[202] cf supra n 25.

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

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

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

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

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

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

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

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

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

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

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

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

3. LAWFUL AND FAIR USE OF EVIDENCE FROM A EUROPEAN HUMAN RIGHTS PERSPECTIVE

J.A.E. Vervaele

1. INTRODUCTION – THE GATHERING AND USE OF EVIDENCE IN A TRANSNATIONAL SETTING

Writing a thematic report on the admissibility of evidence within the framework of a comparative study on the 'Admissibility of OLAF final Reports as Evidence in Criminal Proceedings', which analyses the topic from a horizontal comparative perspective with the European Commission's Directorate General for Competition (DG COMP), the European Securities and Markets Authority (ESMA), and the European Central Bank (ECB), but also looks at the judicial follow-up of OLAF evidence in national punitive administrative and criminal proceedings, is like opening several Pandora's boxes.

What is legal evidence and when is that evidence admissible in punitive proceedings sound like very straightforward questions. These questions are also extremely important, as they deal at the same time with effective enforcement and due process in the EU. Nevertheless, the road towards the eventual answers is not very well paved and lacks good signs. To turn this around, what makes evidence illegal as such, based on the invalidity of the act producing it? When is it not apt for use as evidence in punitive proceedings leading to exclusion? Whom and what does the nullity of the act or the exclusion of the evidence aim to protect? Finally, do the questions and answers vary if we apply them to a transnational investigation and/or prosecution at a horizontal level between countries or vertically with the involvement of EU agencies?

The transnational dimension of this topic was already reflected in the resolutions of the Sixteenth International Congress of Penal Law of the AIDP (Association Internationale de Droit Pénal) in Budapest in 1999, dealing with the topic of 'The Criminal Justice System Facing the Challenge of Organized Crime', especially in Section IV on international criminal law, under the leadership of General Rapporteur Bert Swart.[1] Under headings D (new rules on judicial cooperation) and E (new rules concerning the legal position of individuals in international criminal law) the resolutions mostly deal with the equality of arms between the prosecution and defence when gathering evidence and the transnational application of procedural safeguards and defence rights. In resolution D2 on the collection of evidence, the application of the *lex fori* of the requesting state in the requested state is accepted, as long as this is not incompatible with the

[1] See Association Internationale de Droit Pénal (AIDP), 'Resolutions of the AIDP (1926–2014)' (2015) 86 *International Review of Penal Law* 243, 398–404 <www.penal.org/sites/default/files/RIDP86%201-2%202015%20EN.pdf> accessed 18 April 2019.

fundamental principles recognised in the requested state and the basic rights of the defendants. This means that the transnational application of foreign rules of evidence is subject to the fundamental rights and defence rights of the executing state. Resolutions E3 and E5 strengthen the legal position of individuals in internal criminal proceedings by providing that:

> 3. The minimum rights of an individual involved in international criminal proceedings in the requesting state should include the right to obtain evidence abroad and the right to be informed about the exchange of evidence in his case. …
>
> 5. Conviction may not be based on evidence that has been obtained in violation of the human rights of the defendant.

Resolution 5 certainly contains a strong exclusion rule in cases where the sole or decisive evidence has been obtained in violation of the human rights of the defendant. Which human rights are at stake are not mentioned, however. Being resolutions of a worldwide organisation, they do not of course take into account the specific modalities of a regional integration model such as the EU. Moreover, since 1999 there has been increased transnational gathering and use of evidence both in a horizontal setting between the enforcement authorities of Member States and in a vertical setting between EU and national authorities.

If we apply the questions mentioned above to OLAF, then, of course, we do have to start from the complex setting in which OLAF is exchanging information,[2] investigating[3] and forwarding final reports of this investigation to be followed up by the competent national and European authorities, and ask what the status of this OLAF evidence is at the time of assessing its admissibility as well as at the time of assessing its evidentiary value. It is also important that OLAF proceedings cannot be qualified as such as punitive proceedings in the sense of the 'criminal charge' concept of Article 6 of the European Convention on Human Rights (ECHR), as OLAF has no sanctioning powers at all. However the follow-up to OLAF investigations and OLAF-reports can lead to use of OLAF-evidence in national punitive proceedings in administrative and criminal enforcement cases. However, this is very clearly not a clear-cut top-down setting in which European OLAF evidence is used in national proceedings. In our research on 'Investigatory powers and procedural safeguards'[4] we have elaborated different models for interaction between the EU and the national level. In light of our common goal of seeking ways to improve the legal framework of OLAF for gathering evidence, three factors are key in determining the relevant models for interaction and in the imputation of investigative acts to the legal orders of the EU or the national authorities:

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[2] Michele Simonato, Michiel Luchtman and John Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities (ECN/ESMA/ECB)* (Utrecht University 2018).

[3] Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017).

[4] ibid.

1. The issue of which authority is the acting authority, ie the authority that performs the investigative acts. Is this the EU authority itself or its national partner?

2. The issue of whether the national partner becomes (functionally) a part of the EU organisation or whether assistance is provided to the EU authority by the national partner as a representative/part of its national administration (on behalf of the EU authority or in its own name).

3. The issue of who instructs the national partners: are instructions provided by the EU authority or through the national lines/chains of command?

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

- Autonomous investigations by OLAF inspectors (internal and/or external);
- Mixed investigations;
- Mandated investigations;
- Mutual assistance.

The way in which evidence is gathered and transferred depends to a great extent on which investigative model is used. Nevertheless, all OLAF models resulting in external investigative acts do involve interaction with the national legal order. Even for external autonomous investigations the EU legal OLAF framework regularly refers to the applicable national law.

If we then ask what makes OLAF evidence illegal as such, based on the invalidity of the act producing it, or when OLAF evidence is not apt for use as evidence in punitive proceedings leading to exclusion, or whom and what the nullity of the act or the exclusion of the evidence aim to protect, to a large extent the answers will not be provided by EU law but by the applicable national law. When OLAF evidence is presented as admissible evidence in punitive proceedings, then assessing the lawfulness and fairness of this OLAF evidence will depend on

1/ the applicable law for the competent authority and investigative act;

2/ the applicable procedural safeguards;

3/ purpose limitations on its transfer and use; and

4/ the applicable fundamental rights (Constitutional, ECHR and the Charter for Fundamental Rights of the Union (CFR)).

As we can see, the domestic influence on these factors is very substantial, certainly when it comes to the assessment of the admissibility and potential evidentiary value of OLAF-related evidence. This is the reason why in this special report on the admissibility of unlawful evidence and the unfair use of evidence we need a conceptual approach starting from the domestic level. We have to understand, first, the rationale behind the national legal traditions concerning unlawful evidence and nullity/exclusion (section 2). Then we have to assess how and to what extent the EU has recognised the necessity of common standards and common rules for evidence and its unlawfulness in the Member States and has taken steps towards harmonisation (section 3). From the outcome of sections 2 and 3,

in section 4 we can map the problem in a transnational setting, such as in the EU Area of Freedom, Security and Justice (AFSJ), both from the perspective of effective enforcement and due process.

This latter dimension triggers the fundamental rights dimension. In this area both the national and EU level have to comply with the minimum protection provided by the ECHR and related equivalent rights under the CFR. In section 5 we will assess when breaches of fundamental rights can lead to the nullity of evidence as such or to the exclusion of evidence because of a violation of the fairness of the proceedings. Once we have all of these elements on the table, we can then apply them to the OLAF setting of evidence gathering and the use of evidence (section 6) and analyse the applicable law, the applicable legal safeguards, purpose limitation on its use and the applicable fundamental rights standards. In section 7 we will then make some final concluding observations.

2. RATIONALE OF THE ADMISSIBILITY AND THE NULLITY/EXCLUSION OF EVIDENCE

Investigations into illegal conduct, be it of an administrative or criminal nature, can suffer from failures or errors in law or in fact. Even in a single jurisdiction this can lead to problems with the admissibility of the evidence gathered. This admissibility is however not only related to problems of illegally obtained evidence. Indeed, the rules on the gathering and use of evidence in criminal matters differ extensively from one Member State to another and this difference is not limited to the common law-civil law divide.[5] Some Member States have closed prescribed systems of admissible evidence, while others have open systems based on the discretion of the judiciary. Common law, for instance, was traditionally indifferent as to how evidence was gathered, as long as it was reliable and probative. Some Member States have very strict rules on the nullity of unlawful evidence, even for minor legal errors that do not harm the interests of the defence. In some of these states the exclusion of evidence as fruits of the poisonous tree is even a constitutional norm, although the case law of the Constitutional Courts has softened this concept by bringing in links with the right of the defence (the so-called *Schutznorm*). Other Member States have very flexible rules on the admissibility of evidence, even in cases involving violations of due process rules. The moment at which evidence is assessed also varies from one Member State to another. Some countries provide for specific pre-trial procedures to check and assess the legality of evidence, while others do not. The latter, mostly common law countries, use exclusionary rules. The former, mostly civil law countries, exclude evidence on the basis of an assessment of the validity of the investigative acts, also called '*purge des nullités*'.[6] This means that during the pre-trial phase there will be an assessment of the validity of the investigative

[5] The British Law Society, 'Study of the Laws of Evidence in Criminal Proceedings throughout the European Union' (Study for the European Commission's Directorate General for Justice and Home Affairs 2004).

[6] Benoît Chabert and Pierre-Olivier Sur, 'Le Point en Matière de Nullités de Procédure Pénale au Fil des Cent Dernières Décisions de la Chambre d'Accusation de Paris' (15 November 1997) *Gazette du Palais* 1473.

acts and the legality of the obtained evidence. This assessment is mostly done by a court/chamber or the judge of liberty/examining magistrate. In some countries this assessment depends on the use of remedies by the interested parties; in others the assessment is a mandatory exercise before prosecution and bringing the case to judgement.

Already from the terminology we see that the rationale behind the assessment of unlawful evidence and related consequences might differ from country to country. In all legal systems the conceptual framework of evidence is related to the finality of the punitive process, based on the formal and substantive truth sustained by evidence/proof that does respect due process. This therefore includes the legality of the proceedings from the start of the pre-trial investigations and respect for fundamental rights and procedural guarantees during the proceedings. However, in the case of unlawful evidence, the approach and the consequences are very different from one legal order to another, depending on what and whom the various legal orders aim to protect by the exclusion or nullity of the evidence, and on the reasons for that protection.

From comparative studies[7] on the topic we can define groups of countries, depending on the rationale of the protection. Countries like the USA, which is the champion of the doctrine of the fruits of the poisonous tree (although this has been strongly reduced by case law),[8] mainly aim at deterring unlawful police conduct (a deterrence approach). The exclusion of evidence is a tool to guide law enforcement on the right path. Countries like France,[9] Italy,[10] Spain,[11] Colombia, etc aim to protect the rights of suspects. So this exclusion or nullity is strictly related to the infringement of fundamental or substantial rights (the vindication of rights approach). Within that group some countries, like Spain, also directly relate it to the presumption of innocence.[12] Many

[7] Stephen C Thaman, 'Fruits of the Poisonous Tree in Comparative Law' (2010) 16 *Southwestern Journal of International Law* 333; Christopher Slobogin, 'A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases' (9 April 2013) Vanderbilt Public Law Research Paper No 13–21 <https://ssrn.com/abstract=2247746> accessed 25 June 2019; Stefano Ruggeri (eds), *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases* (Springer 2014).

[8] See, already in 1968, Robert M Pitler, 'The Fruit of the Poisonous Tree Revisited and Shepardized' (1968) 56 *California Law Review* 579; Joseph G Casaccio, 'Illegally Acquired Information, Consent Searches, and Tainted Fruit' (1987) 87 *Columbia Law Review* 842.

[9] Mireille Delmas-Marty, *Procès Pénal et Droits de l'Homme* (Presses universitaires de France 1992); Pierre Bolze, *Le Droit à la Preuve Contraire en Procédure Pénale* (Droit, Université Nancy 2 2010) <https://hal.univ-lorraine.fr/tel-01752930/document> accessed 18 April 2019; Etienne Vergès, Géraldine Vial and Olivier Leclerc, *Droit de la Preuve* (Presses universitaires de France 2015); Jacques Pradel, *Procédure Pénale* (19th edn, Cujas 2017).

[10] Paolo Tonini, *Manuale di Procedura Penale* (16th edn, Giuffrè 2015).

[11] Vicente Carlos Guzmán Fluja, *Anticipación y Preconstitución de la Prueba en el Proceso Penal* (Tirant Monografías 2006) 377; Juan Luis Gómez Colomer (ed), *Prueba y Proceso Penal. Análisis Especial de la Prueba Prohibida en el Sistema Español y en el Derecho Comparado* (Tirant lo Blanch 2008); Victor Moreno Catena and Valentin Cortés Domínguez, *Derecho Procesal Penal* (4th edn, Tirant lo Blanch 2010); María Isabel González Cano, *La Prueba en el Proceso Penal* (Valencia Tirant Tratados 2017).

[12] Teresa Armenta Deu, *La Prueba Ilícita* (*Un Estudio Comparado*) (Pons 2011) and Andrea Planchadell Gargallo, *La Prueba Prohibida: Evolución Jurisprudencial* (Thomson Reuters-Aranzadi 2014).

countries, like Canada, the UK,[13] and Germany,[14] use a so-called systemic integrity model with a balancing approach (the judicial integrity approach). This means that they only apply the exclusion of evidence for significant violations of important rights and only in cases where the dismissal of the charges will not significantly undermine the state's interest in convicting those who have committed serious crimes. For instance, in Germany the Constitutional Court does limit the exclusion of evidence (*Fernwirkung des Beweisverbots*)[15] by relating it to protected persons (*Rechtskreistheorie*) and the aim of the protection (*Schutzzwecklehre*).

The determining factors for exclusion or nullity are – depending on the group – the deterrent effect, the impact of the exclusion or admission for the reputation of the punitive justice system, the seriousness of the offence and the importance of the evidence for successful prosecution, the investigator's potential awareness of the illegality and of alternative methods for obtaining the evidence and the nature of the right that has been violated.

Finally, the doctrine of the exclusion or nullity of evidence is also related to the architecture of the punitive justice system. In an adversarial system such as in England and Wales, each party collects its evidence and the evidence is presented at the oral trial only. The exclusion of evidence is mainly aimed at preventing the judges – who have a passive role when assessing the merits of the case – from knowing this evidence at all. In a semi-inquisitorial system, like in France, Germany, the Netherlands or Belgium, the judiciary is actively involved in the pre-trial investigation and prosecution and has an active role. A great deal of the evidence produced during the pre-trial setting will also be presented in a written form at the trial, without further cross-examination, etc. As to the legality of the pre-trial investigative acts, before the file is forwarded to the trial court, the situation where decisive elements of the evidence at trial are based on unlawful pre-trial judicial decisions (like, for instance, a search warrant or an order to intercept telecommunications) must be avoided. In other words, the exclusion is in the light of the trial setting, the nullity is aimed at sound legal acts during all stages. Under the nullity approach, when investigative action violates certain specified statutory rules, and when it prejudices the interests of the accused, the action is declared void and its evidentiary result may not be used.

In all systems the exclusion or nullity has become less absolute over the years. Nullities have been divided into absolute nullities or relative nullities or into nullities and irregularities. The relative ones are not sufficiently serious to exclude the evidence from the file. The irregularities are those that can still be repaired in due time, for instance by providing the right authorisation or calling in the defence for a pre-trial hearing, etc. Also the fruit of the poisonous tree doctrine has been softened by making exceptions based on

[13] Richard May and Steven Powles, *Criminal Evidence* (Criminal Practice) (Sweet & Maxwell 2004) and Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press 2012) 58–81, especially chapter 3 on 'Evidence Obtained by Illegal or Unfair Means'.

[14] Kai Ambos, *Beweisverwertungsverbote, Grundlagen und Kasuistik – Internationale Bezüge – Ausgewählte Probleme* (Duncker & Humblot 2010).

[15] Sabine Gless, *Beweisverbote und Fernwirkung* (2010) Band/Tome 128, 146 ZStrR.

a causal link with the suspect, good faith of the agent, inevitable discovery, the legal aim protected by the offence, etc.[16] Just to give an example: on the basis of the illegal interception of communications, law enforcement officers obtain a legal search warrant against a person who was already a suspect and under surveillance. The search results in the discovery of quantities of hard drugs. In the softened version of the fruit of the poisoned tree, the illegal interception is a neutral act that no longer prejudices the legality of the search.

Our approach and explanation above are based on a strict domestic approach to the role of evidence, the admissibility of evidence and its eventual exclusion.[17] In the EU context, however, we have to deal not only with this dimension but also with the horizontal and vertical dimension. This means that evidence can be gathered in EU country A and assessed as to its admissibility in country B, or that evidence can be gathered by country A and used by a European enforcement agency, or gathered by a European enforcement agency and used by it or gathered by a European enforcement agency and used by a national enforcement agency for follow-up action (definitely the OLAF scenario). So we have to test the EU dimension of the already complex topic of the admissibility of evidence and the nullity or exclusion thereof.

3. ADMISSIBILITY OF (CROSS-BORDER) EVIDENCE IN THE EU: LEGISLATIVE INITIATIVES

The differences in the gathering of evidence, the use of evidence and the related admissibility and nullity or exclusion of evidence can lead, in the cross-border gathering and cross-border use of evidence, to situations of unlawful or illegal evidence or the unfair use of evidence, meaning a violation of due process and fair trial under Article 6 ECHR and Articles 47 and 48 CFR. Unlawful evidence and the unfair use of evidence seems to be one of the great taboos in European criminal justice. It has been greatly neglected by all cooperation instruments, be they instruments of mutual legal assistance or mutual recognition.

The European Commission tackled the problem for the first time in its 2001 Green Paper on the European Public Prosecutor.[18] Under section 6.3.4 thereof the Commission explicitly dealt with the law of evidence, tackling both the admissibility of evidence and the exclusion of unlawfully obtained evidence. The Commission was very much aware of the fact that 'a simple reference to national law is by definition incapable of settling the question of the admissibility of evidence in a European investigation and prosecution area' and that

> The rules of evidence, being based on a set of comparable principles, are still too different in matters of detail for the European Public Prosecutor to be able to take them as a basis

[16] See Thaman (n 7).
[17] For an analysis of the topic at the international criminal courts, see Michele Caianiello, *Ammissione della Prova e Contraddittorio nelle Giurisdizioni Penali Internazionali* (Giappichelli 2008).
[18] European Commission, 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor' COM(2001) 715 final, 11 December 2001.

> … Neither unification in the form of a complete code on the admissibility of evidence, nor a simple reference to national law but mutual admissibility of evidence is the most realistic and satisfactory solution here.

Under 6.3.4.2 the Commission explicitly included the exclusion of unlawfully obtained evidence, as this is 'the prior condition for any mutual admissibility of evidence'. The rules governing exclusion would be, in the view of the Commission, those of the Member State in which the evidence was obtained, meaning that the forum court has to apply foreign law. As for the validity of evidence (its credibility in the eyes of the court), this will obviously be within the discretion of the courts themselves, on the basis of the applicable national law.

It is interesting that the Commission also elaborated upon the admissibility of evidence obtained in the course of a Community administrative procedure when that is to be used in a criminal trial. In this case the Commission applies the *Saunders* doctrine, meaning that this should be conditional on compliance during the administrative investigation – if there are grounds for believing that there is a suspicion of a criminal offence – with the defence rights and procedural safeguards under a criminal procedure. The guidance in the Green Paper has not really led to innovative solutions for the EPPO. In the Commission Proposal of 2013[19] the following is stated in Section 5 on the admissibility of evidence, although in only one article:

> Article 30. Admissibility of evidence
>
> 1. Evidence presented by the European Public Prosecutor's Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence.
>
> 2. Once the evidence is admitted, the competence of national courts to assess freely the evidence presented by the European Public Prosecutor's Office at trial shall not be affected.

From this Article and recital 32 it becomes clear that the approach is strictly limited to avoiding inadmissibility based on different evidence standards in the Member States. The trial court cannot exclude evidence presented by the EPPO as inadmissible on the ground that the conditions and rules for gathering that type of evidence are different under the national law that is applicable to it. In other words, this article does not really harmonise the rules on evidence and neither does it contain standards for the exclusion of unlawfully obtained evidence. Quite the opposite, Article 30 contains an inclusionary rule. The only European threshold at the stage of assessing the admissibility by the forum court is that the EPPO must have respected the procedural safeguards and the defence rights under Articles 47 and 48 CFR. Per Article 52(3) CFR the content of this protection must comply

[19] European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM(2013) 534 final, 17 July 2013.

with the minimum thresholds developed by the European Court of Human Rights (ECtHR) case law under Article 6 ECHR. The meaning of this remains very unclear, however, as the proceedings as a whole must be fair, which means that unlawfully obtained evidence in the locus state can still be admissible in the forum court if the proceedings as a whole (including the trial stage) do meet the fairness criterion. In other words, the minimum thresholds under Article 6 ECHR neither lead to standards for admissible evidence, nor to standards for the exclusion of evidence. This will be further elaborated upon in this contribution under point 4 in the text.[20] The EU could raise this minimum threshold, but it has not done so in the EPPO Regulation.[21]

In the approved EPPO Regulation,[22] the article on evidence has been rephrased as follows:

> Article 37. Evidence
>
> Evidence presented by the prosecutors of the EPPO or the defendant to a court 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.
>
> The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.

Basically it retains the same focus as the proposed Article 30, but also extends it to evidence presented by the defendant. From recital 80 we can derive that not only Article 6 TEU, the CFR and the ECHR apply, but that fundamental rights based on Member States' Constitutions also apply. And even more importantly:

> In line with those principles, and in respecting the different legal systems and traditions of the Member States as provided for in Article 67(1) TFEU, nothing in this Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems, including in common law systems.[23]

This means that national standards on (un)lawful evidence can be applied, which means that the protective standard – compared to the ECHR standard – can be increased, but can also be made more flexible under the 'fairness of the proceedings as a whole' doctrine of the ECtHR. The result is, of course, that there is not and will not be any level playing field for the admissibility of evidence between Member States, even in the context of EPPO proceedings. There is a system of free flow of evidence, based on the inclusionary

[20] See infra, section 4.

[21] András Csúri, 'Grenzüberschreitende Ermittlungen. Bemerkungen zur Europäischen Ermittlungsanordnung und zur Europäischen Staatsanwaltschaft' in Robert Kert and Andrea Lehner (eds), *Vielfalt des Strafrechts im Internationalen Kontext. Festschrift für Frank Höpfel zum 65. Geburtstag* (NWV Verlag 2018) 681–691, and András Csúri, 'Towards an Inconsistent European Regime of Cross-Border Evidence: The EPPO and the European Investigation Order' in Willem Geelhoed, Leendert H Erkelens and Arjen WH Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (TMC Asser Press – Springer 2018) 141–153.

[22] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] OJ L 28/1.

[23] Second part of recital 80 of the EPPO Regulation.

rule of Article 37, that only can be rebutted if the 'fairness of the proceedings as a whole' is at stake.

It is also interesting that recital 81 stresses that, taking into account the mandatory prosecution, the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is sufficient evidence and no legal ground bars prosecution. In other words, the EPPO is called upon to avoid jurisdictions where higher thresholds for the admissibility of evidence could lead to unsuccessful prosecutions.

It is easy to conclude that Article 37 of the EPPO Regulation certainly does not set a standard for the admissibility and exclusion of evidence. It does not lead to any harmonisation as to who can gather the evidence (the competent authorities), under which conditions they can gather the evidence, or what should happen with unlawful or unfair evidence. The approach in Article 37 is limited to a non-discrimination clause, in the sense that the national courts cannot make a distinction between EPPO evidence gathered by the European Delegated Prosecutors in their own domestic legal order and EPPO evidence gathered by the European Delegated Prosecutor in other jurisdictions. However, we must not forget that in many countries the gathering of criminal evidence will in practice be done by law enforcement authorities, such as the police or specialised (administrative or judicial) agencies. The unlawfulness of this evidence can thus be directly related to their conduct, but they are not mentioned at all in the EPPO Regulation.

Outside the framework of the EPPO the European Commission already attempted to pave the way for a legislative initiative by issuing the 2009 'Green Paper on obtaining evidence in criminal matters and transferring it from one Member State to another with the aim of *securing its admissibility*'.[24] The Commission was very aware of the fact that the rules on cross-border evidence gathering, as laid down in the European Evidence Warrant of 2005 'only approach the issue of admissibility of evidence in an indirect manner as they do not set any common standards for gathering evidence'.[25] There is therefore a risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence. As set out in the 2009 Communication entitled 'An area of freedom, security and justice serving the citizen', the best solution to this problem would seem to lie in the adoption of common standards for gathering evidence in criminal matters.[26] The Commission is therefore advocating additional rules on the admissibility of evidence.[27] However, the Green Paper was so poorly elaborated that it did not lead to any added value or substantial support from the Member States and resulted in no further action from the Commission.

The 2009 Lisbon Treaty does however offer new perspectives for legislative action, as Article 82(2)(a) TFEU provides for an explicit legal basis for approximation in

[24] COM(2009) 624 final, 11 November 2009 (emphasis added).
[25] ibid 5.
[26] ibid, para 4.2.
[27] European Commission, 'An area of freedom, security and justice serving the citizen' COM(2009) 262 final, 10 June 2009.

the field by referring to the mutual admissibility of evidence between Member States. Although the approximation is in theory limited to minimum rules in order to facilitate the mutual recognition of judicial decisions,[28] it has become clear from the use of Article 82(2)(b-c) TFEU by the legislator that this approximation is in fact the harmonisation of domestic criminal procedure (so not limited to mutual recognition instruments) in order to facilitate potential mutual recognition. The harmonisation is not strictly limited to minimum harmonisation but to minimum rules, meaning that which is necessary for facilitating and enhancing mutual recognition between the Member States. The new and interesting potential of Article 82(2)(a) TFEU, both for the harmonisation of obtaining evidence (and thus of criminal investigative tools) with a view to the admissibility of evidence, has however not been used at all. Neither the Commission, nor the Member States have triggered any legislative proposal, leaving Article 82(2)(a) TFEU dormant, and a legislative failure thus remains in place.

In the case of OLAF-related investigations in the area of the protection of the financial interests (PIF) of the EU we also have to ask the question whether Article 325 TFEU is not imposing obligations on the rules on evidence and the exclusionary rules at the national level. This question was recently referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling by a specialised criminal court in Bulgaria.[29] Mr Dzivev and other persons are accused of leading a criminal gang that has committed VAT fraud. In order to gather evidence of their involvement, telecommunications were intercepted. However, some of those recordings were ordered by a court which apparently did not have jurisdiction to make such an order. Furthermore, some requests for the orders were not properly reasoned by the prosecutor. Under Bulgarian law, the evidence thus gathered is unlawful and cannot be used in criminal proceedings against the accused. As it concerns crucial key evidence in this case, this would lead to an acquittal and thus impunity. Advocate General Bobek delivered his conclusion on the 25th of July 2018 and rephrased the main question as follows:

> Do Article 325(1) TFEU, Article 1(1) and Article 2(1) of the PFI Convention and Articles 206, 250 and 273 of the VAT Directive, interpreted in the light of the Charter, preclude the application of national provisions on admissibility of evidence, under which evidence obtained unlawfully must be disregarded, given the specific circumstances of the main proceedings?[30]

For the Advocate General it is important, as a point of departure, that the rules on evidence have not been harmonised by EU law and that Member States have therefore retained discretion in shaping their own rules. However, rules on evidence have an impact on guilt

[28] According to the prevailing opinion in doctrine, Art 82(2)(a) TFEU only constitutes a legal basis for a partial harmonisation of criminal procedure laws (or in this case the law of evidence) by means of minimum standards. The admissibility of evidence facilitates only indirectly the mutual recognition of judicial decisions by establishing common standards for the admission of evidence and so facilitating the recognition of decisions taken on that basis by foreign judicial authorities. See for instance Helmut Satzger, *Internationales und Europäisches Strafrecht* (8th edn, Nomos 2018) § 10 Rn 81.

[29] Reference for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 31 May 2016 — Criminal proceedings against Petar Dzivev.

[30] Case C‑ 310/16 *Dzivev and Others*, Opinion of AG Bobek, EU:C:2018:623, para 46.

and punishment, in this case concerning VAT fraud, and thus fall within the application of EU law. The result is that Member States must comply with the dual requirement of equivalence and effectiveness, but also with the CFR. The latter means that any non-application of the national rule on the exclusion of evidence could only be prospective and could not apply to ongoing cases. The AG came to the conclusion that this case is not an illustration of a systemic risk of impunity and that, for that reason,

> Article 325(1) TFEU, Article 1(1) and Article 2(1) of the Convention on the Protection of the European Communities' financial interests, and Article 206, Article 250(1) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, interpreted in the light of the Charter of Fundamental Rights of the European Union, do not preclude national legislation, such as that at issue in the main proceedings, that prohibits the use of evidence obtained in breach of national law, such as that acquired by means of interceptions of telecommunications authorised by a court which did not have jurisdiction to do so.[31]

In its judgment of 17 January 2019,[32] the CJEU faithfully followed the reasoning of the AG by insisting on the fact that the obligation to ensure the effective collection of the European Union's resources does not absolve national courts of the necessary observance of the principle of legality and the rule of law which is one of the primary values on which the European Union is founded, as is indicated in Article 2 TEU (para 34). For that reason EU law cannot require that a national court must not apply such a procedural rule, even if the use of that evidence gathered unlawfully could increase the effectiveness of criminal prosecutions and even in situations in which that evidence alone is capable of proving that the offences in question have been committed (paras 39–40). In other words, Article 325 TFEU cannot be used as the legal base for introducing a balancing test between EU effectiveness and applicable legal safeguards in case of unlawful evidence.

4. MAPPING THE PROBLEM FROM THE POINT OF VIEW OF EFFECTIVE ENFORCEMENT AND DUE PROCESS

Specialised studies have illustrated to what extent the lack of harmonisation on the gathering of evidence does lead to problems concerning the admissibility of evidence. In their study on the EU cross-border gathering and use of evidence in criminal matters, Vermeulen and others (eds)[33] first assess the domestic rules on unlawfully obtained evidence and their legal consequences, making a distinction between three types of scenarios: rules that sanction unlawfully obtained evidence with absolute nullity, with relative nullity, depending upon the impact of the unlawfulness or irregularity for the reliability of the information/evidence, or rules that state that the use of the information/evidence as evidence would violate the right to a fair trial. The conclusion of

[31] ibid, para 133.
[32] Case C‑ 310/16 *Dzivev and Others*, EU:C:2019:30.
[33] Gert Vermeulen, Wendy De Bondt and Yasmin Van Damme (eds), *EU Cross-border Gathering and Use of Evidence in Criminal Matters. Towards Mutual Recognition of Investigative Measures and Free Movement of Evidence?*, Vol 37 IRCP-series (Maklu 2010).

this first assessment is that the domestic regimes attribute a variety of consequences to unlawfully obtained evidence. Whereas some Member States apply absolute nullity others do not necessarily exclude it even under relative nullity. This variety and the lack of harmonisation can of course hamper the mutual admissibility of evidence.

Secondly, the study examines whether Member States have specific rules on unlawfully obtained evidence in foreign countries. Some Member States do not have any specific rules at all, while others do but do not make a distinction between EU Member States and non-EU states. The Member States with specific rules have very different approaches, however. Some are stricter concerning foreign evidence compared to domestic evidence, while others are more lenient and only apply the comity rule (in the sense of admissibility without any further inquiry, based on respecting the sovereignty of the partner state, mutual trust or simply the factual impossibility of checking legality in the foreign legal order). Vermeulen and others conclude that the fact that a significant number of Member States do not presently take into account where unlawfully obtained evidence was obtained when determining its validity, is certainly a sign of the possibility of a future complete mutual admissibility of evidence, and attribution of the same value to any kind of evidence, regardless of where in the EU it was obtained. Vermeulen and others also conclude that under a future system of mutual admissibility of evidence the rules governing exclusion can and should be those of the Member State in which the evidence was obtained.

I find that both conclusions are too straightforward and not convincing. First of all, the conclusions do not sufficiently take into account the very different consequences under domestic law for sanctioning the gathering and use of unlawful evidence, ranging from absolute nullity to very lenient exclusion rules. Second, Member States still want to be able to refuse admissibility if the gathering of the evidence is contrary to their fundamental principles of law, especially when they are mandatory constitutional rules. Third, Member States cannot simply rely on the lawfulness of the evidence in the foreign jurisdiction, if the cross-border use of evidence would lead to an unfair trial under Article 6 ECHR and/or Articles 47/48 CFR. In my opinion, it will be impossible to establish the mutual admissibility of evidence and the free movement thereof without elaborating common standards, taking into account the minimum requirements of applicable human rights law under the ECHR/CFR.

This was also the approach taken in the 2000 study on 'The Implementation of the *Corpus Juris* in the Member States'.[34] Article 32 of the *Corpus Juris* 2000[35] partially harmonises the gathering of evidence and the tools for producing legal evidence, complementary to the admissible evidence under the national law in force in the Member States of the court of judgment (*forum regit actum)*. For instance, Article 32 explicitly stipulates that pre-existing documents that the accused has been required to produce in a preliminary administrative investigation are admissible evidence in criminal proceedings. Article 33 of the *Corpus Juris* 2000 specifically deals with the 'exclusion of evidence

[34] Mireille Delmas-Marty and John Vervaele (eds), *The Implementation of the* Corpus Juris *in the Member States* (Intersentia 2000).
[35] ibid 209.

illegally obtained'.[36] Article 33(1) stipulates that evidence must be excluded if it violates fundamental rights enshrined in the ECHR or if it violates rules included in Articles 31 and 32 of the *Corpus Juris* 2000. The latter essentially means a violation of the presumption of innocence or a violation of human rights standards, such as for instance the right to remain silent. The exclusion is however only mandatory if the admission of evidence would undermine the fairness of the proceedings, meaning that the legally protected interests of the accused person (*Schutznorm*) must be at stake. Article 33(2) deals with the applicable law in order to determinate whether the evidence has been obtained legally or not. The point of departure is the law of the country where the evidence was obtained. This means that the law of the country of the forum is not applicable. However, the forum must exclude the evidence if it would contravene the fairness of the proceedings, as enshrined in the ECHR.

From this overview it becomes clear that the admissibility of evidence and the exclusion of unlawful or unfair evidence is a real problem in the EU that can undermine the effectiveness of proceedings, due process and mutual trust between the enforcement authorities. We must not forget that as long there is no specific instrument on the mutual admissibility of evidence, the rules on the lawfulness of evidence are a matter for national law and the Courts of the European Union have no jurisdiction in this respect.[37] However, if the evidence is used at the European level, be it by the EPPO or by EU enforcement agencies in punitive proceedings, the EU authorities may not

> knowingly rely on evidence which was quite clearly obtained in breach of essential procedural requirements. Fundamental principles of EU law such as, in particular, the right to good administration (Article 41(1) of the CFR) and the right to a fair trial (Article 47(1) CFR) require that the EU institutions undertake at least a summary examination in the light of all circumstances of the particular case that are known to them.[38]

This can of course have consequences for the admissibility of evidence: 'In the administrative proceedings, therefore, the Commission must ensure that according to all the indications available to it, the evidence in question was neither unlawfully gathered by the national authorities nor unlawfully forwarded to it'.[39]

The problem is moreover not limited to evidence gathered in the setting of a criminal investigation. More and more administrative enforcement agencies, both at the national level[40] and the European level, increasingly gather evidence with a (criminal) punitive aim. In national systems with double-track enforcement (administrative and criminal) and in combined European-national enforcement the evidence obtained through an administrative investigation can become key evidence in criminal matters or vice

[36] ibid.
[37] See Case C-469/15 P *FSL Holdings NV and Others v European Commission,* EU:C: 2017:308, para 32, and Case C-407/04 P *Dalmine v Commission,* EU:C:2007:53, para 62.
[38] Case C-469/15 P *FSL Holdings NV and Others v European Commission*, Opinion of AG Kokott, EU:C:2016:884, para 37.
[39] ibid, para 38.
[40] See, for instance, Renzo Orlandi, *Atti e Informazioni della Autorità Amministrativa nel Processo Penale. Contributo allo Studio delle Prove Extracostituite* (Giuffrè 1992).

versa. Obviously this can also lead to questions concerning unlawful evidence in transnational punitive proceedings, be it of a horizontal and/or vertical nature. In fully-fledged European punitive proceedings, like the ones of ECB, ESMA or DG COMP, European authorities/courts will have to assess the lawfulness of the evidence of national origin, but 'given that there is no legislation at EU level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible'.[41] As for unlawful evidence, the EU Courts can 'draw inspiration from the law of the Member States. However, that does not mean that it is bound to apply the law of the Member State with the strictest rules on the evaluation of evidence, particularly because both national legal systems and EU law are deemed to incorporate the safeguards enshrined in the ECHR'.[42]

However, reviewing the lawfulness of contested evidence does not relieve the institutions of their obligation to respect the fundamental rights of the applicants. It is clear from settled case law that respect for fundamental rights is a condition for the lawfulness of EU acts and that measures that are incompatible with respect for fundamental rights are not acceptable in the European Union.[43] It is at this level where the CFR/ECHR dimension comes into play. Later on,[44] we will further elaborate on this and demonstrate to what extent unlawfully obtained evidence can or cannot be used in punitive proceedings. In other words, the fruits of the poisonous tree do not apply as such.

The CFR/ECHR dimension also applies in national cases where EU law applies.[45] A good illustration of this is to be found in *WebMindLicenses*,[46] in which confidential evidence had been obtained after an unduly authorised, and thus illegal, criminal tapping of telephone conversations and search and seizure of e-mails had been used in administrative punitive VAT proceedings that are governed by Article 325 TFEU.

Considering the lack of legislative standards in the EU for the gathering of evidence, the use of evidence and the exclusion of evidence, the question arises to what extent we can derive common standards from the ECtHR and the EU courts' case law and whether these praetorian standards can be used as input for future legislative harmonisation.

[41] Case T-54/14 *Goldfish BV v European Commission*, EU:T:2016:455, para 43, with reference to the judgment of 23 March 2000, in the Joined Cases C-310/98 *Met-Trans and Sagpol* and C-406/98 *Sagpol SC Transport,* EU:C:2000:154, para 29.
[42] Case T-54/14 *Goldfish BV v European Commission*, para 78.
[43] ibid, paras 45–46.
[44] See section 5.
[45] Case C-617/10 *Åkerberg Fransson,* EU:C:2012:340.
[46] Case C-419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, EU:C:2015:832. See further the analysis in section 5.2.

5. HUMAN RIGHTS CASE LAW ON EVIDENCE AND ITS EXCLUSION IN PUNITIVE PROCEEDINGS: COMMON STANDARDS?

5.1 ECtHR and its general approach

Evidence or proof is not mentioned as a topic in the ECHR, not even under the concept of 'fairness' under Article 6 ECHR. The point of departure is that the admissibility of evidence in criminal matters[47] (including the exclusion of unlawful evidence) is a matter that is dealt with by domestic jurisdiction.[48] The ECtHR neither deals with evidential errors of fact nor errors of law.[49] So it is not so astonishing that leading handbooks on the ECtHR and the ECtHR 'Guide on Article 6 ECHR/Right to a fair trial/criminal limb'[50] do not contain specific rubrics on evidence or the exclusion of evidence.

Evidentiary issues do however play an essential role in assessing the fairness of proceedings under Article 6 ECHR. For assessing the fairness of the proceedings the essential feature is that all evidence must be presented at a public hearing that allows for an adversarial procedure in which the submitted evidence can be challenged by the parties.[51] As the ECtHR assesses the fairness of the proceedings as a whole, meaning from the opening of the judicial investigation until the final sentencing, this adversarial character can be materialised at different stages in these proceedings. In other words, it is perfectly compatible with the ECHR to have an adversarial hearing on evidentiary issues in the pre-trial setting and a written presentation thereof at the trial setting. Indirect evidence and hearsay evidence at trial are therefore not by definition a violation of the fair trial concept.[52] By this approach the ECtHR has been able to develop an osmosis between the common law procedure (focusing on an oral defence by the parties at the trial setting) and the civil law procedure (focusing on truth finding by the judicial authorities).

The ECHR and the ECtHR case law do not contain specific rules on unlawfully obtained evidence either, as the ECHR does not prescribe legal means for the gathering of evidence. The way in which criminal evidence is gathered is also the exclusive domain of domestic jurisdictions. This means that the use of unlawfully obtained evidence is not a violation of the ECHR as such. As regards the question of whether, in a criminal context, evidence that has been obtained unlawfully deprives the accused of a fair trial and infringes Article 6 of the ECHR, the ECtHR has held:

> While the [ECHR] guarantees, under Article 6, the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter

[47] Defined in an autonomous way by the ECtHR, meaning including all punitive proceedings. See *Engel and Others v The Netherlands* Apps nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976).

[48] *Van Mechelen and Others v the Netherlands* Apps nos 21363/93, 21364/93, 21427/93 and 22056/93 (ECtHR, 23 April 1997), para 50, and *Hümmer v Germany* App no 29881/07 (ECtHR, 19 July 2012).

[49] See, for example, *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 88, and *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), para 162.

[50] 'Guide on Article 6 ECHR/Right to a fair trial/criminal limb' (2018) <www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> accessed 21 April 2019.

[51] See, for example, *Kostovski v The Netherlands* App no 11454/85 (ECtHR, 20 November 1989).

[52] See, for example, *Bricmont v Belgium* App no 10857/84 (ECtHR, 7 July 1989).

> for national law. The Court therefore cannot exclude that evidence gathered in breach of national law may be admissible … The Court also recalls that it has already had occasion to find that the use of an illegal recording, moreover as the only item of evidence, does not, in itself, conflict with the principles of fairness laid down in Article 6[(1) of the ECHR], even where that evidence was obtained in breach of the requirements of the [ECHR], particularly those set out in Article 8 …[53]

Even if the way in which evidence has been obtained constitutes a breach of privacy or the protection of the home under Article 8 ECHR, due to, for instance, the lack of a clear and foreseeable legal basis or to disproportionality with the protected aim in a democratic society, this does not automatically mean that this unlawful evidence has to be excluded from the criminal proceedings.[54] Neither does the ECHR prescribe any sanctions for the use of unlawful evidence, such as, for instance, exclusion (the fruit of the poisonous tree doctrine), the inadmissibility of the prosecution or the mitigation of the criminal sanctioning.

Nevertheless, evidence obtained in breach of some human rights have to be excluded on that ground. Typical examples are evidence obtained by means of torture or inhuman treatment. This evidence has to be excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.[55] In certain cases, however, the Court will only impose an exclusion if the evidence obtained in breach of Article 3 ECHR had an impact on the defendant's conviction or sentence.[56] Besides evidence gathered by way of torture and inhuman treatment (absolute human rights), there are other violations of relative human rights that are so serious that the ECtHR considers that they lead to a flagrant denial of justice, which means leading to a trial which is manifestly contrary to the provisions of Article 6 ECHR or the principles embodied therein.[57] Which forms of unfairness can amount to a flagrant denial of justice? Typical examples are evidence obtained by entrapment and incitement and in which there is no indication that the offence would have been committed without the intervention of law enforcement authorities,[58] evidence based on confessions that have been made without the assistance of a lawyer and which are used as key evidence without further legal assistance being given to the accused,[59] serious violations of the right to remain silent[60] or of the right to cross-

[53] *Popescu v Romania* Apps nos 49234/99 and 71525/01 (ECtHR, 26 April 2007), para 106.
[54] See, for example, *Khan v the United Kingdom* App no 35394/97 (ECtHR, 12 May 2000).
[55] *Gäfgen v Germany* (n 49), paras 98–99; *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012); *El Haski v Belgium* App no 649/08 (ECtHR, 25 September 2012); *Al Nashiri v Poland* App no 28761/11 (ECtHR, 24 July 2014), paras 565–569; *Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECtHR, 24 July 2014), paras 555–561.
[56] *Khan v the United Kingdom* (n 54), paras 35 and 37. See also *Gäfgen v Germany* (n 49), para 104; in this case the evidence in dispute had not been necessary for determining the sentence for the accused, therefore his trial as a whole was considered to have been fair.
[57] *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006), para 84; *Stoichkov v Bulgaria* App no 9808/02 (ECtHR, 24 March 2005), para 56; *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR, 26 June 1992), para 110.
[58] *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), paras 38–39.
[59] *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).
[60] *Allan v the United Kingdom* App no 48539/99 (ECtHR, 5 November 2002).

examination.[61] In these cases the violation leads automatically, just as in the fruit of the poisonous tree doctrine, to a violation of Article 6 and therefore the exclusion of the evidence. The consequences of the exclusion of evidence in punitive proceedings depend on the availability of other forms of key evidence.

Besides these exceptional cases, there is no strict doctrine of the fruit of the poisonous tree embodied in Article 6 ECHR.[62] Nevertheless, the ECtHR underlines that the concept of 'fair proceedings as a whole' may entail specific requirements with respect to evidence. However, if we apply this to, for instance, the defence right to the cross-examination of witnesses,[63] as provided for in Article 6(3)(d) ECHR, it is not easy to identify general rules or principles in the case law of the ECtHR on the admissibility of witness evidence without any cross-examination, as the Court does not examine Article 6(3)(d) ECHR separately but jointly with the right to a fair procedure (Article 6(1) ECHR). The assessment of the fairness of the proceedings will depend a great deal on the concrete facts of the case,[64] especially the restriction of rights under Article 6 ECHR, the counterbalancing factors to compensate the restriction, the way in which the evidence has been obtained (the reliability of the evidence), the way in which the evidence is used (for instance, as the sole and decisive evidence or not) and the possibilities for the defence to assess the relationship between the reliability and legality of the evidence. In *Schenk v Switzerland* the ECtHR stated that:

> consideration should be given as to whether the use of an unlawfully obtained recording as evidence deprived the applicant of a fair trial and whether the rights of the defence were respected, particularly by determining whether the applicant was able to challenge the authenticity and use of that recording. It also considered the question whether the recording at issue was the only item of evidence relied on in support of the conviction.[65]

5.2 EU Courts and the admissibility of evidence

Unless EU law contains specific provisions on the law of evidence – as in competition Regulation 1/2003[66] – it falls under the general rule of national procedural autonomy. Contrary to the ECtHR, the EU Courts do not have a general approach to standards of evidence, the admissibility of evidence or its exclusion. This does however not mean that Member States have full freedom when applying EU law. Under the *Rewe* requirements[67] Member States must provide for equivalent and effective protection. So Member States

[61] *Vidgen v the Netherlands* App no 29353/06 (ECtHR, 10 July 2012).
[62] Maria CD Embregts, 'Uitsluitsel over Bewijsuitsluiting. Een Onderzoek naar de Toelaatbaarheid van Onrechtmatig Verkregen Bewijs in het Strafrecht, het Civiele Recht en het Bestuursrecht' (2003) PhD Tilburg <https://pure.uvt.nl/ws/portalfiles/portal/563388/123647.pdf> accessed 18 April 2019.
[63] Lorena Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law' (2013) 9 *Utrecht Law Review* 127.
[64] A good illustration of this assessment exercise can be found in *Al-Khawaja and Tahery v the United Kingdom* Apps nos 26766/05 and 22228/06 (ECtHR, 15 December 2011).
[65] *Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988), para 48.
[66] Art 12 of 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 L 1/1.
[67] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.

must have remedies available to be able to give effect to EU law just as effect is given to national law and must ensure that these remedies for breaches of EU law can be obtained at national level without undue burden.

However, through Article 52(3) CFR the EU authorities and the EU Courts do have to apply the minimum standards of the ECHR when evidentiary issues are at stake in cases where EU law does apply. Secondly, where EU authorities have full jurisdiction to enforce and adjudicate, including the imposition of punitive sanctions, other EU general principles, such as the right to good governance, also come into play. Finally, the Court of Justice has interpreted Article 53 CFR as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.[68] Below I have selected a couple of emblematic cases to show how the EU Courts deal with evidentiary issues.

Case T-54/14, Goldfish BV v European Commission

In this case the company Goldfish contested a decision by DG COMP/European Commission[69] stating that companies that were active in the North Sea grey shrimp sector had participated in various agreements and concerted practices and had exchanged sensitive information, resulting in an infringement of Article 101(1) TFEU. The decision was based on a variety of sources of evidence, which, however, included a number of audio recordings of telephone conversations and related handwritten notes of telephone conversations made by a private person (in this case one of the applicant's competitors) in which two competitors had exchanged sensitive commercial information, including on price setting. The applicant argued that the notes accompanying the secret recordings of the telephone conversations on which the Commission relied in the contested decision were extremely unreliable, with the result that their use as evidence in that decision also infringed Article 101 TFEU and Article 2 of Regulation 1/2003. The General Court therefore had to assess the lawfulness of using secret recordings of telephone conversations and related notes as evidence of an infringement of Article 101 TFEU.

The European Commission recalled that those recordings had been made in the Netherlands where they did not constitute a criminal offence; that even if private parties had obtained such evidence unlawfully, the Commission would not be prevented from using it in view of the case law of the EU Courts and the ECtHR; that neither the Commission nor the national authorities were responsible for the recordings; and that the undertaking where they were found had no interest in providing such incriminating evidence to the Commission. In contrast the applicant claimed that, first, secretly recording telephone conversations was an offence in several Member States and, consequently, amounted to unlawful proof of an infringement of Article 101 TFEU; secondly, the use of secret recordings of telephone conversations as evidence could not

[68] Case C-399/11 *Melloni v Ministerio Fiscal,* EU:C:2013:107, para 60.

[69] For a general overview of evidentiary issues in EU competition law, see Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in the EU Competition Law* (Edward Elgar 2017).

be justified under the case law of the ECtHR; thirdly, such use could not be justified under the Court's case law either; and fourthly, Dutch law does not permit the use of secret recordings of telephone conversations in the context of competition law.

The General Court commenced its reasoning by recalling a couple of principles. First, lawfully obtained evidence cannot be contested before the Court and the only relevant criterion for the purpose of assessing the probative value of evidence lawfully obtained relates to its credibility.[70] Secondly, given that there is no legislation at the EU level governing the concept of proof, any type of evidence that is admissible under the procedural law of the Member States in similar proceedings is in principle admissible.[71] However, there might be reasons to exclude some evidence from the file, for instance if there are serious doubts about the credibility of the piece of evidence, the nature of the evidence, or the way in which it has been obtained. This had occurred for instance in its judgment of 17 December 1981, *Ludwigshafener Walzmühle Erling KG and Others* v *Council and Commission*.[72] The Court nevertheless underlined that such an exclusion is not automatic and the EU Courts have, on occasion, agreed to consider documents which had not been shown to have been obtained by proper means. The Court here referred to its judgment of 8 July 2008, *Franchet and Byk v Commission*.[73] The non-exclusion of evidence in this case was however in favour of the applicants and the General Court decided that the effective judicial protection/remedy for the applicants and their defence rights prevailed above the possible unlawfulness of the documents, even if they violate the human rights of certain persons. Thirdly, the General Court underlined in *Goldfish* that:

> 45 It should also be noted that reviewing the lawfulness of contested evidence does not relieve the institutions of their obligation to respect the fundamental rights of the applicants.
>
> 46 It is clear from settled case-law that respect for fundamental rights is a condition of the lawfulness of EU acts and that measures incompatible with respect for fundamental rights are not acceptable in the European Union.[74]

The General Court clearly stated in paras 47–48 that EU law cannot, as a consequence, accept evidence obtained in complete disregard of the procedure laid down for gathering it and designed to protect the fundamental rights of interested persons. The use of that procedure must therefore be regarded as an essential procedural requirement within the meaning of the legality review under Article 263(2) TFEU and the CFR. Through Article

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[70] Case T-54/14 *Goldfish BV v European Commission*, para 42, with reference to Joint Cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens* v *Commission*, EU:C:2013:866, para 128.

[71] Case T-54/14 *Goldfish BV v European Commission*, para 43, with reference to Case C-310/98 *Met-Trans and Sagpol*, EU:C:1999:599, and Case C-406/98 *Sagpol SC Transport*, EU:C:2000:154, para 29.

[72] Joined cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle Erling and Others v Council and Commission*, EU:C:1981:311, para 16.

[73] Case T-48/05 *Franchet and Byk v Commission*, EU:T:2008:257, para 78. For a further analysis, see section 6.

[74] With references to Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, para 284, and Case T-410/09 *Almamet* v *Commission*, EU:T:2012:676, para 39.

52(3) CFR the General Court included the relevant standards and reasoning under the right to respect for private and family life (Article 8 ECHR) and an effective remedy before an independent and impartial tribunal (Article 6 ECHR). The Court also recalled that the use of an illegal recording, moreover as the only item of evidence, did not in itself conflict with the principle of fairness.[75] Whether the use of unlawfully obtained evidence does deprive the applicant of a fair trial and the related defence rights depends on the ability of the defence to challenge the authenticity and use of the evidence and whether the evidence was the only and decisive item of evidence in support of liability.[76]

The evidence had been lawfully obtained by the Commission during an inspection, the legality of which was not at stake. This means that such evidence is, in principle, admissible in an investigation into a breach of competition law. However, the question which arose in the case in question was whether the evidence that had been lawfully collected by the Commission could be used by it even though it was originally obtained by a third party, possibly in an unlawful manner, for example in breach of the right to respect for the private life of the person who was the subject of the disputed recordings. In this case the applicant had had ample opportunity to check the source and content of the evidence, what is more, this evidence was not the sole piece of evidence. The Court was also not impressed by the references to national law and it underlined the fact that the Commission's assessment of the evidence in competition disputes is governed by EU law.[77] The EU judicature can draw inspiration from the law of the Member States, however, this does not mean that it is bound to apply the law of the Member State with the strictest rules on the evaluation of evidence, particularly because both national legal systems and EU law are deemed to incorporate the safeguards enshrined in the ECHR. Otherwise, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of EU law.[78] The Commission had not committed any illegality by using the disputed telephone recordings to establish an infringement of Article 101 TFEU. As we can see from the reasoning the General Court was using the *Schenk* standards from the ECtHR to assess the fairness of the EU proceedings in these punitive competition proceedings.

Case C-419/14, WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság

In this case the question was whether, in the case of parallel proceedings, the use of evidence obtained by judicial authorities through the tapping of telecommunications and the seizure of emails by tax authorities was consistent with fundamental rights, in particular Article 8(2) ECHR, Articles 7, 8, 41, 47, 48, 51(1), and 52(2) of the Charter, the rights of the defence, and the right to good administration. In this case EU law did apply, as it concerned a VAT debt procedure.

[75] *Popescu v Romania* Apps nos 49234/99 and 71525/01 (ECtHR, 26 April 2007), para 106.
[76] *Schenk v Switzerland* (n 65), para 48.
[77] Case T-54/14 *Goldfish BV v European Commission*, para 77.
[78] Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, EU:C:2010:512, paras 69–76.

The AG followed the ECtHR's reasoning under Article 8 ECHR (provided by law/legitimate aim/necessary in a democratic society).[79] The tapping of telecommunications had been authorised by an examining magistrate and was thus provided for by law. However, the seizure of the emails lacked the necessary prior authorisation. But WebMindLicences, although it was not aware of the criminal evidence and the transfer, had had the opportunity to be heard by the Hungarian tax authorities in relation to the evidence in question before their decision and had also had the opportunity to appeal against it. The AG only discussed this reasoning but referred to the national courts for its application to this case.

For the CJEU the starting point was indeed the lawfulness under national law. Secondly, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.[80] Fundamental rights can only be limited if this is provided for by law and if, when observing the principle of proportionality, this is necessary and genuinely meets the objectives of the general interest recognised by the EU. As for examining the necessity of the investigative measures, in the absence of prior judicial authorisation a strict legal framework for, and strict limits on, such seizure are required if individuals are to be protected from the authorities arbitrarily interfering with the rights guaranteed under Article 7 CFR.[81] Thus, such a seizure can only be compatible with Article 7 CFR if domestic legislation and practice afford adequate and effective safeguards against any abuse and arbitrariness.[82] The CJEU stated in para 78 that it is incumbent upon the referring court to examine whether the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the person concerned by the seizure having the availability of an *ex post factum* judicial review relating to both the legality and necessity of the seizure, a review which must be effective in the particular circumstances of the case in question.[83]

It must also be examined whether that use of the evidence satisfies the requirements set out in Article 52(1) of the Charter. Besides legality, legitimate aim, and proportionality, the CJEU strongly insisted on the right to an effective judicial remedy, guaranteed by Article 47 of the Charter. In order for the judicial review to be effective, the court reviewing the legality of a decision implementing EU law must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and especially by the Charter. The CJEU came to the conclusion that the transfer of the evidence was as such not precluded under EU law, provided that obtaining that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law. The CJEU thus concluded in para 91 that:

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[79] Case C‑419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, Opinion of AG Wathelet, EU:C:2015:606.
[80] Case C-617/10 *Åkerberg Fransson*, para 19.
[81] *Camenzind v Switzerland* App no 21353/93 (ECtHR, 16 December 1997), para 45.
[82] *Funke v France* App no 10828/84 (ECtHR, 25 February 1993), paras 56–57; *Miailhe v France* App no 12661/87 (ECtHR, 25 February 1993), paras 37–38; and *Société Colas Est and Others v France* App no 37971/97 (ECtHR, 16 April 2002), paras 48–49.
[83] With reference to *Smirnov v Russia* App no 71362/01 (ECtHR, 7 June 2007), para 45.

> by virtue of Articles 7, 47 and 52(1) of the Charter it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting VAT to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter, *it must disregard that evidence and annul that decision* if, as a result, the latter has no basis. *That evidence must also be disregarded if* the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law. (emphasis added)

This conclusion contains very clear instructions on the exclusion of evidence if the necessary standards of the rights of defence and an effective judicial remedy are not complied with.

Case C-469/15 P, FSL Holdings and Others v European Commission

Also in this case evidence – personal notes – gathered by the Italian finance police during a search as part of national criminal investigations into tax offences and their transfer to and use by the European Commission in a competition procedure against a southern European banana cartel were at stake. The starting point for the AG was that the existence of an antitrust offence can be demonstrated by any appropriate evidence.[84] There is no general principle in EU law to the effect that competition authorities may only rely on certain forms of evidence or only take into account evidence from certain sources. The AG further underlined in para 34 that:

> Reliance on particular items of evidence to demonstrate infringements of Article 101 TFEU or 102 TFEU is only exceptionally precluded by prohibitions on the use of evidence. Such prohibitions may be based on the fact that evidence was obtained in breach of essential procedural requirements intended to protect the individuals concerned or on the fact that evidence is to be used for an unlawful purpose.

Although the lawfulness of the gathering and transfer of evidence is governed by national law, the Commission may not knowingly rely on evidence which was quite clearly obtained in breach of essential procedural requirements. Fundamental principles of EU law such as, in particular, the right to good administration (Article 41(1) CFR) and the right to a fair trial (Article 47(1) CFR) require that the EU institutions undertake at least a summary examination in the light of all the circumstances of the particular case that are

[84] Case C-469/15 P, *FSL Holdings and Others v European Commission*, Opinion of AG Kokott.

known to them.[85] In this case the gathering of the evidence was lawful under Italian law and its transfer was duly authorised by the competent Italian prosecutor's office. As for the use of the evidence for an unlawful purpose, the AG rejected this reasoning as there is no specific legal basis for this purpose limitation – meaning that only evidence obtained in competition proceedings could be used – in competition law. The CJEU completely followed the reasoning and conclusion of the AG.

Interim conclusion

From this analysis of the case law of the ECtHR and the EU Courts it is very obvious that they have not developed common standards for the gathering of evidence (the type of evidence), the admissibility of the evidence, or the exclusion or nullity of evidence. Nevertheless, certain forms of evidence gathering do infringe upon human rights and the essence of justice to such a serious extent that they automatically lead to the exclusion of evidence or the invalidity of the act. In other cases, both the unlawfulness and the unfairness of the gathering and use of evidence (the lack of rights of defence or effective judicial remedies) can lead to a situation in which the use of that evidence infringes upon the 'fairness of the proceedings as a whole'. This means that in certain situations unlawful evidence can be admissible evidence in punitive proceedings, even if that evidence is inculpatory for the suspect or the person concerned.

Looking back at the rationale of the concept of the admissibility of evidence, we can state that the ECtHR and the EU Courts mostly use a systemic integrity model with a balancing approach (the judicial integrity approach). This means that they only resort to the exclusion of evidence for serious violations of important rights and only in cases where the dismissal of the charges will not significantly undermine the justice interest in convicting those who have committed serious crimes. Exceptions are however based on a nullity approach for evidence based on violations of Articles 2 and 3 ECHR and some serious unlawful acts under EU law.

6. OLAF PROCEEDINGS AND THE ADMISSIBILITY OF EVIDENCE AS WELL AS THE EXCLUSION AND NULLITY OF EVIDENCE

At this stage, we can apply the legal framework elaborated under sections 3–5 to the OLAF setting of evidence gathering and the use of evidence and then analyse what it means from the perspective of the applicable law, the applicable legal safeguards and the purpose limitation on the use of that evidence in the light of the applicable fundamental rights standards.

In doing this we must by definition take into account the particular setting of OLAF investigations and the use of OLAF evidence. Our analysis of the information exchange and the use of investigative powers by OLAF has shown OLAF's dependence on the national legal framework.[86] This means that the applicable law and the applicable procedural safeguards are to a large extent determined by domestic law. This does not

[85] ibid, para 37.
[86] See Simonato, Luchtman and Vervaele (eds) (n 2); Luchtman and Vervaele (eds) (n 3).

mean that the EU legal framework has no legal impact. It certainly does have an impact when it comes to the procedural safeguards contained in Article 9 of Regulation 883/2013 that applies to all OLAF investigations.[87]

When it comes to the use of evidence obtained by OLAF, the OLAF setting is of a particular nature since the admissibility of OLAF evidence in punitive proceedings will always be assessed by the national authorities/courts. This is of course very different from proceedings by ECB, ESMA or DG COMP as the results of their investigations will generally be used in EU punitive proceedings, meaning that these results will be used as evidence at the EU level and will be subject to the remedies/control of the EU Courts. Even when, in the case of serious infringements that can lead to criminal liability, ECB, ESMA or DG COMP may have the obligation to notify the competent national judicial authorities, the EU regulations do not contain any specific reference to the status of ECB/ESMA or DG COMP evidence as to its admissibility or evidentiary value in national punitive proceedings. This is very different in the OLAF setting as OLAF Regulation 883/2013 governs the link between OLAF investigations and any (judicial) follow-up action at the national level. The purpose relation is thus explicitly regulated by EU law. The OLAF report is a document that contains statements and recommendations based on evidence gathered by OLAF investigations. The status of the OLAF report is nevertheless somewhat unclear. Thanks to the case law of the CJEU we do know that the transfer of the report to the national competent authorities does not change the legal situation of the person concerned and cannot for this reason be challenged as such before the CJEU:

> *S'agissant, en particulier, des actes de l'OLAF et, plus spécifiquement, d'une décision de transmission d'informations, la Commission relève à juste titre que la Cour et le Tribunal ont jugé qu'une telle décision ne saurait être considérée comme un acte faisant grief, dès lors qu'elle ne modifie pas de façon caractérisée la situation juridique de l'intéressé, les autorités judiciaires nationales demeurant libres, conformément à l'article 10, paragraphe 2, du règlement n° 1073/1999, d'apprécier dans le cadre de leurs pouvoirs propres le contenu et la portée desdites informations et, partant, les suites qu'il convient d'y donner (ordonnance du 19 avril 2005,* Tillack/Commission*, point 23 supra, points 32 et 34; ordonnance du 15 octobre 2004,* Tillack/Commission*, point 23 supra, points 43 et 44, et arrêt* Tillack/Commission*, point 23 supra, point 70)*.[88]

[87] 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 [2013] OJ L 248/1.

[88] Case T-261/09 P *Violetti v Commission*, EU:T:2010:215, para 47. The decision is not available in English but the above-mentioned excerpt can be translated as follows: 'As regards, in particular, OLAF acts and, more specifically, a decision on the transmission of information, the Commission rightly points out that the Court and the Tribunal have held that such a decision cannot be considered to be an act having adverse effect, since it does not bring about a distinct change in the applicant's legal position, the national judicial authorities remaining free, in accordance with Article 10 (2) of Regulation No 1073/1999, in the context of their own powers, to assess the content and significance of that information and, thus, the action to be taken if necessary (order of 19 April 2005, *Tillack v Commission*, paragraph 23 above, paragraphs 32 and 34, order of 15 October 2004, *Tillack v Commission*, paragraph 23 above, paragraphs 43 and 44, and judgment *Tillack v Commission*, paragraph 23 above, paragraph 70)' (author's translation).

This ruling has not been affected by the new Regulation 883/2013 as recitals 30–31 clearly establish:

> In cases where the Director-General transmits to the judicial authorities of the Member State concerned information obtained by the Office in the course of internal investigations, that transmission of information should be without prejudice to subsequent classification in law by the national judicial authority as to whether investigative proceedings are required. It is for the competent authorities of the Member States or the institutions, bodies, offices or agencies, as the case may be, to decide what action should be taken on completed investigations on the basis of the final investigation reports drawn up by the Office.

In the recent order in Case T-289/16,[89] the EU General Court clearly reaffirmed its position:

> 19 … the first subparagraph of Article 11(1) of Regulation No 883/2013 provides first of all that, on completion of an investigation by OLAF, a report is to be drawn up, under the authority of the Director-General, which gives an account of, among other things, the procedural steps followed, the facts established and their preliminary classification in law, the estimated financial impact of the facts established and the conclusions of the investigation. The second subparagraph of Article 11(1) of Regulation No 883/2013 also states that '[t]he report shall be accompanied by recommendations of the Director-General on whether or not action should be taken', and Article 11(2) of that regulation states that 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, that they are subject to the same evaluation rules as those applicable to such administrative reports, and that they have the same evidentiary value as such reports. Article 11(3) of the regulation then provides that reports and recommendations drawn up following an external investigation are to be sent to the competent authorities of the Member States concerned and, if necessary, to the competent Commission services. Finally, Article 11(6) of Regulation No 883/2013 provides that, at OLAF's request, the competent authorities of the Member States concerned must, in due time, send to OLAF information on 'action taken, if any' on recommendations transmitted as a result of an external investigation. 20 It is apparent from the provisions of Article 11(2) of Regulation No 883/2013 that OLAF reports merely constitute evidence that may be used in national administrative or judicial proceedings, that they are to be evaluated according to the rules on evidence in national law, and that they have the evidentiary value provided for in national law. They are therefore not measures which, under Regulation No 883/2013, adversely affect, as such, the persons referred to in them.

Nevertheless, EU civil servants, as persons concerned in OLAF investigations, reports and follow-up actions do have a specific and better position, as they can challenge several OLAF decisions before the EU Courts, including for non-contractual liability. Other persons concerned will have to challenge the gathering of OLAF evidence and the use of that evidence in their respective national jurisdictions using the – non-harmonised –

[89] Case T-289/1 *Inox Mare Srl v Commission*, EU:T:2017:414.

remedies that are available, which might differ substantially from one Member State to another.

The EU and OLAF are and must be very conscious of the consequences of its reports as the evidence contained therein cannot only be admissible evidence but also key evidence for punitive enforcement in the Member States. This is the reason why Article 11(2) of Regulation 883/2013 contains not only instructions on the way in which the reports and recommendations should be elaborated upon, but also on the admissibility of the evidence and its evidentiary value:

> In drawing up such reports and recommendations, account shall be taken of the national law of the Member State concerned. Reports drawn up on that basis *shall 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. They shall be subject to the *same evaluation rules* as those applicable to administrative reports drawn up by national administrative inspectors and shall have *the same evidentiary value* as such reports. (emphasis added)

Article 11(2) is based on an assimilation rule between equivalent authorities under the EU and national legal orders and the legal consequences of their acts as evidence in the domestic setting. This is quite different from Article 37 of the EPPO Regulation that we mentioned in section 2:

> 1. Evidence presented by the prosecutors of the EPPO or the defendant to a court 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.
>
> 2. The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.

The EPPO provision has been shaped in the form of a non-discrimination clause, in the sense that the national courts cannot make a distinction between EPPO evidence gathered by the European Delegated Prosecutor in their own domestic legal order and EPPO evidence gathered by the European Delegated Prosecutor in other jurisdictions. From the wording it is unclear whether OLAF evidence, even that which has been gathered at the request of EPPO (based on Article 101(3) of the EPPO Regulation), will have the same status as evidence gathered by the delegated EPPO prosecutor, as OLAF is not a judicial but an administrative authority.

The outcome of OLAF investigations in the form of the eventual OLAF report, with the evidence being included, can qualify as direct, sole and decisive evidence if evidence gathered by similar or equivalent national administrative enforcement agencies has the same status based on assimilation. It may instead be the case that OLAF evidence does not qualify at all as direct evidence and can only amount to preliminary information for a judicial investigation, depending on the legal provisions on the transfer of administrative evidence into judicial evidence in the domestic legal order. In reality there are very substantial differences between the legal orders of the Member States. Some of

them refuse to recognise that OLAF evidence has any evidentiary value. Some of them simply apply the national rules that are applicable to national administrative agencies, while a minority have introduced special features for OLAF evidence and also accept that OLAF can provide evidence or be heard as a victim in criminal trials. This is very different from EPPO evidence which is directly admissible evidence in all cases.

If OLAF forwards evidence to the national competent authorities, it must assess the lawful status of its own investigation and the outcome in the form of potential evidence for national procedural follow-up actions. In Article 11(1) of Regulation 883/2013 it is clearly stated that that report shall give an account of the legal basis for the investigation, the procedural steps followed, the facts established and their preliminary classification in law, the estimated financial impact of the facts established, the respect given to the procedural guarantees in accordance with Article 9 and the conclusions of the investigation. This therefore means that OLAF has to assess the legality, quality and reliability of its investigations and the related evidence, also in the light of the applicable safeguards and fundamental rights when this evidence is included in the report, and when elaborating recommendations for (judicial) follow-up action. Depending upon the type of investigation (autonomous, mixed, mandated, or based on the model of mutual legal assistance) the assessment will contain a different mix of European and national applicable law. This also means that the potential causes of and the reasons for the unlawful acts and the related nullity/exclusion of evidence can have their background at the EU level, the national level or a combination thereof. OLAF's assessment based on Article 11(1) can also be considered as a first filter ('*purge des nullités*'), before forwarding the report to the national competent authorities. The use of the reports as evidence in punitive proceedings by the national authorities will and must lead to a second filter when these authorities have to assess the admissibility of OLAF evidence in the light of national law and in the light of mandatory EU law (based on the primacy of the OLAF Regulation).

We have selected a couple of OLAF-related cases to show how the EU Courts and the national courts generally deal with OLAF evidence and also to demonstrate the complexity of the issues in question. We will start with a couple of internal investigations by OLAF and then move on to external investigations in France, Belgium and the Netherlands.

Judgment of 8 July 2008, Franchet and Byk v Commission, T-48/05

The applicants, Mr Yves Franchet and Mr Daniel Byk, were, respectively, the former Director-General of and the former Director of Eurostat (the Statistical Office of the European Communities). A number of Eurostat internal audits revealed possible irregularities in its financial management. Consequently, OLAF initiated a number of investigations. OLAF forwarded files relating to the investigation to the Luxembourg and French judicial authorities. In their claim for compensation under non-contractual liability, the applicants made use of certain documents by OLAF's Supervisory Committee because they contained alleged errors in the OLAF investigation. The Commission considered that these documents were internal documents that were not

intended to be made public and that had been obtained by the applicants by unlawful means. The fact that the applicants produced an affidavit stating that they had not removed, or stolen, or intercepted any internal document produced by the secretariat of OLAF's Supervisory Committee, which the Commission had never accused them of doing, was not sufficient to demonstrate that they had obtained the documents lawfully. The applicants submitted that if, in a file such as that in the present case, in which compensation for damage was sought, it would not be possible to comment on or to have access to documents which actually prove the errors committed by OLAF and by the Commission, which are essential elements for the purpose of establishing liability, it is clear that there would be a serious and actual breach of respect for the rights of the defence and effective judicial protection.

It is interesting that the General Court related the unlawfulness to breaches of fundamental rights and the consequences for admissibility:

> 74 It must be observed that neither the fact that the documents in question may be confidential nor the fact that they may have been obtained unlawfully precludes their remaining in the file.
>
> 75 There is no provision that expressly prohibits evidence obtained unlawfully, for example in breach of fundamental rights, from being taken into account.

In para 79 the General Court considered that, on balancing the interests to be protected, it might be necessary to consider whether particular circumstances, such as the decisive nature of the production of the document for the purposes of reviewing the lawfulness of the procedure leading to the adoption of the contested measure[90] or of establishing the existence of a misuse of powers,[91] constituted grounds for not withdrawing a document. On that basis the Court decided that those documents were necessary for the purpose of appraising OLAF's conduct in the investigations relating to Eurostat and therefore had to remain in the file. In other words, the effective judicial protection of and the remedy for the applicants and their defence rights prevailed even if they violated the human rights of certain other persons.

The same approach was taken by the EU General Court in case T-562/12.[92] In this case a version of the opinion of the OLAF Supervisory Committee relating to the case had been leaked and published. The Commission wanted this document to be removed from the case file, since it had been obtained by unlawful means. The EU Court reiterated in para 47 that:

> neither the fact that the documents in question may be confidential nor the fact that they may have been obtained unlawfully precludes their remaining in the case-file. First, there is no provision that expressly prohibits evidence obtained unlawfully from being taken into account (judgments of 8 July 2008 in *Franchet and Byk* v *Commission*, T-48/05, ECR, EU:T:2008:257, paragraphs 74 and 75, and 24 March 2011 in *Dover* v *Parliament*, T-149/09, EU:T:2011:119, paragraph 61). Second, the Court of Justice has not ruled out

[90] With reference to Case T-192/99 *Dunnett and Others* v *EIB*, EU:T:2001:72, paras 33–34.
[91] With reference to Case T-280/94 *Lopes* v *Court of Justice*, EU:T:1996:28, para 59.
[92] Case C‑394/15 P *John Dalli v Commission*, EU:C:2016:262.

> the possibility that even internal documents may, in certain cases, lawfully be placed on the case-file (orders of 19 March 1985 in *Tordeur and Others*, 232/84, paragraph 8, and 15 October 1986 in *LAISA* v *Council*, 31/86, paragraph 5).

The EU Court did not exclude the documents from the file as they had not been obtained illegally by the applicant and were material to his defence.

We did not find cases in which the EU courts have allowed unlawful OLAF evidence to be submitted as inculpatory evidence (*à charge*), but from the general reasoning of the EU Courts under section 5.2 supra it cannot be excluded that this could occur, as long as the fairness of the proceedings as a whole is guaranteed.

Tendering fraud and related active and passive corruption in France and Belgium

The French Supreme Court[93] has had to deal with the nullity of an OLAF final report (and annexes) that had been determined by the Indictment Chamber at the Court of Appeal in Versailles.[94] Based upon information from OLAF, the French judicial authorities started a judicial investigation, headed by an investigating magistrate, into an EU fraud case (tendering fraud and active and passive corruption). The investigating magistrate requested OLAF inspectors to join the judicial investigations as experts. The judicial investigations included searches and seizures at the premises of several suspects in France. OLAF inspectors were also requested by the French judicial authorities to assist in the analysis of the seized digital data. The legal basis for the participation of the OLAF inspectors was Article 77-1-1 of the French Penal Code of Procedure:

> *Le procureur de la République ou, sur autorisation de celui-ci, l'officier de police judiciaire, peut, par tout moyen, requérir de toute personne, de tout établissement ou organisme privé ou public ou de toute administration publique qui sont susceptibles de détenir des informations intéressant l'enquête ... de lui remettre ces informations ....*[95]

Unfortunately this was a legal error and their participation should have been based on Article 77-1, as the OLAF inspectors had participated in a judicial investigation: '*S'il y a lieu de procéder à des constatations ou à des examens techniques ou scientifiques, le procureur de la République ou, sur autorisation de celui-ci, l'officier de police judiciaire, a recours à toutes personnes qualifiées*'.[96]

This also resulted in a violation of Article 166 of the French Code of Criminal Procedure that regulates the status of judicial experts. For that reason the pre-trial chamber determined that the report and all the related annexes had to be nullified because

[93] Court of Cassation, Criminal division, FR:CCASS:2016:CR05486, public hearing (Audience publique) of Wednesday 9 November 2016, No de pourvoi: 16-83602.
[94] Dated 3 May 2016, unpublished.
[95] 'The public prosecutor or, upon authorisation of the latter, the judicial police officer, may, by any means, require any person, any institution or private or public body or any public administration that may hold information relevant to the investigation … to share this information with him or her …' (author's translation).
[96] 'If it is necessary to carry out observations or technical or scientific examinations, the public prosecutor or, upon authorisation of the public prosecutor, the judicial police officer, shall resort to all qualified persons' (author's translation).

of a violation of the fairness of the proceedings, as stipulated in Article 6 ECHR, while Article 174 of the French Code of Penal Procedure stipulates: '*Il est interdit de tirer des actes et des pièces ou parties d'actes ou de pièces annulés aucun renseignement contre les parties, à peine de poursuites disciplinaires pour les avocats et les magistrats*'.[97]

At the Supreme Court, the European Commission, as a civil party, contended that national courts do not have jurisdiction to annul an OLAF report, being a European act, and that the jurisdiction to do so is exclusively reserved for the CJEU and that the primacy of EU law sets aside the national provisions. The Supreme Court did not follow this reasoning at all and concluded that the report and its annexes were the result of annulled acts under French criminal procedure and thus also had to be annulled in order to guarantee a fair criminal procedure. The French Supreme Court had already reached such a decision in a judgement in 2015,[98] in which it also made a very clear distinction between the nullity of the OLAF reports as such – not a matter of criminal jurisdiction – and the nullity of the OLAF evidence when used in criminal proceedings:

> *Attendu que, pour dire n'y avoir lieu de faire droit à la demande de nullité des rapports établis par l'OLAF et des actes subséquents, prise de ce que les investigations réalisées par l'Office avaient porté atteinte au droit à un procès équitable, au principe de loyauté des preuves et aux droits de la défense, l'arrêt relève que ces pièces issues d'une enquête de nature administrative ne sont pas susceptibles d'annulation par une juridiction pénale française au titre des articles 170 et 171 du code de procédure pénale ; que les juges ajoutent qu'il résulte de l'examen des procès-verbaux dressés par les enquêteurs de l'OLAF que ceux-ci se sont entourés de garanties procédurales et ont procédé à des notifications de droits, qui ne sont pas contraires aux dispositions conventionnelles invoquées, sont conformes aux textes communautaires régissant cet organisme et compatibles avec les dispositions de procédure pénale de droit interne ; qu'ils précisent que l'ordinateur portable de M. X..., qui fait grief de ce que celui-ci a été exploité sans son consentement et hors sa présence, a été placé sous scellé fermé à titre conservatoire pour les besoins de l'enquête administrative et qu'il incombe à l'instruction préparatoire, soumise à la contradiction des parties, d'évaluer la valeur des indices ainsi recueillis ; qu'enfin, ils soulignent qu'ils seront amenés à se prononcer, par un arrêt distinct, dans le cadre d'un appel formé par M. X... contre une ordonnance de refus d'acte d'instruction complémentaire portant sur l'ordinateur portable, sur un éventuel vice dans le recueil des données informatiques;*
>
> *Attendu que, si c'est à tort que la cour d'appel énonce que les juridictions françaises sont incompétentes pour connaître de la régularité des actes d'enquête effectués par l'OLAF, organisme administratif indépendant créé par la Commission européenne et habilité à procéder à des investigations en matière de lutte contre la fraude aux intérêts financiers de l'Union européenne, un tel acte versé dans une procédure pénale suivie en France pouvant être annulé, afin de garantir un contrôle juridictionnel effectif, s'il est établi qu'il a été accompli en violation des droits fondamentaux, l'arrêt n'encourt néanmoins pas la*

[97] 'It is forbidden to extract from annulled acts and documents or parts of annulled acts or documents any information against the parties, under penalty of disciplinary proceedings for lawyers and magistrates' (author's translation).
[98] Court of Cassation, Criminal Division, 9 December 2015, no 15-82300.

> *censure dès lors que les juges ont écarté, par des motifs que le moyen ne critique pas, les griefs allégués par M. X ...*[99]

It is interesting that the former file that led to the Supreme Court decision in 2016 also had a transnational dimension, as elements of this OLAF report were also used in parallel judicial procedures against the same suspects in Belgium. However, a specific Belgian statute regulates the transnational use of illegal evidence and this explicitly applies to Europol, Eurojust and OLAF:[100]

> *CHAPITRE V. – De l'utilisation d'éléments de preuve recueillis à l'étranger. Article 13. Ne peuvent être utilisés dans le cadre d'une procédure menée en Belgique, les éléments de preuve: 1° recueillis irrégulièrement à l'étranger, lorsque l'irrégularité: - découle, selon le droit de l'Etat dans lequel l'élément de preuve a été recueilli, de la violation d'une règle de forme prescrite à peine de nullité; - entache la fiabilité de la preuve; 2° ou dont l'utilisation viole le droit à un procès équitable.*[101]

After an adversarial procedure between the Commission (as a civil party) and the suspects before the Brussels first instance court,[102] the court decided that the French decisions were final decisions with a *res judicata* status on the admissibility of OLAF evidence based on

[99] 'Whereas, to find there is no reason to grant the application for the invalidity of the reports drawn up by OLAF and the subsequent acts, the fact that the investigations carried out by the Office had infringed the right to a fair trial, the principle of fairness of evidence and the rights of the defence, the judgment notes that these documents from an investigation of an administrative nature are not subject to annulment by a French criminal court under Articles 170 and 171 of the Code of Criminal Procedure; that the judges add that it follows from the examination of the minutes (*procès-verbaux*) drawn up by OLAF investigators that they complied with procedural guarantees and proceeded to notifications of rights, which are not contrary to the invoked provisions of the Convention, and are in conformity with the Community texts governing that body and compatible with the provisions of domestic criminal procedure; that they specify that the notebook of Mr X ..., who complains that it was used without his consent and out of his presence, was placed under seal as a precaution for the needs of the administrative inquiry and it is incumbent upon the preparatory investigation, subject to an adversarial procedure between the parties, to assess the value of the pieces of evidence (*indices*) thus collected; that, finally, they emphasise that they will have to decide, in a separate judgment, within the framework of an appeal lodged by Mr X ... against an order refusing a complementary act of the instruction (*instruction*) on the notebook, on a possible error in the collection of computer data; whereas, if it is wrong that the Court of Appeal states that the French courts are not competent to decide on the regularity of investigative acts carried out by OLAF, an independent administrative body created by the European Commission and entitled to conduct investigations of fraud against the financial interests of the European Union, such an act included in criminal proceedings in France may be annulled to ensure effective judicial review, if it is established that it has been carried out in violation of fundamental rights and the judgment was nonetheless not wrong since the judges rejected, for reasons that the means [of appeal] do not criticise, the complaints made by Mr X ...' (author's translation).

[100] Art 13 of the Law on the international police transmission of personal data and information with judicial purposes, international legal assistance in criminal matters and amending Art 90ter of the Code of Criminal Procedure (*Loi sur la transmission policière internationale de données à caractère personnel et d'informations à finalité judiciaire, l'entraide judiciaire internationale en matière pénale et modifiant l'article 90ter du Code d'instruction criminelle*), 9 December 2004.

[101] 'CHAPTER V – The use of evidence collected abroad. Art 13. Evidence may not be used in proceedings in Belgium if: (1) it was irregularly collected abroad, where the irregularity: - arises, according to the law of the State in which the evidence has been gathered, from the violation of a procedural rule on form prescribed under penalty of nullity; - taints the reliability of evidence; (2) or its use violates the right to a fair trial' (author's translation).

[102] Judgment of 5 October 2017, file no 04605, unpublished.

nullified acts. Their use in Belgium would undermine the essence of the fairness of the proceedings in Belgium which was the reason why the evidence was also inadmissible under Belgian law.

In a second decision on the same date,[103] the Court of First Instance had to deal with the legality of the analysis of digital data obtained during searches and seizures at Belgian premises in the Belgian investigation which involved the same OLAF inspectors that were also involved in the analysis of the French digital data. In the opinion of the Indictment Chamber at the Brussels Court of Appeal these experts were not involved as judicial experts, but did provide technical assistance under OLAF Regulation 1073/1999. An extraordinary appeal at the Supreme Court was rejected.[104] However, the Court of First Instance also determined that this evidence was inadmissible as it was impossible to make a distinction between evidence that was directly affected by the annulled acts in France and the parallel evidence obtained in Belgium.

Judgment of 3 May 2018, Sigma Orionis v Commission, case T-48/16[105]

In 2014 OLAF initiated an investigation into claims of time sheets being manipulated and excessively high hourly wages being paid in FP7 projects. The investigation was based on Article 3 of Regulation 883/2013, under which a production order was submitted and witness statements were taken from former employees. That evidence persuaded OLAF that it was necessary to conduct an on-site check under Article 5 of Council Regulation 2185/96.[106] OLAF thereby informed the local public prosecutor and requested all necessary assistance from the French authorities, including the adoption of precautionary measures under national law in order to safeguard evidence. OLAF's final report was sent to the Commission. OLAF also forwarded the report to the French authorities with the recommendation that they initiate criminal proceedings at the national level, based on French law, in respect of the conduct found to have occurred, in so far as such conduct was covered by French law. The persons concerned were prosecuted for fraud in respect of acts to the detriment of the EU.

However, in 2015 the Indictment Chamber of the Court of Appeal of Aix-en-Provence determined that the documents used by the French authorities in the criminal proceedings brought against the accused in France were invalid.[107] According to the court, those documents had been obtained in breach of a number of procedural safeguards designed to protect the rights of the defence. One of the main breaches was related to the fact that OLAF investigators were not assisted by French judicial police, as these latter did not show up. The documents held to be invalid included the final report sent by OLAF to the French authorities. In 2017 the Commercial Court rejected the claims entered by

[103] Judgement of 5 October 2017, file no 0606, unpublished.
[104] Judgment of 14 September 2016, unpublished.
[105] Case T-48/16 *Sigma Orionis v Commission*, EU:T:2018:245.
[106] Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 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 L 292/2.
[107] Indictment Division (Chambre de l'Instruction) of the Court of Appeal of Aix-en-Provence, which delivered its judgment on 17 December 2015.

the Commission in the inventory of the applicants' liabilities on the ground that the investigation conducted by OLAF as a result of which the Commission found that the applicants should not have received payment for some services had been 'invalidated' by the judgment of the Indictment Chamber of 17 December 2015. In a procedure before the General EU Court the applicants claimed the amounts owed by the Commission in the context of the implementation of the grant contracts and non-contractual liability.

At the General EU Court the applicants maintained that the *res judicata* effect barred the use of those reports in EU proceedings. The EU court did not follow that reasoning and stated that irrespective of the findings by the French Indictment Chamber in its judgment, OLAF's report continued to be lawful in the EU legal order in so far as it had not been invalidated by the EU judicature. As long as this report and evidence had not been invalidated by the EU judicature, this report could be used in administrative proceedings under EU law, as those related to breaches of contractual grant provisions under FP7.

It is interesting that in this case the applicants also claimed that the use of this report and the evidence therein was a breach of Article 47 CFR in so far as the on-site checks and inspections had been carried out by OLAF without its investigators being accompanied by national police officers, and without the applicants having been informed of their right to resist those operations and without the operations having been authorised beforehand by a national court. The EU Court rejected these arguments, as the former two were not covered by the EU legislation in question and did not fall under Article 47 CFR, and as the latter can be compensated by an effective national remedy.

The EU court also rejected the reasoning of the applicants that Article 53 CFR contains a 'minimum safeguards' clause under which OLAF, in its investigations, is required to comply with national rules where they afford individuals more extensive safeguards than those provided for in EU law, by stating that Article 53 CFR cannot be construed as allowing a Member State to disapply EU legal rules which are fully in compliance with the Charter on the ground that they infringe the fundamental rights guaranteed by that State's Constitution.[108]

Court of Appeal, Amsterdam, Customs Chamber, Judgment 4 October 2012[109]

Due to indications of fraud at the place of origin OLAF carried out an inspection of a company in Malaysia which specialised in exporting bicycles. The OLAF report contained evidence of the fact that a large proportion of the bicycles imported into the Community from Malaysia which were stated to be of Malaysian origin had not been produced in Malaysia, but in China. These bicycles were transhipped via the Malaysian Free Zones to the Community with false or incorrectly obtained Malaysian preferential origin certificates. In the Dutch customs debt proceedings, the company challenged the use of OLAF's reports as evidence. The Appeal Court adopted a clear stance on this in point 4.4: 'Setting aside the findings of a fact-finding mission by OLAF is such a far-

[108] With reference to Case C-399/11 *Melloni v Ministerio Fiscal,* para 58.
[109] NL:RBHAA:2011:BV1238, case no 11/00839.

reaching act that in general this will only be justified if the plaintiff's allegations against the findings of OLAF's fact-finding mission are so serious that no credibility can any longer be attached to the findings of OLAF'.[110] The allegations of the person concerned did not convince the Court of the lack of credibility of the findings in the OLAF report.

Rechtbank Noord-Holland, Judgment 23 July 2013[111]

In this criminal case against a firm accused of falsifying certificates of origin from Cambodia and Thailand, the criminal investigation had been commenced on the basis of an OLAF inspection mission in these third countries. The reports of these investigations were used by the FIOD (the specialised judicial tax enforcement authority) as preliminary information for the Dutch criminal investigation and as criminal evidence. The legal person accused challenged these reports, because the firm was not informed of their existence and because of the fact that a conceptual report had been used by the FIOD and not the final report.

The Dutch Court of First Instance emphasised that the Dutch Public Prosecutor's office is '*dominus litis*' and that the sanction of the inadmissibility of the prosecution under Dutch criminal procedure can only be used in the case of very serious infringements of the essence of the procedure or other fundamental rights which result in the right of the accused to a fair trial being violated, either intentionally or as a result of serious negligence. This was not the case as far as the court was concerned. The court further underlined that the textual difference between the OLAF versions was limited to only one footnote. The court found that this deviation had no connection whatsoever with the facts of which the defendant was accused. There was therefore no evidence of any specific defence interests that had been infringed in this respect. As for the report of the OLAF mission, the Criminal Court of First Instance literally reproduced verbatim para 4.4 of the decision of the Customs Chamber of the Court of Appeal that we quoted above. By doing so the court transferred the reasoning on the admissibility and validity of evidence from an administrative non-punitive customs procedure to a criminal procedure. The court was also not convinced of the reasoning of the defence as to the lack of credibility which could be attached to the OLAF report.

The approach of the Dutch courts contrasts with the French approach, as the approach is mainly based on comity and trust, unless there are very serious allegations that undermine the credibility of the evidence. Moreover, it is for the accused or the defence to come up with convincing arguments to rebut this presumption of credibility. If the rationale of the concept of unlawful evidence is also aimed at the protection of the defence rights and the fundamental rights of the person concerned, then this presumption of lawfulness and credibility is a doubtful approach, as it does not take into account that

[110] Author's translation. The original is: '4.4. *Het terzijde stellen van de bevindingen van een onderzoeksmissie door het OLAF is een dusdanig ingrijpende handeling, dat dit in het algemeen slechts gerechtvaardigd zal zijn, indien de door eiseres onderzoeksmissie van het OLAF zodanig ernstig zijn, dat geen geloofwaardigheid aan de bevindingen van het OLAF (meer) kan worden toegekend*'.

[111] RBNHO:2013:9668, case no 15/993018-06.

even lawful evidence used in this way can lead to the unfair use of evidence and thus to unfair proceedings.

7. CONCLUDING OBSERVATIONS

Although the European Commission has openly recognised, in many documents, that in the Area of Freedom, Security and Justice there is a need for harmonised common standards on evidence and the admissibility thereof, Article 82(2)(a) TFEU has not been used to instigate a legislative proposal in that respect. Even within the framework of the European Investigation Order or the establishment of the European Public Prosecutor's Office no common standards have been elaborated.

The result is that in the AFSJ the treatment of evidence and of unlawful evidence differs very much from one Member State to another and that to such an extent that we cannot speak of a presumption of equivalent standards across the EU. This is of course a problem, I would say both for the enforcement side as well as for the persons concerned or defendants (be they suspects or accused). The only potential protection offered at this stage, due to the lack of an equivalent level playing field in the Member States and the silence of the legislator, is that which could come from the European Courts and national jurisdictions. We have seen, however, that the ECtHR does not offer a common standard when it comes to evidence gathering, the admissibility of evidence or the exclusion thereof. Besides serious violations of absolute human rights or very serious violations that undermine the essence of justice, the ECtHR uses the doctrine of the fairness of the proceedings in order to test the admissibility and use of certain types of evidence. The main weakness of this approach is not only that the balancing exercise is not always very predictable, as it depends on the concrete facts and circumstances of the case, but also that this approach, in many cases, is meaningless in a transnational setting of a horizontal nature (between Member States) and/or in a vertical setting (with EU actors). The test of fairness in these cases is extremely unpredictable, unless it assesses whether a flagrant denial of justice has occurred,[112] but this standard has a very high threshold.

The EU Courts are of course not human rights courts and they strike a different balance between the *effet utile* of EU policies and the fundamental rights dimension. Even in EU cases where the whole procedure is European, the approach is very much a copy paste of the reasoning adopted by the ECtHR, unless under EU law there is really a nullity attached to a specific act. But in punitive proceedings the majority of EU cases are dealt with at the national level and the evidentiary matters are considered as basically domestic matters. In this case the fundamental rights dimension of the CFR does apply, bringing in the minimum standards of the ECtHR, but not necessarily higher national fundamental rights standards.[113]

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[112] See Michiel Luchtman, *Transnationale Rechtshandhaving – Over Fundamentele Rechten in de Europese Strafrechtelijke Samenwerking, Inaugurale Rede* (Boom Utrecht 2017), and Michiel Luchtman, 'Transnational Multi-Disciplinary Investigations and the Quest for Compatible Procedural Safeguards' in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart 2017) 191–209.

[113] Case C-399/11 *Melloni v Ministerio Fiscal*, para 58.

What does all of this mean for the OLAF setting? The selection of OLAF evidence-related cases shows that it is important for assessing the applicable law and the applicable legal safeguards to distinguish between the different scenarios and modus operandi of evidence gathering and the use of evidence. Evidence gathering by OLAF in internal investigations is by definition very different from evidence gathering by OLAF in external investigations. In the latter case OLAF inspectors also have to apply, in combination with the OLAF regulations, national law. The ways in which OLAF inspectors investigate and obtain evidence (autonomous, mixed, mandated) or receive evidence from other law enforcement agencies (from national investigations at OLAF's request or national investigations which are transferred to OLAF under mutual administrative assistance) are of course decisive. In the latter case the question of lawfulness is exclusively national and admissibility entirely depends on national law. In cases of mixed investigations and even autonomous on-site checks, because of the referral to national law for the existence and scope of investigative powers and related safeguards the situation is much more complex as national law and EU law are combined and this combination can itself be the source of invalid acts or unlawful evidence.

From the above cases we have seen that the national applicable law can lead to the nullity of investigative acts and the nullity of the related OLAF reports and evidence, certainly in cases where the unlawfulness affects the fairness of the proceedings and the defence rights. The way in which these nullity or exclusion grounds are shaped differ very much from one Member State to another. Some Member States have a very strict nullity system and have a broad definition of 'affecting the defence rights or the fairness of the proceedings'. We have also seen that the consequence of the nullity or exclusion in one Member State may or may not lead to nullity or exclusion in other Member States or even at the European level. This horizontal transnational effect does however completely depend on the applicable law in the receiving state. As for the EU dimension, the EU Courts have filled in the gap by ruling that inadmissibility or nullity at the domestic level does not automatically lead to the same effect at the EU level.

Unlawful evidence does not however automatically lead to nullity or exclusion either. In many states it depends on the type of violation and the consequences in the punitive proceedings. We have seen above that unlawful evidence is often accepted as admissible evidence if the unlawfulness has not been caused by the persons concerned and is material to the defence. Finally, under the systemic integrity model with a balancing approach (the judicial integrity approach), it is also possible that inculpatory unlawful evidence is declared admissible, as long as the 'proceedings as a whole remain fair'.

So, OLAF has to assess internally the legality of its investigations and the lawfulness and fairness of potential evidence in the light of a complex follow-up panorama, in which the status of that evidence, when it is assessed concerning its admissibility, lawfulness and fairness, is not very predictable, either for OLAF or for the persons concerned or defendants. The praetorian approach by the European and national courts has not led – and given the high degree of divergence in national standards will not

lead – to common standards for the admissibility of evidence and for the exclusion or nullity of evidence.

Finally, the EU legislator should accept its responsibility and submit a proposal for a directive under Article 82(2)(b–c) TFEU, with the aim of harmonising the standards for the admissibility of evidence and unlawful evidence. This would strengthen the setting for the use of mutual recognition instruments such as the European Investigation Order[114] and also the future work of the European Public Prosecutor's Office. For OLAF, an extra effort will have to be made within the framework of the reform of Regulation 883/2013, as the interlinkage between EU administrative investigations and judicial follow-up has to be regulated in more detail in order to guarantee foreseeability, effective enforcement and sufficient due process in OLAF cases in domestic punitive proceedings. The actual reform proposal[115] does limit the reform on this point to Article 11(2)(2):

> Upon simple verification of their authenticity, reports drawn up on that basis shall constitute admissible evidence in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings in the Member States. Reports drawn up by the Office shall constitute admissible evidence in criminal 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. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.

This has fortunately been amended as follows in the European Parliament version of the Committee on Budgetary control:[116]

> Upon simple verification of their authenticity, reports drawn up on that basis shall constitute admissible evidence in judicial proceedings before national courts and in administrative proceedings in the Member States. The power of the national courts to freely assess the evidence shall not be affected by this Regulation.

This amendment substantially changes the status of OLAF evidence, as it would become admissible evidence, like EPPO evidence, without any reference to the assimilation clause included in the actual version of Article 11 and maintained in the Commission proposal above. This amendment does also implement the recommendation in that sense

[114] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.

[115] European 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, 23 May 2018.

[116] European Parliament, 'Draft European Parliament legislative resolution on the 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)0338 – C8-0214/2018 – 2018/0170(COD)'.

of the European Court of Auditors.[117] We can qualify this amendment as a mandatory inclusion rule, which is different from the non-discrimination clause in Article 37 of the EPPO Regulation. This inclusion rule triggers of course new questions as to the possibility of the national authorities declaring investigative acts by OLAF invalid (and thus annulling the related evidence) or declaring evidence inadmissible because of unlawfulness or unfairness. As long as there are no harmonised standards for this an automatic, mandatory inclusion rule seems to be problematic.

It is also interesting that the rapporteur, Ingeborg Gräßle, has introduced a new Article 11a in the proposal as follows:

> Action before the General Court
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> Any person concerned may bring an action against the Commission for annulment of the investigation report transmitted to the national authorities or to the institutions under Article 11(3) on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties, including violation of the Charter, or misuse of powers.

This effective remedy would be backed up by a right for the person concerned to have access to the final report, unless this is precluded by the interest of the investigation/prosecution, as included in Article 9(5a):

> For cases where the Office recommends a judicial follow-up, and without prejudice to the confidentiality rights of whistle-blowers and informants, the person concerned shall have access to the report drawn up by the Office under Article 11 following its investigation, and to any relevant documents, to the extent that they relate to that person and if, where applicable, neither the EPPO nor the national judicial authorities object within a period of six months.

This would give the person concerned an important right and remedy for judicial control over unlawful and unfair evidence at the EU level. But even then, the wording of the European Parliament does not regulate the standards for unlawful evidence, nullity or the exclusion of evidence and seems to leave this to the Courts. Judicial control by the EU Courts can of course lead to a stricter approach concerning the evidence that will be included as EU legal evidence in OLAF reports, and as a consequence lead to evidence that has more credibility at the national level. However, that does not exclude that national courts make use of a stricter standard, based on national law (punitive administrative law, criminal law, the national Constitution) when assessing unlawful or unfair evidence. In other words, the stamp of lawfulness by the EU Court is an exercise distinct from the assessment of the unlawfulness or unfairness of evidence in national punitive proceedings. Bridging this EU dimension to the national punitive dimension still remains. The proposal is however under negotiation at the European Parliament and it remains to be seen if the amendments will actually survive.

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[117] European Court of Auditors, 'Opinion No 8/2018 (pursuant to Article 325(4), TFEU) on the Commission's proposal of 23 May 2018 on amending OLAF Regulation 883/2013 as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' (2018).

4. FRANCE

J. Tricot

1. GENERAL FRAMEWORK

Concept of punitive administrative proceedings. The concept poses two difficulties, one related to the term 'punitive' and the other to the term 'administrative'. Each of these terms requires clarification as to the meaning and scope conferred on them under French law.

'Punitive' proceedings. The punitive proceedings considered here are diverse and fall under different procedural regimes. They concern: for anti-competitive practices, the procedure applicable to investigations and sanctions by the competition authority (provided for in the French Commercial Code),[1] for rating agencies and trade repositories, the procedure applicable to investigations and sanctions by the financial markets authority (provided for in the French Monetary and Financial Code),[2] for the single supervisory mechanism (SSM), the procedure applicable to investigations and sanctions by the prudential supervisory and resolution authority (provided for in the Monetary and Financial Code),[3] for the protection of financial interests, primarily, the procedure applicable to investigations and sanctions by the tax administration (provided for in the tax procedure book)[4] and customs administration (provided for in the Customs Code).[5]

In the absence of a unified legal framework applicable to these procedures, to which it would be sufficient for the legislator to refer, on a case-by-case basis, even if it means that the judge would have to rectify the 'label faking' if necessary, it is up to the judges to verify the effective (and not only formal) nature of the proceedings before them in order to determine whether the regime does indeed contain the necessary guarantees. This verification may be carried out by the ordinary judge, under the supervision of the judge of cassation (administrative or judicial) or by the constitutional judge. In the first case, the judge checks whether the criteria for a criminal charge are met, within the

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[1] Louis Vogel, *Traité de Droit des Affaires, Tome 1: Du Droit Commercial au Droit Économique* (Librairie générale de droit et de jurisprudence 2016).

[2] Thierry Bonneau, *Régulation Bancaire et Financière Européenne et Internationale* (Bruylant 2018); Jérôme Lasserre Capdeville, Michel Storck and Eric Chevrier, *Code Monétaire et Financier Annoté et Commenté* (Dalloz 2019).

[3] ibid.

[4] Martin Collet and Pierre Collin, *Procédures Fiscales, Contrôle, Contentieux et Recouvrement de l'Impôt* (Presses Universitaires de France 2017); Jacques Grosclaude and Philippe Marchessou, *Procédures Fiscales* (Dalloz 2018).

[5] Claude J Berr and Henri Trémeau, *Droit Douanier Communautaire et National* (Economica, 2006); Stéphane Détraz, 'Douanes – Procédure' (2016) *JurisClasseur pénal des affaires*, fasc 20 (mise à jour 2019).

meaning of Article 6 of the European Convention on Human Rights (ECHR). While this verification is carried out in principle in accordance with the case law of the European Court of Human Rights (ECtHR), it is not uncommon for the administrative or judicial judge to identify solutions whose compatibility with the case law of the Court can be discussed. The verification of the (punitive) nature of the procedure may also be carried out by the Constitutional Council. The latter has forged an autonomous concept, the function of which is comparable to that of criminal charge, but whose definition is not exactly the same. This is the notion of a 'sanction having the character of a punishment' which requires compliance with the principles of legality, necessity, proportionality (Article 8 of the Declaration of the Rights of the Man and of the Citizen of 1789, hereinafter: DDHC) and respect for the rights of the defence (Article 16 DDHC).

The Constitutional Council has chosen to qualify as a 'sanction having the character of a punishment' only those measures which have a mainly punitive purpose, whether of a criminal, administrative,[6] civil[7] or disciplinary[8] nature. This does not exclude any type of sanction a priori but presupposes checking whether the sanction is exclusively restorative, not punitive, and whether it takes into account the conduct of the person to whom it causes personal annoyance. On the other hand, it does not matter who is responsible for imposing these sanctions. These may be sanctions imposed by courts, whether judicial or administrative, or sanctions imposed by non-judicial authorities, such as an independent administrative authority (eg the Competition Authority, ADLC), an independent public authority (eg the Financial Market Authority, AMF) or an institution (the *Autorité de contrôle prudentiel et de résolution*, ACPR, which is integrated with the *Banque de France*) or an Administration (such as tax or customs administrations).

'Administrative' proceedings. The administrative nature must also be specified. Although the doctrine has long observed the construction of a 'criminal administrative law'[9] and the concept of 'administrative investigation in criminal matters'[10] or even 'common law of administrative investigation in criminal matters'[11] has emerged, the terms can be misleading.

On the one hand, the administrative nature is intended to underline that the investigative and sanctioning powers in question are entrusted to administrative authorities (either a central administration such as the tax authorities, or independent administrative authorities such as the Competition Authority, the Financial Markets Authority or the Prudential Supervision and Resolution Authority).

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[6] Constitutional Council, 25 February1992, no 92-307 DC, paras 24–31.
[7] Constitutional Council, 13 January 2011, *Établissements Darty et fils*, no 2010-85 QPC, para 3.
[8] Constitutional Council, 28 March 2014, *Joël M*, no 2014-385 QPC, para 5.
[9] See the pioneer work of Mireille Delmas-Marty and Catherine Teitgen-Colly, *Punir sans Juger? De la Répression Administrative au Droit Administratif Pénal* (Economica 1992). The authors show that the administrative nature can also designate another part of criminal law, which is marked by its technical dimension and the strong influence of the administration, but located inside the penal system and sometimes called 'administrative criminal law'.
[10] Martin Collet, 'Les Enquêtes Administratives en Matière Répressive' in *Les Procédures Administratives* (Dalloz 2015) 161ff.
[11] Camille Broyelle, 'Vers un Droit Commun de l'Enquête Administrative en Matière Répressive' (2013) *Revue juridique de l'économie publique* 49.

But it does not imply that the regime applicable to these investigations and/or sanctions is a matter of administrative law (and procedure). Indeed, the punitive action of the administrative authorities is, in the majority of cases, carried out under the supervision of ordinary courts (the Paris Court of Appeal, then the Commercial Chamber of the Court of Cassation).

The competence of the administrative courts is nevertheless provided for in tax matters and financial matters (financial markets, in the case of investment service providers), it concerns the control of administrative sanctions imposed and, in this context, may extend to proceedings and investigations. However, this jurisdiction is partly shared with the judicial judge since it is he who, during the proceedings, authorises or controls the use of certain investigative measures (visit and seizure operations, without the consent of the occupant of the premises).

Thus, although the sanctions imposed are administrative in nature and the investigation is conducted by an administrative authority, this does not imply that the applicable procedure is governed by administrative law or that the competent judge is the administrative judge.

On the other hand, the terms are misleading because they suggest that there is a unified general framework.

However, nothing could be further from the truth.

1.1 Function of admissibility rules in national criminal law

Deficiencies of the legal framework. The regime applicable to the procedure is in principle clear since it is laid down by the Code of Criminal Procedure (CCP) and by this Code alone.[12] However, as Serge Guinchard and Jacques Buisson note in their manual of criminal procedure,

> however decisive it may appear, the manifestation of the truth is, in the end, hardly covered by the Code of Criminal Procedure, which only devotes a few articles to it. Indeed, the system of proof is mainly the work of the doctrine which has developed a theory based on the two essential questions, integrated into procedural law, that of the burden of proof and that of its means.[13]

Even more severe, Etienne Vergès considers that 'in criminal matters, the CCP only deals with evidence indirectly and without any structure'.[14]

[12] François Fourment, *Procédure Pénale* (14th edn, Larcier 2013); Bernard Bouloc, *Procédure Pénale* (26th edn, Dalloz 2017); Serge Guinchard and Jacques Buisson, *Procédure Pénale* (11th edn, LexisNexis 2018).
[13] Guinchard and Buisson (previous n) no 482. In the same vein, Fourment (previous n) no 43, notes that the Code of Criminal Procedure does not contain any general provision on evidence. On the basis of scattered provisions (mainly drawn from Arts 427ff of the CCP, on the administration of evidence before criminal courts), judges have forged general principles.
[14] Etienne Vergès, 'Éléments pour un Renouvellement de la Théorie de la Preuve en Droit Privé' in *Mélanges en l'Honneur du Professeur Jacques-Henri Robert* (LexisNexis 2012) 853–895.

Principles of freedom, lawfulness and fairness. The classic presentation of rules on the admissibility of evidence combines the principle of freedom of evidence and the requirement of legality (lawfulness).[15]

Freedom characterises the search for and production of evidence but also its assessment (by the judge): no mode of proof is imposed; no mode of proof is prohibited or a priori excluded,[16] subject to compliance with the conditions of lawfulness and fairness. Thus, a mode of proof, even if it is not provided for by law, cannot be excluded for this reason and is therefore in principle admissible. Moreover, the possibility of proving by any means is not altered by the fact that a text provides a specific mode of proof of the offence.

Thus, the logic of criminal procedure can be summarised as follows: 'evidence may be obtained *beyond* legal provisions, but not *against* legal provisions'.[17]

The question of lawful and fair evidence is the subject of a particular treatment in criminal law that distinguishes this procedure from other procedures (civil, commercial and administrative).

The latter two conditions (lawfulness and fairness) are only fully applicable to public authorities.

Functions of fairness. The principle of fairness has a complementary function in relation to the freedom of evidence and a limiting function in relation to the lawfulness of the collection of evidence. It sanctions the unfairness of public authorities beyond mere lawfulness.

The purpose is to prevent the circumvention, evasion or destruction of the protection provided by the law or the provoking of the offence for which evidence is sought. While incitement to commit the offence is always prohibited, incitement to evidence of an offence already committed or about to be committed requires a distinction to be made between evidence produced by public officials (which is sometimes considered unfair and rejected or on the contrary admitted since it does not constitute a 'scheme') and that produced by individuals without the involvement of public authority, whose unfairness is not punished, on the grounds of another principle: freedom of evidence in criminal matters.[18]

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[15] Etienne Vergès, Géraldine Vial and Olivier Leclerc, *Droit de la Preuve* (Presses Universitaires de France 2015).

[16] Unless otherwise expressly provided by law, all means of proof are admissible, regardless of the offences considered. This is deduced from Arts 427 and 536 of the Code of Criminal Procedure. However, with regard to *contraventions* (the third category of offences within the three-part classification of French criminal law, which covers the least serious offences), the doctrine is divided as to whether the applicable principle is that of restricted admissibility (restricted freedom of evidence).

[17] Vergès, Vial and Leclerc (n 15) no 272.

[18] Martine Ract-Madoux, 'La Loyauté de la Preuve en Matière Pénale: La Liberté des Preuves' (2015) *Procédures* (dossier) 15. The author – a criminal judge – condemns the case law relating to the principle of loyalty and states that 'by its very nature, criminal evidence does not have to be fair'. Others stress that in criminal matters, the accused person is not required to give fair assistance to the judge or police against his or her interest, whereas in civil proceedings, everyone is required to give his or her assistance in establishing the truth (Art 10 Civil Code), Loïc Cadiet, 'Le Principe de Loyauté devant le Juge Civil et le Juge Commercial' (2015) *Procédures* (dossier) 10.

In both cases, it is a scheme by public authorities that destroys the rights of the accused person. Although lawful, if it irreparably impairs the rights of the defence, it must lead to the exclusion of the evidence gathered and to the annulment of subsequent measures based on it.

But the scheme is only established in that it irremediably infringes the rights of the defence, so that inadmissibility is not a priori established.[19]

In a way, in the silence of the law of criminal procedure (which does not prohibit certain means of investigation or means of proof) fairness frames the limits of lawfulness (what is not permitted by the CCP is not prohibited: one must demonstrate either the misuse of procedure or an interpretation *contra legem* of the procedure).[20]

Admissibility and probative value. However, the admissibility of unfair or unlawful evidence does not prejudge its probative value. The judge's assessment is free (principle of unfettered evaluation of evidence).

On the other hand, the exclusion of unfair or unlawful evidence may have more or less extensive effects on the whole procedure.

The judge may decide to annul all or part of the act. Invalidity may be extended to all acts whose necessary support is the annulled act. When an act (or document) of the procedure is annulled, it is removed from the file. No information can be derived from the invalidated acts or documents.

Invalidity (*nullités*):[21] Concept of 'acts or documents of the procedure'. The distinction thus made in the system of evidence according to whether it is sought and produced by public authorities or by private parties is in line with another distinction: that between, on the one hand, acts or documents in the proceedings (Article 170 CCP) and, on the other hand, mere means of proof or information. Only the first ones can be annulled and excluded from the procedure.[22] The latter cannot be annulled. They are subject to adversarial debate during the trial and to the unfettered evaluation of the judge.

[19] François Molins, 'L'Appréciation du Principe de Loyauté de la Preuve: Applications Pratiques devant le Juge Pénal' (2015) *Procédures* (dossier) 20.
[20] Didier Guérin, 'La Loyauté de la Preuve devant le Juge Pénal' (2015) *Procédures* (dossier) 11.
[21] Alexandre Gallois, *Les Nullités en Procédure Pénale*. *Guide Pratique* (Gazette du Palais 2016).
[22] There are rules that are expressly prescribed 'under penalty of nullity'. Thus, for example, the power of judicial customs officers (Art 28-1; for tax officials, Art 28-2), rules on searches (Arts 56, 56-1, 56-2, 56-5, 57 and 59, 76, 706-24 and 706-28, 706-35), identity checks (Art 78-3), the conditions of indictment (Art 80-1), requests for certain acts by the parties during the investigation (Art 82-1, para 1), telephone tapping of a parliamentarian, lawyer or magistrate (Arts 100-5, 100-7), etc. There is also nullity when the failure to comply with a substantive formality provided for in the Code of Criminal Procedure or any other provision of criminal procedure has adversely affected the interests of the party concerned ('no nullity without grievance'). But according to the case law, certain irregularities carry the grievance with them, so that they imply annulment (eg, lack of information given to the public prosecutor on the grounds for police custody, unjustified absence or delay in notifying a person in police custody of his rights; exceeding the legal duration of police custody; failure to present the person concerned to the prosecutor who must decide whether to extend police custody; absence of audiovisual recording of an interrogation in criminal matters, of the interrogation of a minor during his or her police custody; detention of a person in police custody when this measure is incompatible with his or her state of health; absence of a lawyer's invitation to attend the preliminary adversarial debate on pre-trial detention; violation of the rule that the defence always has the floor last). Finally, there is nullity even in the absence of a grievance in the event of a violation of a rule

The *Cour de cassation* considers that the invalidity concerns only the violation of a rule of criminal procedure, not that of a provision of another nature.[23] It also considers that the violation of a rule of regulatory origin cannot be sanctioned with nullity and that administrative police measures falling within the competence of administrative courts cannot be invoked in support of an application for nullity.

Scope of application. The expression 'act or document of the procedure', under Article 170 of the Code of Criminal Procedure, covers not only all procedural acts performed by the investigating judge or his delegates (with the exception of judicial acts subject to appeal), but also, more broadly, acts of investigation and prosecution.

All acts of administration of evidence and all acts established by a magistrate constitute 'acts' of procedure which may be annulled.

Exclusions. Letters produced by a party in support of the claim,[24] magnetic tapes submitted as exhibits,[25] copies of documents communicated to the prosecutor[26] for information purposes or the writings of the parties even though they refer to cancelled documents do not constitute acts that can be annulled.[27] For judges, recordings of private conversations made by an individual

> are not in themselves acts or documents of the procedure, within the meaning of article 170 of the Code of Criminal Procedure, and as such, liable to be annulled, but evidence that can be discussed in an adversarial manner, and the transcription of these recordings, whose sole purpose is to give substance to their content, can no longer lead to their annulment.[28]

Enforcement of invalidity. The investigating judge cannot annul the irregular act himself: he must refer the matter to the investigating chamber, after having consulted the public prosecutor and informed the parties.

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of public policy (eg organisation, composition, jurisdiction of the courts, irregular appointment of an investigating judge, rule enacted in the interest of the proper administration of justice).

[23] Jean Larguier and Philippe Conte, *Procédure Pénale* (24th edn, Dalloz 2016) 295ff.

[24] Court of Cassation, Criminal Chamber, 23 July 1992, no 92-82.721 (*Bulletin criminel*, 1992) 274.

[25] Court of Cassation, Criminal Chamber, 19 January 1999, no 98-83.787 (*Bulletin criminel*, 1999) 9. Police officers who discover, outside the execution of a letter rogatory, apparent indications of criminal acts in progress and not related to the referral to the investigating judge, are entitled to carry out investigations in accordance with the rules laid down for the investigation of *flagrante delicto*. The Indictment Chamber rightly rejected the claim that the principle of fair evidence had been violated. Indeed, the contested recording did not constitute a procedural act capable of being annulled, but only a means of proof subject to the adversarial discussion by the parties, having been carried out by a police officer, not in the performance of his duties, in order to establish facts of drug trafficking, on judicial delegation, but, as a victim of acts of corruption, to constitute proof of the solicitations to which he was subjected.

[26] Court of Cassation, Criminal Chamber, 28 January 1992, 90-84.940 et 90-84.941 (*Bulletin criminel*, 1992) 34.

[27] Court of Cassation, Criminal Chamber, 17 March 1987 (1987) *Dalloz* (Sommaire) 409.

[28] Court of Cassation, Criminal Chamber, 31 January 2012, no 11-85.464, Maud Léna (2012) *Dalloz* 440 (note); François Fourment (2012) *Dalloz* 914 (note). See also: Court of Cassation, Criminal Chamber, 7 March 2012, no 11-88.118 (audio recordings made by a private individual); Court of Cassation, Criminal Chamber, 27 November 2013, no 13-85.042 (2014) *Droit pénal* no 32 (computer files stolen by an employee).

1.2 Function of admissibility rules in national punitive administrative law

A fragmented procedural framework. Each punitive procedure is governed by its own legal framework. There is generally no common framework for investigations and sanctions by administrative authorities. This absence is even more significant with regard to the question of the regime of evidence in these proceedings.

It is generally possible to observe the absence of systematisation in the texts and a recent and fragmented systematisation in the literature.[29]

It is nevertheless true that common principles and common rules emerge from a comparison of sectoral texts and the case law that has interpreted them.[30] But we will see that these common elements are quite poor and limited.

Nevertheless, it can be observed that the general tendency is to use the ordinary law of civil procedure when the judicial judge is competent; this may be surprising given the punitive nature of the procedure and the sanction. As for administrative case law, it should also be noted that it has evolved to move closer to civil procedure and, in so doing, away from criminal case law.

However, we will see that the differences – where texts or case law exist – are not so clear-cut.

A framework that is incomplete and not very explicit. The procedural framework for the question of the admissibility of evidence is particularly poor in French law. There are few sources – both in criminal law *stricto sensu* (supra 1.1) and regarding punitive proceedings.

In its conclusions, a public rapporteur[31] noted that while public law, case law and scholars[32] have paid considerable attention to questions of burden and administration of proof, questions relating to means of proof and their admissibility have hardly been explored beyond the assertion that in the absence of a text, evidence is free before the administrative judge. However, others have qualified this statement.[33] Moreover, since the requirement of fairness has gradually penetrated administrative case law, the origin and methods of gathering evidence may lead to the exclusion of certain types of evidence, unless the judge refers the difficulty back to the discussion on the evidence so that it is

[29] Audrey Guinchard, *Les Enjeux du Pouvoir de Répression en Matière Pénale* (Librairie générale de droit et de jurisprudence, Thèses 2003); Club des juristes, *Des Principes Communs pour les Autorités Administratives Dotées d'Attributions Répressives* (2012); Broyelle (n 11); François Brunet, 'De la Procédure au Procès: Le Pouvoir de Sanction des Autorités Administratives Indépendantes' (2013) *Revue Française de Droit Administratif* 113; Mustapha Mekki, Loïc Cadiet and Cyril Grimaldi (eds), *La Preuve: Regards Croisés* (Dalloz 2015); Marie Crespy-De Coninck, *Recherche sur les Singularités du Contentieux de la Régulation Économique* (Dalloz 2017) Nouvelle Bibliothèque des Thèses, vol 164; *Droit Processuel. Droits Fondamentaux du Procès* (Dalloz, 2019).

[30] Delmas-Marty and Teitgen-Colly (n 9); Thomas Perroud, *La Fonction Contentieuse des Autorités de Régulation en France et au Royaume-Uni* (Dalloz 2013), Nouvelle Bibliothèque des Thèses, vol 127; Crespy-De Coninck (previous n).

[31] Vincent Daumas, Conseil d'Etat, 16 July 2014, *Ganem*, no 355201.

[32] It should be recalled that in French law, since criminal law is part of private law, it is private law scholars who mainly contribute to the study, analysis and systematisation of the criminal field.

[33] Patrick Frydman and Julien Sorin, 'Le Principe de Loyauté de la Preuve devant le Juge Administratif' (2015) *Procédures* (dossier) 13.

less a restricted admissibility that is organised than a guarantee of an adversarial debate on the evidence and its probative value.

With regard, more specifically, to punitive administrative investigations, one author spoke in 2013 of a 'procedural desert'.[34] In particular, she explained the latter by an apparent paradox: 'the improvement of the sanction procedure'. According to the author, the argument of the 'catch-up session', which would open with the prosecution (ie the entry into the sanction phase), favours and maintains the exclusion of procedural guarantees at the investigation stage. Not only can this argument justify the exclusion of the rights of the defence and the requirements of Article 6 ECHR, but it may also lead to an inoperative application of grounds relating to the regularity of the investigation procedure, even where the applicants argue that the investigation did not take place in accordance with the conditions laid down by the texts. In this sense, the existence of guarantees, applicable from the date of prosecution, would not only make it unnecessary to assert new rights; it could neutralise those recognised by the texts.

However, with the 'proceduralisation' of the investigation, temperaments were introduced. In addition to legislative requirements (aimed at enhancing procedural guarantees during the investigation), there are also changes in case law through the application of the principle of fairness to the investigation. Placed as a watchdog of the rights of the defence, fairness is intended to prevent these rights, which the person concerned only holds from the start of the proceedings, from being 'irremediably compromised'.

This limited framework therefore makes it difficult, if not impossible, to identify clear, precise and predictable solutions.

This is all the more true since the principle of freedom of evidence on the one hand, and the rarity of rules on the collection and production of evidence on the other, favour a considerable margin of uncertainty (and consequently a margin of manoeuvre for the authorities).

To this is added, first, the framing of (ie restrictions on) the consequences drawn from the inadmissibility of certain evidence. Secondly, there is also the postponement (except where the review of certain investigative measures is planned and organised) of the question of admissibility to the sanction review stage, ie at the end of the proceedings, with the effect of diluting the question of admissibility within the broader, more flexible (and therefore less rigorous) framework of an overall assessment of the proceedings, respect for the rights of the defence, and fair trial.

Lawfulness and fairness. However, while the investigation phase is not comparable to the sanction phase,[35] the inapplicability of the rules of fair trial and the existence of a 'procedural desert of investigation'[36] have gradually been called into question. Indeed, the investigation phase is gradually being 'affected by the "shadow cast" by the rights of the defence, which allows for the extension of judicial review'[37] and

[34] Broyelle (n 11).
[35] Brunet (n 29).
[36] Broyelle (n 11).
[37] Crespy-de Coninck (n 29) no 518.

is not without consequence on the system of admissibility of evidence when the sanction is reviewed by the judge.

While excluding the application of the rights of defence at the investigative stage – whether invoked as a general principle of law or in their conventional form – the judges – administrative and judicial – make them effective from the investigative stage by stating that investigations must 'take place under conditions ensuring that the rights of defence of persons to whom complaints are subsequently notified are not irreparably impaired'.[38]

Thus, it is through this lens – the risk that the rights of the defence will be irreparably compromised – that the judge gradually determines the evidence that must be admitted or excluded.

It is, therefore, the principle of fairness that constitutes the 'entry point'[39] for the rights of the defence at the investigation stage.

Thus, even if the rights of the defence are not directly applicable to the investigation phase, they may retroactively affect the latter when its malfunctions are likely to 'contaminate'[40] the sanction procedure, which opens the scope for judicial review.[41]

Yet the question of extending the principles applicable to the sanction procedure to the administrative investigation phase raises the question of assessing the defects of the investigation that could affect the sanction procedure. This is where the admissibility of evidence regime resides.

But the effectiveness of the generalisation of the principle of fairness is questionable.[42] Above all, it makes it possible to address the question of the admissibility of evidence only indirectly: by the judge, not the legislator, and through the punitive purpose of the procedure or measure (which only requires the assessment of the irremediable infringement of the rights of the defence and not the assessment of the measure/evidence in itself); and only partially: insofar as the regime of elements collected outside the legal framework is not resolved.[43]

Functions of the admissibility of evidence. Thus, it emerges from these general characteristics that the rules applicable to evidence are intended, in general terms, to guarantee, with due respect for the rights of the defence, the protection of the general

[38] In the area of financial markets: Conseil d'Etat, 15 May 2013, *Société Alternatives Leaders France*, no 356054. Formula found before the Paris Court of Appeal in competition matters (infra) or the Court of Cassation in the case of AMF investigations or the *Conseil d'État* in the case of investigations conducted by the ACPR (20 January 2016, CELR no 374950).
[39] Crespy-de Coninck (n 29) no 521.
[40] Broyelle (n 11).
[41] Crespy-de Coninck (n 29) no 523, 370.
[42] Collet (n 10).
[43] In this respect, it was held that 'the regulatory authority may rely on the evidence gathered during an investigation that led to the opening of sanction proceedings in the exercise of another competence'. See for example: Conseil d'Etat 13 July 2011, *Vallon*, no 337552; Mathias Guyomar (2011) *Bulletin Joly Bourse* (no 11) 596 (conclusions): concerning the use by the AMF Board of evidence gathered during an investigation when examining an application for an authorisation. See also: Conseil d'Etat, 26 January 2015, *Bernheim Dreyfus Society*, no 368847.

interest and the manifestation of the truth through the freedom of evidence; a principle which is more broadly applicable in so far as it is a question of proving facts.

The applicable rules of evidence aim secondly (in particular through the statement by the law of the legal conditions for the use of certain evidence-gathering measures and the organisation by the law of the monitoring of their compliance) to regulate the investigative powers of the administrative authorities in order to guarantee the rights of the defence.

However, this function is limited insofar as the regime applicable to modalities not provided for by law (silence of the law) is uncertain (both as regards admissibility but also as regards the consequences of possible inadmissibility: simple exclusion or invalidity of the procedure). The remark applies more broadly in so far as the question of the lawfulness and fairness of the evidence is a controversial, evolving question to which not all the answers have been given.

1.3 System of proof: Free or controlled?

Concepts[44] (admissibility – freedom – lawfulness – loyalty). The concept of admissibility under French law refers to the 'aptitude to be taken into consideration as evidence'.[45] When this aptitude includes all modes of proof, the applicable regime is referred to as 'freedom of evidence'.

Overall, the areas covered by this study are governed – in principle – by the principle of freedom of evidence. However, this principle must be well understood: if the evidence is 'free', it must be lawful and, in most cases, fair. In principle, evidence can therefore be adduced by any means at the disposal of the parties and the authorities. But it must be lawful: the collection of evidence is governed by the law and by the requirement of fairness.

However, this requirement of lawfulness and fairness is not understood in the same way in punitive proceedings and in (*stricto sensu*) criminal proceedings.

1.3.1 Criminal law

According to Article 427 of the CCP, 'Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction. The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him'. The principle of freedom of evidence laid down in this text is in line with the provisions of Articles 41, 81 and 151 of the Code of Criminal Procedure, which confer on the investigating judge, the public prosecutor and members of the judicial police under their direction the power to carry out or have carried out 'all acts' necessary for the investigation and prosecution of offences or all acts useful for establishing the truth. But the purpose of Article 427 is not to define the admissible modes of proof. The purpose of the article is to indicate that the existence of an offence may be established by the modes of evidence admitted by law,

[44] Vergès, Vial and Leclerc (n 15).
[45] Gérard Cornu, *Vocabulaire Juridique* (12th edn, Presses Universitaires de France 2018).

without any of them being excluded or on the contrary privileged and without there being any distinction to be made according to whether the evidence results from the investigations of a magistrate or a police officer or is provided by the parties.

However, in certain matters, a particular or enhanced probative value is conferred on certain types of evidence. This is the case, in particular, with the official records and reports drafted by judicial police officers for the establishment of petty offences (*contraventions*):[46] they are *prima facie* authentic evidence; proof of the contrary may only be established in writing or by witnesses. There is no possibility of dismissal, then, for the sole benefit of the doubt; but the judge may resort to expertise. The burden of proof to the contrary lies with the defendant. In some areas, such as customs, the records are authentic until it is proved they are forged (*inscription de faux*).

The requirement of lawfulness and fairness is less strictly understood in criminal proceedings: only evidence obtained unfairly or unlawfully by public authorities is not admitted. This includes the case where these authorities have participated in the unfair/illegal collection of evidence by private persons and the case where, although lawful, the collection is part of a scheme whose unfairness results in the inadmissibility of the material collected and, where applicable, the invalidity of the procedure.[47] Unlawful and unfair evidence presented by private parties is, however, admissible.[48] On condition that it is subject to an adversarial debate, this evidence is subject to the unfettered evaluation by the judge (who determines its probative value).

1.3.2 Punitive administrative law

In the absence of specific legal provisions, the principle of freedom of evidence is required in the field of punitive proceedings.

The requirement of lawfulness and loyalty is strictly understood in the context of these procedures: evidence obtained unlawfully and/or unfairly is not admitted, whether

[46] In the case of felonies, the minutes are considered as mere information. This is also the case, unless there is a legal exception, for misdemeanors.

[47] Court of Cassation, Plenary Assembly (Assemblée plénière), 6 March 2015, no 14-84.339:

> A stratagem by an official of public authority undermines the right to a fair trial, the right to remain silent and the right not to incriminate oneself and the principle of fair evidence. The placement, during a period of police custody, during rest periods between hearings, of two persons detained in contiguous cells previously equipped with sound systems, in order to encourage verbal exchanges which would be recorded without their knowledge for use as evidence, constitutes an unfair investigative procedure which frustrates the right to remain silent and the right not to incriminate oneself and violates the right to a fair trial. Consequently, the judgment is subject to cassation if, in order to validate such a procedure, it finds that several indications constituting plausible grounds for suspecting that one of the persons concerned may have participated in the offences being prosecuted justify his detention in police custody, in accordance with the requirements of Art 62-2, para 1, of the Code of Criminal Procedure, that the interception of conversations took place under the conditions and in the form provided for by Arts 706-96 to 706-102 of the Code of Criminal Procedure, which do not exclude the sound system of police cells, unlike other places covered by Art 706-96, para 3, of the same Code, where the persons concerned, who have been notified of the prohibition on communicating with each other, have made spontaneous statements, without any provocation by the investigators, and that the right to silence applies only to hearings and not to rest periods.

[48] This applies to the person being prosecuted, the victim or a third party (eg a witness).

presented by public authorities or by private persons. Such evidence will not be taken into account. It cannot be used as a basis for investigative measures or sanctions.[49]

1.4 Review of the decision on admissibility

In criminal proceedings, as in punitive proceedings, there is no decision on the admissibility of evidence as such.

Consequently, there is no specific procedure dedicated to the examination of the admissibility of evidence. However, this examination may be carried out incidentally during the review of investigative acts undertaken during the (criminal or punitive) pre-trial phase.

A special procedure is organised for the review of the validity of criminal acts and documents: it is the nullity procedure which gives the investigating chamber the power to annul criminal acts and documents due to irregularities committed during the investigation by the public authorities. Evidence given by the parties (the prosecuted person or the victim) cannot be annulled. It cannot be excluded. It is subject to adversarial debate during the trial. As for acts or documents drawn up by public authorities, once they have been annulled, they may no longer appear in the file of the proceedings or form the basis for any procedural act (acts adopted on the sole basis of an annulled act or document must also be annulled).

1.4.1 Criminal law

Review of investigative acts. If the evidence results from a measure substantially or formally related to a judicial police act (tax, customs, anti-competitive practices[50] or market abuse,[51] inspections and seizures), legal remedies are organised to challenge the decision to use the measure and then to challenge the conduct of the measure.

On this occasion, the judge's control can be exercised and is limited to the measure concerned.

Invalidity. If the evidence constitutes an act or document of the procedure, it may be the subject of an application for a declaration of invalidity (Articles 170–174 CCP) at the investigation stage or of a plea of invalidity at the judgment stage.

[49] See, in particular, infra section 3.

[50] Judicial control is limited in the investigation phase to operations of inspections and seizures. For the rest, acts likely to cause grievances may be challenged by incidental means if a sanction procedure is initiated (Constitutional Council, 8 July 2016 concerning simplified investigations under competition law, 2016-552 QPC).

[51] Except in the case of an inspection authorised by the judge of freedoms and detention (L621-2 CMF), there is no text providing for the possibility of an immediate appeal, which postpones the question until the end of the procedure (case of violation of the rights of the defence during the investigation and the collection of evidence). This analysis is criticised because it removes the grievance that is 'drowned' in the middle of the procedure; Emmanuel Brochier, 'La Loyauté de la Preuve dans l'Enquête AMF. Un Principe Affirmé, une Mise en Œuvre Limitée' (2015) *Procédures* (Dossier) 17.

Judgement / decision on the sanction. In general, it is at the stage of the sanction procedure (administrative sanctions or criminal trial) that the admissibility (unlawful / unfair evidence) and probative value of the evidence may be challenged.

1.4.2 Punitive administrative law

Subject to the specific case of nullity, whose regime is specific to criminal proceedings, the findings made at the time concerning criminal proceedings also apply to punitive proceedings.[52]

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

Uncertainties (silence of texts and uncertainties in case law). According to some authors, in the event of the annulment of documents by the civil or administrative court, if the question arises as to whether their inclusion in criminal proceedings remains possible, 'no clear answer has been given to this question'.[53]

Indeed, it must be noted that the question is not settled by the texts or in case law.

Existing decisions are scattered, sometimes old.

These are the general rules that must apply with regard to the admissibility of evidence and in particular to invalidity in the context of criminal proceedings.

It can be deduced that: inadmissibility in administrative (non-criminal) proceedings does not in itself imply exclusion in criminal proceedings.

It all depends on the reason for the inadmissibility and the use to be made of the evidence in the criminal proceedings.

Simple information. Elements resulting from the administrative investigation may be included as 'mere information' in the criminal proceedings.

In this case, they are in principle admissible and escape the rules relating to invalidity.

However, they are subject to the general principles of the rights of the defence, the adversarial principle and the principle of unfettered evaluation of evidence by the judge.

Acts or documents of the procedure. Elements resulting from the administrative investigation may belong to the procedure (as acts or documents of the latter).

In this case, the rules relating to invalidity may apply.[54]

Case of abuse of procedure. Where it is established that specialised officials have used their powers for purposes other than those provided for in the texts (in particular

[52] See also infra, sections 2 and 4.
[53] Frédéric Desportes and Laurence Lazerges-Cousquer, *Traité de Procédure Pénale* (3rd edn, Economica 2013) no 2001.
[54] supra, section 1.1.

with a view to facilitating the establishment of ordinary offences outside their jurisdiction), the information collected may be cancelled.[55]

Special case: illicit origin. In any case, the fact that the evidence has an unlawful origin is not sufficient in itself to exclude it from the proceedings. Thus, although the requirement of fairness may lead to the exclusion of the element in question from the administrative procedure, this requirement (since it cannot be established that the public authority contributed to or participated in the unlawful gathering of evidence) has no place in the criminal proceedings: although it is unlawful[56] and inadmissible in non-criminal proceedings, it is admissible and subject to the unfettered evaluation of the criminal judge in accordance with the principle of adversarial proceedings.

It is sufficient to establish that these elements have been regularly transmitted to the judicial authority.

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

General remarks. In general, the transfer of criminal evidence to other authorities (in particular the civil authority to which part of the punitive proceedings are subject) is governed by the following rules: first, the disclosure of criminal documents is permitted (and is not unfair) as long as it complies with the law (lawfulness/regularity) and/or is justified by the exercise of the rights of the defence.[57] Secondly, the fairness of production is determined by the regularity of the issuance of documents.[58]

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[55] Case of the use by customs officers of powers derived from Art 60 of the Customs Code (general right of search) to establish traffic offences, Court of Cassation, Criminal Chamber, 18 December 1989 (*Bulletin Criminel*, 1989) 485. Police officers cannot obtain information *in flagrante delicto* solely through a search by customs officers, in the absence of apparent evidence revealing the currentness of the commission of an offence. Cases of customs officers assisting police officers conducting searches *in flagrante delicto* on an offence of illegal work, an offence outside their jurisdiction: 17 October 1994 (*Bulletin criminel*, 1994) 333. Cases of tax officers: 31 January 2006 (*Bulletin criminel* 2006) 30, (2006) *Droit pénal* 23.

[56] Computer files which are alleged to have originated from a theft cannot be annulled since, on the one hand, they do not constitute, within the meaning of Art 170 of the Code of Criminal Procedure, acts or documents of the procedure which may be annulled, but are evidence subject to an adversarial discussion and, on the other hand, judges consider that the public authority did not intervene in the preparation or obtaining of the disputed documents. Since they do not constitute acts or documents of the procedure, documents thus collected by private persons and used in the proceedings may not be annulled and it is solely for the criminal judges, at the trial stage, to assess their probative value, in particular by following some rules already specified by the Criminal Chamber: if these documents were entered into the proceedings by a civil party when such entry did not constitute a necessary and proportionate measure for the defence and protection of the rights of that civil party, within the meaning of Art 8 ECHR, then it will be for the judges to accept or reject them on the merits from the proceedings (Court of Cassation, Criminal Chamber, 24 April 2007). On the contrary, if the filing of such documents is justified by the need to prove the facts of which the author of the recording is a victim and by the needs of his/her defence (or, in the case of the accused, by the interest of his/her defence), then a court of appeal, after having debated them in an adversarial way, will admit them as evidence without disregarding the provisions of Art 6 ECHR (Court of Cassation, Criminal Chamber, 31 January 2007).

[57] Eymeric Molin, 'La Communication de Pièces Pénales dans une Instance Civile; Entre Loyauté et Légalité' (2015) *Procédures* (Dossier) 26.

[58] Thus, the party must show that it has lawfully taken possession of the documents (in particular in accordance with Art R 156 of the Code of Criminal Procedure, which requires the authorisation of the Public Prosecutor's Office to issue criminal documents to a third party).

Cancelled acts. When the acts or documents of the procedure are annulled, they are removed from the file (Article 174, para 3 of the Code of Criminal Procedure). They may not be invoked in criminal[59] or civil proceedings.[60]

Where invalidity has not been raised in criminal proceedings, the rights of the defence require the possibility of challenging the admissibility of the act or document in dispute during the civil proceedings.[61] Such a challenge can only have the effect of declaring unlawfulness and allowing the exclusion of evidence.

Admissible acts. Moreover, once the criminal judge has considered the evidence admissible, the evidence (eg unfair evidence) becomes lawful; it becomes invocable before the civil judge.[62] The question then moves on to the assessment of the evidence.

However, the last point must be qualified. Indeed, the Commercial Chamber of the Court of Cassation was able to state that:

> it is right that, after having found that documents produced by the Administration in support of its request had an unlawful origin, in that they came from a theft, the first President of the Court annulled the authorisations [of inspections and seizures] obtained on the basis of these documents, stating that it did not matter whether the Administration had knowledge of them through the transmission of a public prosecutor or earlier.[63]

Tax matters. In tax matters, Act No 2013-1117 of 6 December 2013 validated the use by tax officials of documents or information, 'whatever their origin' (in other words, even if they are unlawful or anonymous), as long as they are regularly brought to their attention under the *droit de communication*[64] (power to request documents or information), but provided that they are not used for searches (Article L 10-0 AA Book of Tax Procedures).[65] This rule also applies when the transmission is the result of administrative assistance.

Constitutional guarantee. However, the Constitutional Council, by a reservation of interpretation, prohibited the tax and customs services from using documents obtained

[59] The Criminal Chamber of the Court of Cassation has thus stated that 'article 174 of the Code of Criminal Procedure prohibits that annulled acts or documents may constitute the basis for the prosecution of a separate procedure, in the event that they have been submitted to the customs administration prior to their regular annulment, pursuant to article L 101 of the Book of Tax Procedures', Court of Cassation, Criminal Chamber, 16 May 2012, no 11-83.602, concerning acts carried out in ordinary criminal proceedings and then transmitted to officers of the Customs and Excise Administration in other criminal proceedings they were conducting.

[60] Jean-Christophe Saint Pau, 'De la Preuve Pénale à la Preuve Civile' in Pascal Beauvais and Raphaële Parizot (eds), *Les Transformations de la Preuve Pénale* (Librairie générale de droit et de jurisprudence 2018) 185.

[61] ibid 186.

[62] ibid 188 and 194.

[63] 31 January 2012, no 11-13.097.

[64] According to the legal remedies provided (and not outside them). Thus, the transmission by the judicial authority (Public Prosecutor's Office) may be carried out because it has received the information from the person who collected the information (thief) or because it has acquired it during investigative measures.

[65] Customs equivalent: Art 67 E Customs Code.

by an administrative or judicial authority under conditions subsequently declared illegal by the judge.[66]

This reservation seems to be of a general nature and is in line with the rules of criminal procedure mentioned above, which deprive annulled acts of the possibility of being used in separate proceedings.

2. ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

Application of 'ordinary' law. In the absence of specific rules specially designed to address the question of the admissibility of evidence collected by OLAF, the general rules described above (section 1) apply.

We find the general observation made in the previous report:[67] no specific text is devoted to cooperation with OLAF or to OLAF's action on national territory.

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

A limited number of cases. A search for the occurrences of the terms 'OLAF' and 'Anti-fraud Office' in the case law leads to a distinction between two types of proceedings: customs proceedings and criminal proceedings.

In the absence of systematic access to the decisions of the trial courts, the research and analysis proposed is exhaustive only with regard to the decisions of the Court of Cassation. However, reference is made to decisions of trial courts when they have been identified by the doctrine or when they are available in the databases of legal publishers.

Case law on customs procedures. It is therefore customs cases, more specifically those relating to notices of recovery[68] (*Avis de mise en recouvrement*), which provide the relevant case law examples. This falls within the jurisdiction of the Commercial Chamber of the Court of Cassation.

The case law collected makes it possible to identify the grounds put forward (and sometimes recognised by the judges) for directly or indirectly challenging the admissibility of OLAF's findings. The two main grounds concern respect for the adversarial procedure through the question of the disclosure of OLAF's investigation report (and its annexes) and the conditions under which the judge may validly justify an order authorising customs inspections and seizures (Article 64 of the Customs Code).

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[66] Constitutional Council, 4 December 2013, no 2013-679 DC, recital 33.

[67] Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017).

[68] Instituted by Art 345 of the Customs Code, the notice of recovery is the act by which customs claims (taxes and customs duties) that have not been paid within the legal time limits are authenticated, subject, where applicable, to referral to the judicial judge.

The decisions listed also make it possible to note in advance that the courts very early on established the admissibility of the OLAF investigation's results as evidence. It should be noted, however, that the express recognition by judges of their competence to control its regularity is more recent. [69]

Admissibility of OLAF's findings. It is in this context (notice of recovery) that the French judge stated that the findings made by OLAF 'constitute admissible evidence in national litigation proceedings'.[70] In the same decision, the judge was also careful to reject the company's arguments that the customs administration had relied solely on the OLAF report (to establish the Chinese origin of the products). This source alone may be sufficient to form the basis for the offence notification report.

More specifically, the Paris Court of Appeal (whose decision was not criticised by the Commercial Chamber of the Court of Cassation)[71] was able to consider that:

> the Court is right to point out that, pursuant to Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999, all reports drawn up by OLAF constitute admissible evidence in national litigation proceedings; that, in addition, Article 342 of the Customs Code allows proof of customs offences by 'all legal means'.[72]

This solution is frequently mentioned by judges, including recently. Thus, according to the Paris Court of Appeal, Article 342 of the Customs Code states that 'information, certificates, records and other documents provided or drawn up by the authorities of foreign countries may be validly presented as evidence'. Since Article 342 allows proof of a customs offence by any means, OLAF reports referred to in Regulation No 1073/1999 (and now Regulation No 883/2013) form part of it.[73]

Discussion and assessment of OLAF's findings. It can be deduced from these judgments that the French judge also admits that the findings made by OLAF can be challenged and contradicted by the operators.

For example, before the national court, an importer tried to criticise the findings and deductions in an OLAF's report which invalidated an EUR1 certificate under the preferential regime between the EU and Jamaica. The Company criticises OLAF's report for being based only on assumptions and suspicions. It also criticises the findings and deductions in OLAF's report, which are allegedly based solely on statistics and do not detail the operations in question by characterising their irregularities. By challenging the conclusions of the report, the company was attempting to have them declared null and void in order to make the certificates valid and allow it to benefit from the reduced rate of duty. But for the French judge, 'this report, countersigned by the Jamaican government,

[69] Observation moreover 'reinforced' in criminal case law by the decision of the Court of Cassation of 9 December 2015 (15-82,300) in which it quashed a Court of Appeal decision which had declared itself incompetent to review the regularity of OLAF's investigation, whose report had been incorporated into the French criminal procedure file.
[70] Court of Appeal of Paris, 4 March 2014, no 2012/18625, *Still c/ Ministère de l'Économie, des Finances et du Commerce extérieur* (decision not consulted, cited in *Guide Lamy des procédures douanières*).
[71] Court of Cassation, Commercial Chamber, 21 October 2014 (12-17.256).
[72] Court of Appeal of Paris, Pôle 5, Chamber 7, 7 February 2012 – no 2010/14925.
[73] Court of Appeal of Paris, 8 October 2018, no 17/22268, *Etam c/ Ministre de l'Économie et des Finances*.

was not challenged by the European Commission in its decision REM 03/07 of 3 November 2008, so the objection must be rejected'.[74] Incidentally, to return to this point below,[75] it should be noted that in this decision, the judge made it clear that he or she was not 'the judge of the European investigation'.

Failure to disclose or late disclosure of OLAF's report (or its annexes). Failure to disclose or late disclosure is one of the main reasons given. In this case, the challenge does not directly concern the admissibility of evidence collected by OLAF but rather the conditions under which national authorities can rely on such evidence and use it as a basis for a sanction decision.

A decision of the Court of Appeal of Pau of 12 September 2013 perfectly illustrates the judges' reasoning:[76]

> It follows from the above that, although contradictory exchanges took place in the phase prior to the notification of the infringement, none of them allowed Stock Man to engage in any discussion with the customs authorities on the proposed taxation.
>
> Indeed, as regards the hearings held by customs during the inspection, during which the manager should have been able to make his observations, he was not aware of all the facts on which the proceedings were based, since only extracts from OLAF's report are recorded in the minutes and no annexes are included, even though these documents are those on which the customs administration relies in order to consider that the pallet trucks imported by Stock Man were mainly of Chinese origin.
>
> Consequently, in the light only of the extracts from OLAF's report made available to him on the day of the audit, he was unable to make any useful statements.
>
> Subsequently, before both the first and second AMRs were issued, no debate could take place since the customs administration had the first notice of recovery issued two days after notifying Stock Man of its refusal to disclose the OLAF report to it and then rushed thirteen days after the Bayonne District Court cancelled the first notice of recovery on 8 September 2010 for purely formal reasons, to issue a new notice of recovery, the subject of this challenge, whereas it had not provided the annexes to the report on which it based its prosecution.
>
> It therefore appears that the customs administration took its decision without giving Stock Man the opportunity to be usefully heard in its explanations. Those provided ex post in the first challenge were not really examined, since as soon as the first notice of recovery was cancelled a second notice of recovery was issued and one of the essential elements of Annex 29 of OLAF's report was never communicated to Stock Man despite its request.
>
> The customs administration may not invoke the volume and content of these annexes in order to refuse to disclose them if they concern the company under control.
>
> It thus appears that the customs administration did not respect the general principle of the rights of defence by not allowing Stock Man to put forward its explanations before a decision adversely affecting it was taken against it by the public authority.

[74] Court of Appeal of Douai, 7 September 2017, no 16/07571, *Administration des douanes et impôts indirects c/ Jules*.
[75] infra, section 2.4.
[76] Court of Appeal of Pau, First Chamber, 12 September 2013 – no 12/01441.

This reasoning[77] is confirmed by the Court of Cassation, which finds that the operator has not been able to make a useful argument concerning the documents on which the customs proceedings are based (and that the procedure is therefore not in order because the rights of the defence are not respected), since, on the one hand, annexes to an OLAF report used as the basis for the customs proceedings against this operator were not communicated to him (before the notice of recovery) and, on the other hand, only extracts from the OLAF report were transcribed in the customs records, whereas they should have been included in their entirety.[78]

In the same vein, and not surprisingly, the communication by Customs to the operator of essential documents on which the demonstration of the facts alleged by a notice of recovery (in this case the annexes to the OLAF report) is based, after this has been issued, does not respect the principle of adversarial proceedings.[79]

However, once it is established that the importer has been given the opportunity to make his views known to the customs administration in full and with sufficient time, the customs administration is not obliged to forward to that company the full investigation report drawn up by OLAF.[80] Already in a decision of 2012, the Commercial Chamber of the Court of Cassation had stressed that 'Article 334 of the Customs Code, which provides for the elements to be set out in the report drawn up following an inspection by the customs administration, does not require the addressee to be provided with all the documents referred to therein but only those used as evidence of the offence'.[81] Yet 'the only document whose absence is explicitly invoked, namely the report of the Anti-Fraud Office (OLAF), could not adversely affect Frimo [ie the company involved] since it was not used as evidence'.

Office of the JLD (Liberty and custody judge). The OLAF report and its annexes may be used as a basis for a search and seizure order issued by the JLD at the request of the customs administration. It is often on this occasion, in order to challenge the order and the resulting procedure, that the regularity of the investigation conducted by the European Office and the admissibility of its results are questioned. In particular, the inadequacy of the judge's examination of OLAF's report is often invoked in order to have the authorisation and the subsequent investigative measures annulled. This inadequacy may be based on the very large size of the report and annexes, compared to the very short time taken by the judge to make his or her decision. It may also be based on the fact that the report and annexes have not been translated and have therefore been transmitted in English, so that the existence or quality of their examination by the judge is questionable. But in any case, since it is not established that the report and annexes do not constitute the only element referred to in the customs administration's request or the decisive document that led the JLD to take its decision, these arguments are

[77] See also, in the same sense, Court of Appeal of Aix-en-Provence, 6 July 2012, no 11/18807.
[78] Court of Cassation, Commercial Chamber, 25 November 2014, no 13-26.240.
[79] Court of Cassation, Commercial Chamber, 25 November 2014, no 12-26.141.
[80] Court of Cassation, Commercial Chamber, 21 October 2014, no 12-17.256.
[81] Court of Cassation, Commercial Chamber, 23 October 2012, no 10-25.824.

systematically rejected in the name of the power of unfettered assessment of the probative value of the evidence submitted to it.

As for the language of the proceedings, it should be noted that there is an old text in France – the Villers-Cotterêts Ordinance of 1539 – which requires that procedural documents be drafted in French (and therefore, if necessary, translated). However, this order only concerns procedural documents. It does not exclude the production without translation of documents in a foreign language.[82]

In a decision handed down by the Paris Court of Appeal,[83] the company claimed that the lack of translation of OLAF's report made it impossible for 'the JLD to verify its content'. It argued that in the absence of this document, the JLD did not have sufficient evidence to presume fraud and should therefore have dismissed the request. The Court of Appeal rejected these arguments after recalling that the Villers-Côtterets order only concerns procedural acts and does not exclude the production without translation of documents written in a foreign language. In particular, it states in the case of documents in a foreign language that the JLD

> upon whom it is incumbent to assess the probative value of all the evidence submitted to him/her may have sufficient knowledge [thereof]. This was clearly the case here. Indeed, the JLD, which did not consider it necessary to request a translation of the document criticised, namely the report of the mission commissioned by OLAF to verify a possible circumvention via Indonesia of the anti-dumping measures imposed on certain elements originating in China, included in the grounds of his/her order which he/she is deemed to have established (page 3/7), elements and conclusions whose content is not contested and which we[the Court] are in a position to review, taken from that report. There is therefore no reason to dismiss it.

It should be noted that the judges add in response to the invocation of the violation of the right to an impartial tribunal that

> the reasons and the operative part of the order issued pursuant to Article 64 of the Customs Code are deemed to be established by the judge who issued and signed it. The fact that the JLD bases its decision in particular on information contained in OLAF's report drawn up in English does not constitute an objective factor such as to cast doubt on its impartiality.

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

The case law collected has not made it possible to identify cases in which OLAF's reports have been found inadmissible on their own merits or on the basis of higher national standards or on the grounds that OLAF's sui generis nature would render inadmissible the evidence collected by the Office.[84]

[82] Court of Appeal of Paris, Pôle 5, Chamber 1, 29 March 2017, no 15/20423.
[83] Court of Appeal of Paris, Pôle 5, Chamber 7, 6 May 2015, no 13/22647.
[84] To our knowledge, the latter argument has only been raised in criminal proceedings: Court of Cassation, Criminal Chamber, 16 January 2013, no 12-84.221:

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

The investigation conducted by OLAF may be subject to indirect control in two separate frameworks. First, if measures for searches have been requested by the national authorities on the basis of the results of the OLAF investigation, the control of the investigation may be carried out either at the time of the request for authorisation of the measure or at the time of the control of the progress of the measure.

Secondly, in any case, if a sanction (or 'punitive' measure) is imposed, the appeal against this measure (and the procedure that led to its imposition) may also provide an opportunity to challenge the investigation conducted by OLAF. This is the case in most of the decisions mentioned above.

With regard to the standards for the review of the regularity of OLAF's investigation, the judge shall base himself on the law applicable to the investigation, in particular Union law and, where applicable, the law specifically applicable to the investigation conducted outside the territory of the EU and based on a special agreement.[85]

For example, in a recent case decided by the Paris Court of Appeal,[86] companies invoked the nullity of OLAF's investigation for having been initiated in violation of the principle of confidentiality prescribed by the 1995 Basic Regulation (Council Regulation No 384/96 of 22/12/1995). This decision thus shows that while some judges stress that they are not 'judges of the European investigation',[87] they agree to review 'the nullity of OLAF's investigation' in the light of EU texts (in this case Regulation 1073/1999), since OLAF's investigation is likely to lead to the irregularity of the French procedure.

Whereas, in the light of these grounds, and since, on the one hand, the applicants did not invoke, in order to question the impartiality of the experts, whose findings are under discussion, elements other than their membership of OLAF, an investigative body whose independence, with regard to the Commission representing the European Union, as a civil party, is institutionally guaranteed, on the other hand, the judges were able to deduce from the reports already transmitted by the said body that the experts had not relied on information not in the file, the investigating chamber justified its decision.

[85] See, for example, the decision of the Court of Appeal of Paris of 8 October 2018 (no 17/22268):
In the present case, OLAF's investigation was conducted in accordance with the provisions of Article 32 of Protocol No. 1 applicable under the Cotonou Agreement on the date of the disputed exports at the invitation of the Jamaican Ministry of Foreign Affairs and Foreign Trade. The investigation report is co-signed by a representative of the Jamaican government. ... In addition, it should be stressed that Article 342 of the Customs Code allows proof of a customs offence by any means and Regulation (EC) No 1073/199 considers that reports drawn up following investigations carried out by OLAF are admissible evidence in administrative or judicial proceedings in the Member State where their use is necessary.

[86] Court of Appeal of Paris, Pôle 5, Chamber 10, 12 November 2018, no 17/20991.

[87] cf Court of Appeal of Douai, 7 September 2017, no 16/07571, *Administration des douanes et impôts indirects c/ Jules*.

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

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

In the absence of special rules specially provided for,[88] the general rules apply to ECB-collected evidence (supra, section 1). These rules are organised around the principles of freedom, lawfulness and fairness of evidence. To our knowledge, there is no litigation at the moment and no cases have been usefully identified.

All means of evidence are consequently a priori admissible, provided that their collection and production are lawful and fair, whether they are adduced by individuals or by the public authority (compliance with the rules on investigative measures, respect for privacy, respect for protected secrets, etc).

This absence of restriction at the collection stage is extended by the unfettered evaluation of evidence by the competent authority (whether it is the national authority's commission of sanctions or the judge).

Unlike proceedings before the ADLC or the AMF, remedies are not available at the investigation stage. They are limited to the sanction procedure. In addition to the arguments that can be put forward before the Sanctions Committee of the ACPR, only an appeal to the *Conseil d'État*[89] can make it possible to challenge ex post the administrative measures adopted and to raise the irregularity of the control procedure.[90]

In the latter respect, the scope and effect of the challenge is itself limited. Thus, the doctrine has been able to note that 'the opening of the adversarial sanction procedure is largely insufficient to compensate for the violations of the rights of the defence during the control procedure. While the legal person in question may challenge the merits of the charges against it and the inspection report, it cannot challenge the very regularity of the inspection procedure. Indeed, the Enforcement Committee considers that the grounds for raising the irregularity of the control procedure are ineffective as long as the rights of the defence have not been "irremediably compromised" during the control mission'.[91]

This analysis is supported by a decision of the *Conseil d'État* of 20 January 2016 in which it is stated that:

> If, when dealing with acts which may give rise to the sanctions provided for in the Monetary and Financial Code, the Enforcement Committee of the Prudential Supervision and Resolution Authority must be regarded as deciding on the merits of criminal charges

[88] The adjustments made to the Monetary and Financial Code to take account of the ECB's powers are limited to the possibility for the ECB to request the ACPR's supervisory college to initiate sanction proceedings. In accordance with EU law, Art L612-38 CMF provides that, 'In this case, the notification of grievances ... shall include any document, including, where appropriate, any on-the-spot audit report, provided by the European Central Bank in support of its request'.

[89] The higher administrative court.

[90] Margot Pugliese, 'L'Autorité de Contrôle Prudentiel et de Résolution: Pouvoirs de Contrôle et Garanties Procédurales' (2014) *Revue Lamy Droit des Affaires* 93.

[91] ibid. ACP, Commission des sanctions, 18 June 2013 and 25 November 2013.

> within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of the rights of the defence, recalled both in Article 6 of that Convention and in Article L. 612-38 of the Monetary and Financial Code, applies only to the sanction procedure initiated by the notification of grievances by the College of the Authority and by the referral to the Enforcement Committee, and not to the prior phase of the controls provided for in Article L. 612-23 of that Code. These controls must only take place under conditions which ensure that the rights of defence of persons to whom charges are subsequently notified are not irreparably prejudiced. The person being prosecuted cannot usefully rely, in support of his challenge to the regularity of the Authority's administrative investigation, on a breach of the provisions of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 § 3 of the International Covenant on Civil and Political Rights, arguing that the investigators did not notify its officials of their right to remain silent, since these provisions are not applicable to the administrative investigation procedure. Moreover, since the person prosecuted was able to make his or her observations before the Enforcement Committee, and even if some of the shortcomings identified by the Committee were based on the oral statements made by his or her officials during the on-the-spot inspections, the fact that he or she had not been informed of the possibility of being assisted by counsel or of the right of his or her officials to remain silent during the administrative investigation procedure did not irreparably affect the rights of the defence.[92]

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

In the absence of specific rules,[93] the general rules apply to evidence collected by ESMA (supra, section 1). These rules are organised around the principles of freedom, lawfulness and fairness of evidence. To our knowledge, there is currently no dispute as to the admissibility of this evidence and no cases have been usefully identified. Nor does consultation of the AMF's annual reports provide useful information on this point.[94] As an indication, it may be noted that the obligation imposed on persons heard in Quebec, within the framework of cooperation agreements, to answer under oath all the questions asked and to tell the truth under penalty of criminal sanctions ignores the right of the persons prosecuted to remain silent and not to contribute to their own criminalisation,

[92] Conseil d'État, 20 January 2016, no 374950, *Caisse d'épargne et de prévoyance du Languedoc-Roussillon* (2016) *L'Actualité juridique: Droit administratif* 818; Jean-Philippe Kovar and Jérôme Lasserre Capdeville (2016) *Revue Banque* (no 794) 90 (note); Nicolas Mathey (2016) *Revue Droit bancaire et financier* 195 (note); Marie-Anne Nicolet, 'Sanctions ACPR et AMF et Juridictions de Recours' (2016) *Banque et Droit* (no 166) 95.

[93] The adjustments made to the Monetary and Financial Code to take account of ESMA's powers are limited to organising, in general terms, the exchange of information between authorities (Arts L632-6 and L 632-8 CMF).

[94] Reference is made in passing to a decision of the Paris Court of Appeal (in the 2017 report) which ruled that: 'it is permissible for the AMF to obtain information from a foreign authority for the purposes of an investigation, even in the absence of prior conclusions of a written cooperation agreement'. This decision indirectly supports the principle of freedom of evidence.

protected by Article 6 ECHR, so that the minutes of these hearings should be excluded from the debates.[95]

Thus, all means of evidence are a priori admissible, provided that their collection and production are lawful and fair, whether they are adduced by individuals or by the public authority (compliance with the rules on investigative measures, respect for privacy, respect for protected secrets, etc).

However, it should be noted that the Constitutional Council recently censured the powers of AMF controllers and investigators to obtain access to data stored and processed by telecommunications operators (former Article L 621-10 CMF).

When a priority preliminary ruling on constitutionality was referred to it by the Court of Cassation, concerning the lack of sufficient guarantees to ensure a balance between the right to respect for private life and the constitutional value objectives of safeguarding public order and investigating offenders, the Constitutional Council replied that the disclosure of connection data was likely to infringe the right to privacy of the person concerned. As a result, the Council considered that:

> While the legislator has reserved the power to obtain such data in the context of an investigation for authorised officials subject to professional secrecy and has not conferred on them the power of forced execution, it has not attached any other guarantee to the procedure provided for in the provisions in question. Consequently, the second sentence of the first paragraph of Article L. 621-10 of the Monetary and Financial Code must be declared unconstitutional; the immediate repeal of the contested provisions would have manifestly excessive consequences and, consequently, it should be postponed until 31 December 2018.[96]

To access connection data, AMF staff must now obtain in advance, in accordance with Article L621-10-2 of the French Monetary and Financial Code, the authorisation of the 'controller of connection data requests'. This function is carried out, alternately every 4 years, by a member of the *Conseil d'État* (elected by this court) and then by a magistrate of the Court of Cassation (elected by this court).

Fairness during the investigation.[97] As we have seen (section 1), the investigation phase offers limited guarantees that are determined by compliance with the procedures explicitly provided by the Monetary and Financial Code to govern the powers of controllers and investigators. They are supplemented by a minimum standard of protection enshrined by judges that the rights of defence of persons to whom charges are

[95] AMF, 7 December 2016, Louis D'Avout (2017) *Bulletin Joly Bourse* 96 (note).
[96] Constitutional Council, 21 July 2017, no 2017-646/647 QPC.
[97] See also, Court of Appeal, Commercial Chamber, 24 May 2011, *Société Kelly*, no 10-18.267, which extends to the AMF the case law established with regard to the competition authority regarding the admissibility, as evidence, of clandestine recordings (infra section 3.3).

subsequently notified must not be irreparably impaired;[98] the investigation must be fair so as not to irremediably compromise the rights of the defence.[99]

Invalidity. The annulment of an act of the AMF's administrative investigation may lead to the annulment of subsequent acts and even the annulment of the entire procedure and the decision of the Enforcement Committee based on the annulled act.

In the *Vivendi* case, it was decided that the irregularity in the form of a record of the hearing is such as to justify its annulment, but without in itself rendering the proceedings as a whole invalid: the informal hearing of persons whose unreported statements were not used in the prosecution does not affect the rights of the defence.[100] By a judgment dated 30 June 2011,[101] the European Court of Human Rights dismissed the application against that judgment, on the ground that 'the applicant has not demonstrated that the fact that certain documents were collected during the investigation and not placed in the file would have affected the adversarial and fair nature of the proceedings and that he had no means of obtaining documents in the file that were necessary for his defence'.

In three judgments of 20 September 2011, the Court of Cassation reiterated the principle formulated on 19 December 2006:

> The fact that the *Autorité des marchés financiers* has selected the documents in the file finally submitted to the Enforcement Committee is not, in itself, likely to vitiate the procedure, unless it is shown that, in breach of its duty of fairness, it has diverted elements likely to influence the assessment by the Enforcement Committee and, if necessary, the Court of Appeal, of the merits of the charges retained.[102]

This absence of restriction at the collection stage is extended by the unfettered evaluation of evidence by the competent authority (Enforcement committee or judge) at the sanction or trial stage.

In general, the remedies available either at the investigation stage against certain investigative measures (in the case of searches and seizures)[103] or during the sanction procedure allow evidence gathered in violation of EU rules to be challenged. At the investigation stage, these elements may be challenged if the investigation measure is

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[98] '[T]he principle of the rights of the defence, recalled both by Article 6(1) of this Convention and specified by Article 6(3) thereof and by Article L. 621-15 of the Monetary and Financial Code, applies only to the sanction procedure initiated by the notification of charges by the [AMF] Board and by the referral to the Enforcement Committee, and not to the preliminary phase of investigations carried out by [AMF] officials', Conseil d'État, 15 May 2013, Isabelle Riassetto (2013) *Bulletin Joly Bourse* 409 (note); Conseil d'État, 2 July 2015, nos 366108 and 366194.

[99] Court of Cassation, Commercial Chamber, 1 March 2011, Charles Arsouze (2011) *Revue des sociétés* 575 (note).

[100] Court of Cassation, Commercial Chamber, 19 December 2006, Thierry Bonneau (2007) *Droit des sociétés* 80 (note); Charles Arsouze (2007) *Bulletin Joly Société* 580 (note).

[101] Nicolas Rontchevsky (2011) *Bulletin Joly Bourse* 634 (note).

[102] Court of Cassation, Commercial Chamber, 20 September 2011, nos 10-13.591, 10-13.878 and 10-13.911.

[103] Art L 621-12 Monetary and Financial Code.

based on these elements (exclusively or decisively) or if there is a risk that the rights of the defence may otherwise be irreparably impaired.

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

In the absence of special rules,[104] the general rules apply (supra, section 1) to the DG COMP-collected evidence. These rules are organised around the principles of freedom,[105] lawfulness and fairness of evidence.[106]

'A cocktail of rules'.[107] Before the Competition Authority, the general rules of the Code of Civil Procedure and special rules of the Commercial Code apply, as well as the rules of criminal procedure and the rules of administrative procedure. However, the whole is subject to the principles and guarantees of criminal law because of its repressive nature.

This composite set has given rise to judicial and doctrinal debates, particularly in the field of evidence.

The debate began on the question of the admissibility, as evidence, of clandestine recordings made by an individual, as to whether this should be considered as civil litigation, which should lead to the exclusion of the evidence thus obtained, or whether it should be criminal litigation, which could lead to its being admitted.

The reasoning of the Paris Court of Appeal is very instructive in this context:

> the provisions of the Code of Civil Procedure, which essentially aim to define the conditions under which a party may obtain a decision from the judge on the merits of a claim against another party based on the recognition of a subjective right, do not apply to the procedure followed before the Competition Council which, in the context of its mission to protect public economic order, prosecutes for criminal purposes leading it to impose punitive sanctions.[108]

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[104] 'There is no text dealing with evidence before the Council', Conseil de la Concurrence (predecessor of the ADLC), decision 07-D-50 of 29 December 2007.

[105] The system of proof before the Competition Authority does not involve any particular formalism. All types of evidence (written documents, testimonies, confessions) may be used before it, subject to respect for the principle of fair evidence; subject to this reservation, the relevance and strength of a piece of evidence are directly related to its credibility; Autorité de la concurrence, decision 14-D-08, 24 July 2014.

[106] Although the ADLC's annual reports have systematically recalled since 2006 the mechanism resulting from Art 12 of Regulation 1/2003, consultation of these reports does not provide useful information on this point either.

[107] Expression borrowed from Laurence Idot: 'Application par les Autorités Nationales et Autonomie Procédurale' (2011) *Europe* 71.

[108] Court of Appeal of Paris, First Chamber, section H, 19 June 2007, Georges Decocq (2007) *Contrats, concurrence et consommation* 208 (note) et Court of Appeal of Paris, 29 April 2009, no 2008/11907: Philippe Delebecque (2009) *Dalloz* 2716 (note); beforehand, in the same case: Conseil de la concurrence, 5 December 2005, no 05-D-66: *Dalloz* 2006, *Cahiers de Droit des Affaires* 225; Court of Appeal of Paris, First Chamber, section H, 29 April 2009, no 2008/11907, *Philips France, Avantage*, Muriel Chagny (2009) *Communication, commerce électronique* 88 (note).

Thus, it should be noted that, in order to validate the possibility for the competition authority to base a sanction decision on clandestine recordings, the Court of Appeal had noted, first, the absence of a text regulating the production of evidence; second, it had relied on procedural autonomy with regard to both national private judicial law and Community law; in other words, in particular, the possibility of excluding the national 'common reference system'. Thirdly, it had jointly addressed the mission of protecting economic public order, the repressive nature of prosecutions and the expected effectiveness of the financial penalties that might be imposed. These references to the proximity of competition law to criminal law made it possible – and thus aimed – to establish the admissibility of this type of evidence since the case law of the criminal judge allows it.[109]

However, the Commercial Chamber and the Plenary Assembly[110] of the Court of Cassation condemned this approach, referring to Articles 9 of the Code of Civil Procedure and 6 ECHR: 'unless expressly provided otherwise in the Commercial Code, the rules of the Code of Civil Procedure apply to disputes concerning anti-competitive practices under the jurisdiction of the Competition Authority'; consequently, 'the recording of a telephone communication made without the author's knowledge constitutes an unfair means by which its production as proof is not admissible'.

Since then, despite decisions to the contrary by the Union General Court,[111] the Court of Cassation has not changed its position. However, there are signs[112] that a shift may occur.[113]

[109] This dimension is further strengthened when the Court is seised once again after the cassation of its first judgment and it decides to maintain its case law despite the cassation.

[110] Court of Cassation, Plenary Assembly (Assemblée plénière), 7 January 2011, no 09-14.316 and no 09-14.667 (*Bulletin de l'assemblée plénière*, 2011) 1; Boris Ruy (2011) *La semaine juridique, édition générale* 208 (note); François Fourment (2011) *Dalloz* 562 (note). Cf Court of Cassation, Commercial Chamber, 24 May 2011, no 10-18.267; Yves Paclot (2011) *La semaine juridique, édition Entreprise* 1489 (note).

[111] Case T-54/14 *Goldfish BV v European Commission*, EU:T:2016:455; Julie Grangeon, 'La Preuve en Droit de la Concurrence: La Fin Justifie les Moyens!' (2016) *Revue Lamy de la concurrence* 56.

[112] Indeed, on 6 October 2016 (Decision no 16-D-21), the Competition Authority issued a decision in which the admissibility of evidence was challenged on the grounds of its alleged unlawful and unfair nature. In order to consider the controversial evidence admissible, the Authority states, first, that the unlawfulness is only alleged and not established. A filing of a complaint is not sufficient to establish it in the absence of a final judgment effectively establishing the unlawfulness of the conditions for obtaining evidence. It goes on to state that: 'Even if, under a final criminal judgment, the fraudulent origin of the documents is established, the documents in dispute do not, at first sight, contain any words or statements collected unfairly without the author's knowledge'. Moreover, the authenticity of the documents is not disputed. Finally, the Authority notes that: 'the conditions under which [it] was provided with these documents ... do not in themselves affect the principles of fairness enshrined in Article 6(1) of the ECHR, provided that they do not deprive the parties of the exercise of their rights of defence and in particular of the possibility of challenging the probative value of these documents later during the adversarial examination of the application to the court'. It is based on the *Schenk* decision of the ECtHR (*Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988)) and the above-mentioned *Goldfish* judgment of the EU General Court.

[113] Mustapha Mekki, 'Le Principe de Loyauté Probatoire A-t-il Encore un Avenir dans le Contentieux de la Concurrence ?' (2016) *Dalloz* 2355.

To date, however, it is possible to consider that evidence collected clandestinely (without the knowledge of the person concerned by the statements or information reported) or by scheme[114] is considered unfair and therefore inadmissible.

Apart from these cases, fairness is required not of the evidence but of the procedure, which amounts to replacing questions of inadmissibility with those relating to the principle of adversarial proceedings, fairness and equality of arms[115] thus they are discussed – and therefore postponed – at the time of the imposition of the sanction (if the procedure is successful).

In continuation of this very narrow approach of the Court of Cassation concerning the admissibility of clandestine recordings and more generally concerning the admissibility of unfair evidence obtained clandestinely or by stratagem, there is the question of protecting the confidentiality of correspondence exchanged with a lawyer. On that subject, the First President of the Paris Court of Appeal considered that the privilege of confidentiality of correspondence between lawyers and their clients extends to e-mails (internal to the company) emanating from the in-house lawyer of the company seized and searched, if they reflect the lawyer's defence strategy.[116] Thus, the extension is limited insofar as it is based on the content of the e-mails and not on the quality of the senders and recipients. In other words, as soon as the internal email includes the defence strategy developed and then transmitted by the lawyer, it does not matter who disseminates and receives this information. Only the fact that the information in question is covered by secrecy is relevant.

Comparison of the procedure for searches and seizures in competition matters and the criminal procedure for searches. Some authors consider that criminal procedure would be strengthened if the legal framework governing searches and seizures in competition matters were applied to it. Indeed, while criminal proceedings remain resistant to the mere presence of the lawyer during searches, competition proceedings allow him to be present alongside his client. In addition, any challenge to the searches and seizures in competition matters may be brought before the first president of the Court of Appeal within the jurisdiction of which the JLD authorised the searches and seizures in competition matters, within 10 days of notification of his order (in practice at the end of the operations). This possibility of immediate challenge before the judicial authority does not exist in criminal matters, as actions for the nullity or release of seizures are generally much later than searches.

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[114] That is, by means of an act involving a deceptive process, the use of a trick or scheme that renders the result – the evidence obtained – inadmissible.

[115] 'The fairness cursor moves and is no longer upstream, when obtaining evidence, but downstream during its discussion', Mekki (n 113).

[116] Paris, ord, 8 November 2017, no 14/13384: *AJ Pénal* 2018.49, obs Cyrille Mayoux; CCC 2017, no 256, obs David Bosco. Regarding a search and seizure operation carried out against Whirlpool France by the Competition Authority, the first president had to rule – in particular – on the legality of the seizure of two internal company emails, repeating the elements contained in writings that the company's lawyer had sent to his client, with a view to preparing his defence because of previous searches made in the same case. In his order of 8 November 2017, the first President analyses in concreto the content of the said e-mails, before concluding that their seizure has affected, on the one hand, the secrecy of correspondence between the lawyer and his client and, on the other hand, the rights of the defence.

However, it must be noted that the competition procedure is particularly close to criminal procedure: the searches and seizures in competition matters are authorised by an order of the JLD and are carried out in accordance with the provisions of Article 56 of the Code of Criminal Procedure; the remedies are carried out in accordance with the rules of criminal procedure; the Criminal Chamber of the Court of Cassation rules *in fine*.

Yet, in criminal matters, the seizure of documents covered by secrecy is more likely as the number of e-mail seizures – by keywords, or even global – potentially containing lawyer/client exchanges and subsequent internal e-mails increases. Unfortunately, it is not uncommon to see the presence, in criminal cases, of internal company emails containing customer/lawyer correspondence, or even the correspondence itself. The seizures of the latter are systematically cancelled by the criminal judge, in the name of respect for professional secrecy, but several months or years after their seizure and their reading by all those involved in the trial. On the other hand, the Criminal Chamber does not yet seem to have cancelled a seizure of internal company e-mails.

Thus, all means of evidence are a priori admissible, whether they are adduced by individuals or by the public authority, provided that their collection and production are lawful and fair (compliance with the rules on investigative measures, respect for privacy, respect for protected secrets, etc).

This absence of restriction at the collection stage is extended by the unfettered evaluation of evidence by the competent authority (Enforcement committee or judge) at the sanction or trial stage.

In general, the remedies available either at the investigation stage against certain investigative measures (in the case of searches and seizures)[117] or during the sanction procedure allow evidence gathered in violation of EU rules[118] to be challenged.

[117] Art L 450-4 Code de commerce.

[118] In a case where the company's lawyer, after unsuccessfully seeking the intervention of the JLD, had obtained by order of the first president of the court of appeal the annulment of the seizure, the Criminal Chamber of the Court of Cassation challenged this annulment on the grounds that 'the occupant of the premises [the company] does not have the right to bring the matter before the judge who authorised the visit and the seizure himself, the judicial police officers responsible for attending the operations having to, during the search, keep the magistrate informed of the difficulties encountered' (Court of Cassation, Criminal Chamber, 9 March 2016, no 14-84.566 (2016) *Dalloz* 652; Élisabeth Gautier and Johanna de Mortillet (2016) *Actualité Juridique Contrats d'Affaires* 251 (note)). The solution is reflected in a decision stressing that 'there is no text requiring that the parties or their lawyer have personal access to the judge [and that] Competition Authority investigators are not required to communicate precisely the criteria for selecting the data seized or to reveal the technical details of the seizures, the search engines and the keywords used' (Court of Cassation, Criminal Chamber, 26 October 2016, no 15-83.477). The company faced with the refusal of the judicial police officer can therefore only lodge an appeal a posteriori before the first president of the competent court of appeal (it being noted that, in the first decision, no grievance had been raised for the refusal by the judicial police officer to the lawyer to record the incident in the record, while in the second, it is specified that 'observations [had] been recorded by the lawyer in the records', the question therefore remains of the obligation for the judicial police officer to collect the observations made, Jean-Michel Vertut (2016) *Lettre distribution* no 12). To qualify somewhat the criticisms formulated above, commentators have stressed that the expectation of the Court of Cassation has the merit of specifying the mission of police officers during home visits. Since the latter 'must, during the visit, keep the magistrate informed of the difficulties encountered', the Court does not seem to give them the choice of whether or not to refer the matter to the JLD in the event of an incident raised by the company: this is a real obligation for them. Only this reading of the judgment seems to make it possible to limit the infringement of the right

At the investigation stage, these elements may be challenged if the investigation measure is based on these elements (exclusively or decisively) or if there is a risk that the rights of the defence may otherwise be irreparably impaired.

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

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

General principles. Information collected by national administrative authorities is in principle admissible, without particular restriction, as evidence in criminal proceedings.

This is the result of the principle of freedom of evidence that governs French criminal procedure.

This is further reinforced by the provisions which provide for the obligation of the administrative authorities to transmit to the judicial authorities (in particular the public prosecutor) the elements in their possession which appear likely to justify criminal proceedings (Article 40 CCP;[119] L462-6 Commercial Code in the case of the Competition Authority, for example)[120] or which provide more generally for the possibility for the administrative authorities to transmit any element to the courts (ex Article L452-3 of the Commercial Code), or even to bring civil proceedings.[121]

Hence, the general rules of criminal procedure as set out above[122] apply.

Thus, these elements are subject to the principles of lawfulness, fairness and regularity of gathering of evidence by the administrative authority, of which the criminal judge is the guardian.

In the case of non-criminal investigations or proceedings. Documents from non-criminal proceedings, whether civil, commercial or administrative (including elements of an internal administrative investigation), may be included in the file of the proceedings. Such documents may not be annulled by the criminal court. In principle,

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of access to the judge by companies, provided, of course, that the police officers, seized of an incident, have the means to join the JLD and systematically do so in accordance with the principle of adversarial proceedings, ie in the presence of the occupant of the premises or his representative (cf Gautier and de Mortillet (above)).

[119] Art 40, para 2 is a general provision that also applies to independent administrative authorities: 'Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents'.

[120] As Haritini Matsopoulou points out, since the criminal judge is required to seek the opinion of the AMF when deciding on one of the offences against market transparency, 'it is obvious that when the same facts have previously given rise to an administrative investigation, the AMF may forward to the criminal judge the evidence it holds' (Haritini Matsopoulou , 'De la Preuve Administrative à la Preuve Pénale' in Beauvais and Parizot (n 60) 175).

[121] Art L621-16-1 Monetary and Financial Code with respect to the AMF; Art L232 of the Book of tax procedure with respect to the Tax Administration.

[122] supra, section 1.

documents not issued by an authority vested with 'penal' prerogatives cannot be considered as falling within the category of acts that may be annulled.

However, the status of an administrative procedure may vary depending on the role it plays in the initiation of prosecutions and more broadly in criminal proceedings.

Thus, a preliminary administrative enquiry, included in the procedure, does not constitute an act or document that can be annulled,[123] as long as it is included for information purposes; which is generally the case. On the other hand, in the case of the administrative tax audit procedure, because it constitutes the preliminary and necessary support for prosecutions, the criminal court is competent to examine its regularity.[124] Otherwise, it is from the point of view of fairness that the act of criminal procedure undertaken to obtain the elements of the administrative procedure may be challenged. In a very specific case concerning evidence gathered in the course of a canonical procedure, the Criminal Chamber held that the mere fact that evidence relating to the offence was gathered in the non-criminal procedure according to rules less protective of the rights of the defence than those of the criminal procedure did not in itself establish the existence of a(n) (unfair) scheme.[125]

Case of information transmitted by an internal security attaché. The information provided by internal security attachés, provided in accordance with the provisions governing the organisation of internal security services within diplomatic missions abroad, does not constitute judicial police acts and is intended solely to guide any investigative acts by the French authorities, so that these elements, if necessary subject to adversarial debate before the trial court in accordance with the rights of the defence, may not, pursuant to the last paragraph of the preliminary article of the Code of Criminal Procedure, serve as the sole basis for a conviction.[126]

Consequently, either the attachés act on the basis of a letter rogatory or a production order, and their acts constitute acts of judicial police likely to be annulled; or they act within the framework of their intelligence mission laid down by the decree of 30 August 2006 and their acts, though they are not judicial police acts, nevertheless are likely to be annulled. In both cases, the formal regularity of the attachés' acts is subject to control.

Where such regularity is not in question, the content of the notes is a matter of substance and therefore of adducing of evidence. The Court of Cassation states unsurprisingly that the note is for information purposes only.[127]

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[123] Court of Cassation, Criminal Chamber, 16 September 2003, no 03-82.918, Jean Pradel, 'L'Enquête Administrative Versée dans une Procédure Pénale n'est pas un Acte ou une Pièce de la Procédure' (2004) *Dalloz* 670 (note).
[124] Court of Cassation, Criminal Chamber, 3 May 2001, no 00-82.416.
[125] Court of Cassation, Criminal Chamber, 17 December 2002, no 02-83.679
[126] Court of Cassation, Criminal Chamber, 19 September 2017, no 17-82.317, Chloé Fonteix (2017) *Dalloz actualité* (note).
[127] Court of Cassation, Criminal Chamber, 19 September 2017, Gildas Roussel, 'Valeur Probatoire de Notes d'Attachés de Sécurité Intérieure' (2017) *AJ Pénal* 507.

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

Lack of special rules. The admissibility of evidence collected by European bodies in criminal proceedings is governed by the general principles of criminal procedure. As indicated above,[128] texts relating to evidence are rare and not very detailed. No text provides for specific rules to govern the conditions for the admissibility of information collected by administrative authorities in the context of criminal proceedings. This also applies to evidence collected by European bodies or authorities.

It is the case law which, on the basis of the principle of freedom of evidence in criminal matters, determines the conditions for the admissibility of such information and its probative value.

Apart from the question of the (procedural) regularity of obtaining the information (compliance by the administrative authority with the special rules governing the collection of this information), no distinction is made between the procedural frameworks – in particular punitive or non-punitive – in which this information has been collected.[129] Similarly, there is no distinction between the types of evidence collected.

Incidentally, however, it is possible to mention the case of information collected in the context of the leniency procedure which is the subject of a special approach to its use outside the framework of that procedure.[130]

OLAF report as 'act of procedure'. With regard to the evidence collected by OLAF and in particular its report, the conditions of admissibility vary depending on whether the evidence or the report constitutes an 'act of the procedure' within the meaning of the Code of Criminal Procedure.[131] It is on condition that information, reports or other elements emanating from OLAF (or more broadly a foreign or European authority) fall into this concept that they may be annulled and thus excluded from the procedure, or even be at the origin of the annulment of the entire subsequent procedure.

Special case of OLAF assistance (participation in the national investigation) / act of cooperation or mutual assistance. OLAF's assistance to national criminal investigations, either on its own initiative or at the request of national authorities, seems to fall under the rules of international cooperation and mutual assistance.

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[128] supra, section 1.

[129] In this respect, it was held that 'the regulatory authority may rely on the evidence gathered during an investigation that led to the opening of sanction proceedings in the exercise of another jurisdiction'. See, eg, Conseil d'État 13 July 2011, *Vallon*, no 337552; Mathias Guyomar (2011) *Bulletin Joly Bourse* (no 11) 596 (conclusions): concerning the use by the AMF Board of evidence gathered during an investigation during the examination of an application for approval. See also Conseil d'État, 26 January 2015, *Bernheim Dreyfus Society*, no 368847.

[130] Autorité de la concurrence, Communiqué de procédure, 3 April 2015, relatif au programme de clémence français; criticised by the doctrine, see Georges Decocq, 'Le Rôle du Ministère Public au Regard du Pouvoir de Sanction des Autorités Indépendantes. En Droit de la Concurrence' (2015) *Cahiers de Droit de l'Entreprise* 42.

[131] supra, section 1.

Regime of acts of mutual assistance. According to part of the doctrine, OLAF acts included in the procedure are treated as acts of international mutual assistance.[132] However, this analysis is fragile insofar as the rules on international mutual assistance distinguish two situations which do not correspond perfectly to the case of OLAF's participation in (or contribution to) a national criminal investigation. These two situations are as follows: either OLAF acts are treated as acts of assistance executed in France on the basis of an international letter rogatory of a foreign (judicial) authority; or they are treated as acts executed abroad on the basis of an international letter rogatory of a French (judicial) authority.[133]

In the first situation, the acts in question are not intended to be part of proceedings in France but must be executed in accordance with the legislation of the French State acting as the executing State. The Criminal Chamber concluded that these acts could be reviewed by French courts, in particular by way of an application for a declaration of invalidity under Article 173 of the Code of Criminal Procedure. However, in this case, the disputed documents must not have been returned to the requesting State. Once this return has been made, the validity can no longer be contested in France.

In the second situation, the acts performed constitute acts of the French procedure. However, their regularity cannot be examined under French law (or foreign law). This does not mean, however, that the parties cannot request their annulment before the investigating chamber, but they can only invoke the violation of the rights of the defence or that of a general principle of law, an expression which covers the principles set out by the ECHR.

Cooperation with OLAF. The case law handed down by the Criminal Chamber of the Court of Cassation on OLAF investigations extends and clarifies this analysis of the doctrine.

The exchange of information governed by European rules (the legitimacy of OLAF's investigative acts). In a very important decision,[134] which has not been published and has not been the subject of any analysis by academics, the Criminal Chamber provided very valuable information on the qualification and status of the acts performed by OLAF in the context of national criminal proceedings. In this case, a request for assistance was sent to OLAF by the French investigators consisting in the preparation of a report making it possible, firstly, to identify the links between the persons and companies identified on the basis of banking and telephone documents provided by the investigators to OLAF, secondly, to identify suspect markets and, thirdly, to indicate the evidence found. A further request was made for OLAF to use computer data seized during searches. These requests and the reports drawn up by OLAF in response were the subject of applications for a declaration of invalidity which were rejected by the criminal court. The Criminal Chamber validated the analysis of the criminal judge that these requests and

[132] Marie-Emma Boursier, 'Entraide Internationale, Lutte contre les Infractions d'Affaires Internationales et Nouveaux Leviers d'Efficacité' (2016) *AJ Pénal* 137; Olivier Beauvallet, 'Artt 694 à 695-9' (2010) *JurisClasseur Procédure pénale*, Fascicule 20, no 41.
[133] Desportes and Lazerges-Cousquer (n 53) no 2000.
[134] Court of Cassation, Criminal Chamber, 16 January 2013, no 12-84.221.

the documents sent in response by OLAF constitute acts of 'mutual cooperation', governed by Regulation 1073/1999 (Article 10, now Article 12 of Regulation 883/2013) and the Second Protocol to the PIF Convention (Article 7). According to the criminal judge, 'the disputed act and OLAF's response can be analysed as diligences performed within the framework of the aforementioned European standards, the authority of which is greater than that of the legal provisions of the Code of Criminal Procedure'. The parties unsuccessfully challenged this analysis before the Court of Cassation on the grounds that the request of the French investigators did not constitute a mere exchange of information within the meaning of Regulation 1073/1999 or an act of cooperation likely to escape the provisions of the Code of Criminal Procedure. They claimed that this request was in fact an investigative act within the meaning of the Code of Criminal Procedure which could not be directly entrusted to OLAF, which had no judicial police powers. The Court of Cassation rejects these arguments and states that the request for assistance addressed to OLAF is indeed an exchange of information provided for by the Second Protocol to the PIF Convention and does not constitute a delegation of investigative powers to OLAF.

Cooperation subject to compliance with national procedural rules (cases of invalidity). However, the request for assistance itself (addressed by the national authorities to OLAF) must comply with the rules of national criminal procedure. Failing this, this request and the information transmitted by OLAF as a result may be annulled. This is what happened in the same case.

The national investigators had carried out production orders addressed to OLAF without prior authorisation from the public prosecutor's office. This absence is a cause of invalidity which affects the request and all the acts that constitute its follow-up. Therefore, the reports sent by OLAF in response to this request have been annulled. However, in this case, the criminal judge has made a partial annulment as he has the power to do. This is confirmed by the Court of Cassation, which emphasises that this decision (that is, the decision between a total or a partial annulment) is subject to the sovereign assessment of the judges of the merits.

But, even if only partially, this annulment has far-reaching effects since the final investigation report drawn up by OLAF at the end of internal investigations is also null and void in so far as it recapitulates and summarises the content of the previously annulled and withdrawn documents of the procedure. According to the Criminal Chamber,[135] this reference infringes the requirement of a fair trial, provided for in the preliminary article of the Code of Criminal Procedure and article 6 ECHR, 'in that it creates a real disadvantage to the detriment of the applicants'. In addition, the maintaining in the proceedings of this investigation report is contrary to the final provisions of Article 174 of the Code of Criminal Procedure, which provides that 'no information against the parties may be obtained from acts or documents or parts of acts or documents annulled'. Yet, it is not possible to distinguish in the report and its annexes the passages referring to the annulled documents. Therefore, it is the whole that must be discarded. Thus, the

[135] Which ruled in another decision of 9 November 2016 (no 16-83.602) in the same case.

Criminal Chamber approves the criminal judge on the basis that the final report and its annexes were indeed supported by acts that had been definitively annulled.

In the judgment of 16 January 2013, the **participation of OLAF agents in searches** was also challenged, as it had not been authorised by the prosecutor (in accordance with the CCP). However, while the judges considered that the requests for assistance should be cancelled, they refused to cancel the police records (signed by OLAF agents) and the searches carried out. The judges considered that to the extent that OLAF agents did not intervene during the searches (as indicated in the records), the requests were 'fruitless' acts as they were 'not followed by effect'. The mere presence of OLAF agents shall not be grounds for the annulment of the search and the resulting reports.

Case law of the Criminal Chamber of the Court of Cassation concerning the admissibility of OLAF acts and investigations in French criminal proceedings. The rulings handed down by the Criminal Chamber are few in number,[136] but they already make it possible to outline the procedural status of OLAF's final report (and its annexes).[137]

First, these judgments confirm that these elements are admissible a priori and that they can be used as evidence. Moreover, a decision of 15 November 2015[138] shows that OLAF's investigations and report cannot be described as 'mere allegations', and moreover, as 'unverified'.

Secondly, as mentioned above, the request for assistance addressed by the French authorities and the acts carried out in response fall within the scope of cooperation governed by the specific provisions of Union law applicable to OLAF's action.[139]

Thirdly, however, such cooperation must be conducted by national authorities in accordance with the rules of national criminal procedure.[140] Otherwise, the risk of cancellation of the request for cooperation and the acts carried out in response is incurred.[141]

Fourthly, the Criminal Chamber considers that OLAF's final report in the criminal proceedings file constitutes, not merely information or evidence 'only' subject to adversarial debate but an act of the proceedings which may be annulled. The report is obviously not annulled as such, but insofar as it constitutes an act of the (French) criminal procedure, which implies its exclusion from the file. It cannot be used as a basis for

[136] There are actually three cases. The first, relating to acts of corruption, is discussed above in this section. It was the subject of three decisions of the Criminal Chamber of the Court of Cassation: on 16 January 2013 (no 12-84.221), on 10 November 2015 (no 15-82.497), and on 9 November 2016 (no 16-83.602). The second case was the subject of the landmark decision of 9 December 2015 (no 15-82.300; published and commented decision). The third is of lesser importance; it was issued on 15 November 2015 (no 14-82.819).
[137] Unfortunately, the decisions of the trial courts are not published.
[138] No 14-82.819 (n 136).
[139] Court of Cassation, Criminal Chamber, 16 January 2013 (no 12-84.221), see supra in this section.
[140] In particular, the requesting of OLAF by the police must be based on the prior authorisation of the Public Prosecutor's Office and the swearing in of the required officers. As for OLAF agents, required as experts, they must base their expert report on the information in the file.
[141] ibid.

decisions by judges or national (investigative or prosecutorial) authorities. The annulment also has the effect of depriving all subsequent acts of any merit.[142]

The Criminal Chamber of the Court of Cassation justifies this solution by guaranteeing effective judicial control. The annulment in this case is based on a finding of a violation of fundamental rights.

Fifthly, as regards the grounds for annulment and the content of the control carried out by the criminal judge, the decision of 9 December 2015[143] provides several lessons. Thus, the criminal judge made a point in this case of noting that:

> it follows from the examination of the records drawn up by OLAF investigators that they have surrounded themselves with guarantees in terms of fundamental rights and freedoms since, before hearing Mr. X.... as a witness, they informed him of the context of their proceedings and the reasons for the hearing, of his right to request that a person of his choice be present during the hearing, of his right not to answer questions likely to incriminate him, of his right to submit the documents to be attached to the hearing minutes, of his right to receive a copy at the end of the hearing; that they also informed him that this record could be used in administrative, disciplinary or criminal proceedings.

They add: 'It follows from these elements that the precautions taken by OLAF investigators, before and during their investigations and the notifications of rights they have made, are not contrary to the treaty provisions invoked, but comply with the Community texts governing this body and are compatible with the provisions of criminal procedure under national law'. These elements show the content and extent of the control that can be carried out by the criminal judge over the OLAF investigation and report, noting that the judge emphasises that the guarantees listed are in conformity with EU provisions and with those of French criminal procedure.

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

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

In addition to French AFCOS, which seems to be notified only in case of difficulty, OLAF contacts the competent national authorities directly. In particular, it seems that in practice the information at OLAF's disposal is transmitted to the Paris Public Prosecutor, who forwards it to the prosecutors of the Republic with territorial competence.

OLAF then refers the matter to the judicial police services and, in particular, to the Offices of the Central Directorate of the Judicial Police (DCPJ) for investigation or assistance. They may be called upon to investigate OLAF denunciations or to assist OLAF investigators when they carry out acts of investigation on national territory.

[142] See Court of Cassation, Criminal Chamber, 9 November 2016 (no 16-83.602), see supra in this section.
[143] cf no 15-82.300 (n 136).

The information of the national authorities is considered as a prerequisite by practitioners (a position relayed by the French authorities in the context of the negotiations on the reform of the rules on OLAF's tasks and action). This position is based in particular on grounds for coordinating European and national investigations, both punitive and non-punitive, but also on grounds relating to the securing of OLAF investigations in France and the detection of possible criminal offences.

The 'privileged' services are mainly those dedicated to financial crime, namely the Central Office for the Prevention of Major Financial Crime (OCRGDF), which is responsible for combating Community fraud, and the Central Office for the Prevention of Corruption and Financial and Tax Offences (OCLCIFF), which is responsible, inter alia, for combating corruption and illegal taking of interests. The National Judicial Customs Service could usefully be activated, but to date this does not seem to have been the case, for reasons that seem to stem from the choice of prosecutors initially referred by OLAF.

Cooperation, which may take the form of assistance by OLAF agents to operations (presence during searches) or, conversely, assistance by national agents (customs officers in particular) to administrative inspections carried out by OLAF, or requests for assistance (provision of information or analysis), is in any event based on compliance with the rules of the Code of Criminal Procedure as regards acts of judicial investigation (and the Customs Code as regards acts of administrative investigation).

In this sense, prior consultation is carried out through information and then effective assistance from the police (or customs) services concerned, which then act in accordance with the rules of the Code of Criminal Procedure, respect for which they are responsible for guaranteeing.

5.2 Duplication of OLAF activities

Investigative acts carried out by OLAF, on its own initiative or at the request of the French authorities, as well as the results of such investigations, shall not constitute judicial police acts which cannot be delegated to the OLAF agents. They represent acts of cooperation subject to the European rules governing the Office's activities. Their integration into the national criminal procedure presupposes compliance with the rules of the Code of Criminal Procedure, which does not require duplication of acts. For example, police services may require OLAF agents to carry out analyses. In this case, the request must comply with the conditions of the CCP; OLAF's activity then falls within the scope of expertise (agents are appointed as experts in accordance with the provisions of the CCP).

More generally, acts of investigation carried out by OLAF (in particular on-the-spot checks), insofar as they constitute acts or documents of national criminal proceedings, must, under penalty of being declared void, respect the rights of the defence.

5. GERMANY

M. Böse and A. Schneider

1. GENERAL FRAMEWORK

In the German criminal justice system, misconduct may be punished by criminal sanctions (imprisonment or criminal penalty) or non-criminal sanctions (administrative fines). Whereas criminal sentencing is governed by the Criminal Code (*Strafgesetzbuch – StGB*) and the Code of Criminal Procedure (*Strafprozessordnung – StPO*), the imposition of administrative fines and punitive administrative proceedings falls within the scope of the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz – OWiG*). The OWiG applies to all regulatory offences under Federal and state law (§ 2 OWiG). A regulatory offence is defined as 'an unlawful and reprehensible act, constituting the factual elements set forth in a statute that enables the act to be sanctioned by imposition of a regulatory fine' (see § 1(1) OWiG), ie any offence that can be punished by a fine. According to § 46(1) OWiG, regulatory offences are not governed by administrative law (such as the Act on Administrative Proceedings, *Verwaltungsverfahrensgesetz – VwVfG*), but by the law of criminal proceedings.

Regulatory offences are investigated by administrative authorities (§ 35 OWiG). If a regulatory offence has been established, the authority may issue a regulatory fining notice (*Bußgeldbescheid*) and thereby impose a fine upon the defendant (§ 65 OWiG). The regulatory fining notice is subject to judicial review if the defendant submits a written objection to the regulatory fining notice to the Local Court in criminal matters (*Amtsgericht,* § 68 OWiG). If the objection is admissible and the administrative authority does not withdraw the fining notice, the public prosecutor will take over the function of the administrative authority in court proceedings (§ 69(3) and (4) OWiG), and the rules on criminal proceedings apply accordingly unless otherwise provided (§ 71(1) OWiG).

1.1 Function of admissibility rules in national criminal law

In criminal proceedings, the main aim of admissibility rules is to maintain the rule of law and – according to some authors – to deter law enforcement authorities from illegally collecting evidence.[1] Accordingly, core admissibility rules are derived from fundamental

[1] See the overview provided by Matthias Jahn, *Beweiserhebungs- und Beweisverwertungsverbote im Spannungsfeld zwischen den Garantien des Rechtsstaates und der effektiven Bekämpfung von Kriminalität und Terrorismus, Gutachten C für den 67. Deutschen Juristentag 2008* (CH Beck 2008) C 51–65; Hans-Heiner Kühne, *Strafprozessrecht* (9th edn, CF Müller 2015) 908–908.5.

rights and the right to a fair trial.[2] Thus, evidence obtained by an interrogation is inadmissible if the defendant has not been properly informed of the right to remain silent[3] or of the right to consult with defence counsel[4] (§ 136(1)2, § 163a(3)2 and (4)2 StPO). The exclusion of evidence, however, must be based upon an overall assessment of the gravity of the violation of the individual right and the impact on the fairness of proceedings and the public interest in effective criminal law enforcement.[5] Therefore, the failure to inform the defendant of the right to free legal assistance by counsel if he or she has sufficient means to pay it (§ 136(1)5 StPO), does not result in the exclusion of evidence obtained by the interrogation of the defendant if he or she has been properly informed of the right to consult with defence counsel.[6]

Furthermore, evidence may be excluded in order to ensure its quality and reliability. For instance, evidence derived from a polygraph test has been rejected for a lack of probative value ('wholly inappropriate', § 244(3) StPO).[7] For similar reasons, the examination of a witness during trial shall not be substituted by reading out the record of a prior interrogation (§ 250 StPO). The exceptions to this rule distinguish between interrogations conducted by judges (§ 251(1) StPO) and interrogations carried out by other officials (§ 251(2) StPO, eg public prosecutor, police officer). As can be inferred from this distinction, the record of a judicial interrogation is considered to be more reliable.[8]

If the evidence has been collected in the framework of administrative proceedings (eg the supervision of economic operators), the transfer of information (personal data) to public prosecutors and criminal courts interferes with the right to privacy and to the protection of personal data (Article 2(1) and Article 1(1) Basic Law, *Grundgesetz – GG*) and, thus, requires a legal basis.[9] As a rule, administrative law provides for a corresponding legal basis (eg § 9(1)3 No 1 Banking Act, *Kreditwesengesetz – KWG*) or even an obligation to transmit the information to criminal law enforcement authorities (§ 11 Securities Trading Act, *Wertpapierhandelsgesetz – WpHG*; § 12 Customs Administration Law, *Zollverwaltungsgesetz – ZollVG*). However, information that has been collected in tax proceedings is protected by tax secrecy (§ 30 Fiscal Code, *Abgabenordnung – AO*) and may be disclosed to criminal law enforcement authorities for the purpose of prosecuting tax crimes or particularly serious crimes only (§ 30(4) and (5) AO; see also §§ 31a, 31b AO). Accordingly, evidence which the taxpayer, in compliance

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[2] Ulrich Eisenberg, *Beweisrecht der StPO* (10th edn, CH Beck 2017) 330; Werner Beulke and Sabine Swoboda, *Strafprozessrecht* (14th edn, CF Müller 2018) 454.
[3] Bundesgerichtshof (Federal Court of Justice), official court reports in criminal matters (hereinafter: BGHSt) 38, 214 (220).
[4] BGHSt 47, 172 (174).
[5] BGHSt 38, 214 (219–220); 42, 15 (21); for more details see Jahn (n 1), C 45–47.
[6] BGH *Neue Zeitschrift für Strafrecht* (hereinafter: *NStZ*) 2018, 671 (671–672).
[7] BGHSt 44, 308 (319); BGH *NStZ* 2011, 474 (475).
[8] BGHSt 51, 325 (332); Helmut Kreicker, '§ 251' in Hartmut Schneider (ed), *Münchener Kommentar zur Strafprozessordnung*, vol 2 (1st edn, CH Beck 2016), para 69.
[9] Bundesverfassungsgericht (Federal Constitutional Court), official court reports (hereinafter: BVerfGE) 65, 1; for a detailed analysis see Martin Böse, *Wirtschaftsaufsicht und Strafverfolgung* (Mohr Siebeck 2005) 281ff.

with his obligations under tax law, has revealed to the competent revenue authority may not be used in criminal proceedings, except for the prosecution of tax crimes or particularly serious crimes (§ 393(2) AO).

Furthermore, information that has been collected by an administrative authority using particularly intrusive measures (eg surveillance of telecommunication) may be used as evidence in criminal proceedings without the consent of the person affected by the measure only to investigate and adjudicate an offence in respect of which such a measure could have been ordered in a criminal investigation (§ 161(2) StPO – *hypothetischer Ersatzeingriff*, for acoustic surveillance of private homes and online-searches see also § 100e(6) No 1 StPO). However, where, unlike the corresponding measure in a criminal investigation, investigative acts in administrative (customs) proceedings do not require judicial authorization (eg a search warrant), the obtained evidence may be used in criminal proceedings even if the competent authority decided to use its administrative powers instead of its corresponding powers in the framework of a criminal investigation in order to maintain the secrecy of the ongoing investigation.[10]

It follows from the foregoing that the exclusion of evidence may result from an autonomous exclusionary rule (*selbständiges Beweisverwertungsverbot*) aimed at the protection of fundamental rights against the use of evidence collected legally (such as § 161(2) StPO) or an exclusionary rule derived from a provision on gathering of evidence (such as the privilege against self-incrimination) that has been violated (*unselbständiges Beweisverwertungsverbot*).[11]

1.2 Function of admissibility rules in national punitive administrative law

In punitive administrative proceedings (*Ordnungswidrigkeitenverfahren*), the admissibility rules in criminal proceedings apply accordingly (§ 46(1) OWiG). Likewise, these rules shall ensure the rule of law and protect individual rights.[12] As a consequence, evidence that has been collected by wilfully disregarding the law is inadmissible.[13] However, the provisions on the quality and the reliability of evidence are less strict than the corresponding rules in criminal proceedings and allow for a simplified procedure for taking the evidence. In particular, the examination of witnesses may be replaced by reading out records of a previous examination of witnesses or statements of public authorities (§ 77a(1) and (2) OWiG).

In general, information that has been gathered in administrative proceedings may be used in punitive administrative proceedings if the latter proceedings are conducted by the same authority (§ 30(4) No 1 AO, § 12 ZollVG). In some cases, the legal basis for the transmission (and use) of the collected data allows the investigation and adjudication of

[10] BGH *NStZ* 2018, 296 (297).
[11] Jahn (n 1) C 33–38.
[12] BVerfG *Neue Juristische Wochenschrift* (hereinafter: *NJW*) 2011, 2783 (2784); Helmut Seitz and Martin Bauer, '§ 46' in Erich Göhler (ed), *Gesetz über Ordnungswidrigkeiten* (17th edn, CH Beck 2017), para 10c; Joachim Lampe, '§ 46' in Wolfgang Mitsch (ed), *Karlsruher Kommentar zum Ordnungswidrigkeitengesetz* (5th edn, CH Beck 2018), para 18a.
[13] KG *Neue Zeitschrift für Verkehrsrecht* (hereinafter: *NZV*) 1997, 48 (50).

any regulatory offence (§ 9(1) No 1 KWG), whereas the scope of other provisions is strictly limited to criminal offences (§ 11 WpHG).

1.3 System of proof: Free or controlled?

1.3.1 Criminal law

As a matter of principle, the German criminal justice system provides for an exhaustive list of means of proof.[14] Facts relevant for the decision on the merits of the case (conviction or acquittal, sentencing) must be proven by a *numerus clausus* of means of evidence (§§ 244–257 StPO, *Strengbeweis*), ie examination of witnesses (§§ 48ff StPO), expert opinion (§§ 72ff StPO), inspection (§ 86 StPO, *Augenschein*), documentary evidence (§ 249 StPO, *Urkundenbeweis*) and statements of the defendant (§ 243(5) StPO). However, facts relevant for procedural decisions (eg on whether to place a witness under oath or to terminate proceedings without taking a decision on the merits of the case) may be established by any other means of evidence (*Freibeweis*).

1.3.2 Punitive administrative law

As far as the investigation and prosecution of regulatory offences are concerned, the fining notice of the administrative authority may be based upon any means of evidence (*Freibeweis*).[15] The court, however, is bound by the strict rules that apply to a criminal trial (*Strengbeweis*).[16]

1.4 Review of the decision on admissibility

1.4.1 Criminal law

In general, there is no remedy to challenge a court's decision on the admissibility (or exclusion) of specific evidence. Instead, the convicted person may appeal the court's judgement on grounds of law (*Revision*, §§ 333ff StPO), claiming that the judgement was based upon inadmissible evidence and, thus, upon a violation of law (§ 337(1) StPO). The same argument can be raised when the appeal is based on grounds of fact and law (*Berufung*, §§ 312ff StPO) and the Court of Appeal has to reassess all evidence.

However, the person concerned has the right to challenge the legality of investigative acts such as search and seizure (§ 98(2)2 StPO) or surveillance measures (§ 101(7)2 StPO). If the court quashes the seizure, the public prosecutor must return the seized documents to the appellant.[17] Upon request, the public prosecutor must delete corresponding data (§ 489(2) StPO), and the applicant may bring the matter before court

[14] See for the following Kühne (n 1) 760.
[15] Karl-Heinz Kurz, '§ 66' in Mitsch (ed) (n 12), para 20.
[16] Lothar Senge, '§ 71' in Mitsch (ed) (n 12), para 75.
[17] BVerfGE 44, 353 (384); Eva Menges, '§ 98' in Jörg-Peter Becker and others (eds), *Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Band 3, Teilband 1 (§§ 94-111a)* (27th edn, de Gruyter 2019), para 63.

if the public prosecutor's office does not comply with its obligation (§ 23 Courts Constitution Act, *Gerichtsverfassungsgesetz – GVG*).[18]

Furthermore, the accused person and his or her defence counsel may object to the taking and using of inadmissible evidence during trial, in fact, according to well-established case-law of the Federal Court of Justice (*Bundesgerichtshof*), the defence counsel must object to the taking of inadmissible evidence because otherwise the appeal against the judgement (*Revision*) cannot be based on the complaint that this evidence was inadmissible (*Rügepräklusion, 'Widerspruchslösung'*).[19] This requirement, however, has been subject to severe criticism[20], and according to most recent case-law, it shall not apply to inadmissible evidence that has been obtained by an illegal search of private premises.[21]

1.4.2 Punitive administrative law

As a matter of principle, the aforementioned observations apply to punitive administrative proceedings, too. The court will not review the legality of the fining notice, but investigate the case and take a decision that is based upon a fresh determination of the facts. To that end, a trial will be held (§ 71(1) OWiG), unless the court decides otherwise (§ 72 OWiG). The simplified procedure for taking evidence notwithstanding, the rules on judicial review of investigative measures apply in as far as the measure is available in administrative punitive proceedings (§ 46(1), (3)–(5) and § 62 OWiG). Furthermore, the court decision is subject to an appeal on grounds of law (§§ 79, 80 OWiG – *Rechtsbeschwerde*).

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

In principle, criminal proceedings and punitive administrative proceedings follow the same rules on the admissibility of evidence (supra 1.1 and 1.2). As a consequence, evidence excluded from punitive administrative proceedings will not be admissible in criminal proceedings either.

According to the admissibility rules, however, illegally obtained evidence is not per se inadmissible; in its decision on the exclusion of such evidence, the court has to balance the interest in maintaining the individual right at stake and the public interest in effective law enforcement.[22] Since the public interest in effectively prosecuting crimes has more weight than the interest in sanctioning regulatory offences,[23] the court may decide to use evidence in trial even though this evidence is or would be excluded in punitive administrative proceedings.

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[18] BVerfG *Neue Juristische Online-Zeitschrift* (hereinafter: *NJOZ*) 2006, 2025 (2026).
[19] BGHSt 38, 214 (225); BGH *NJW* 1997, 2893.
[20] Jahn (n 1) C–101–102, with further references.
[21] BGH *NJW* 2017, 1332 (1333).
[22] BVerfG *NJW* 2011, 2783 (2784); BGH *NJW* 2007, 2269 (2271); Oberlandesgericht (Higher Regional Court, hereinafter: OLG) Frankfurt *NStZ* 2017, 588 (589–590).
[23] See, with regard to the proportionality of home searches for the purpose of prosecuting regulatory offences, BVerfG *Deutsches Autorecht* (hereinafter: *DAR*) 2016, 641 (643).

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

In general, evidence excluded from criminal proceedings must not be used in punitive administrative proceedings (supra 1.5). A different assessment may, however, result from the fact that the provision on which the exclusion of evidence has been based does not apply in punitive administrative proceedings; for instance, the obligation to inform the suspect of the right to consult with defence counsel (§ 136(1)2 StPO, supra 1.2) does not apply to punitive administrative proceedings (§ 55(2) OWiG).[24] Thus, the evidence that has been illegally obtained in a criminal investigation could have been legally obtained in the framework of punitive administrative proceedings (*hypothetischer Ersatzeingriff*).[25] Therefore, the evidence might be used in order to impose an administrative fine.[26]

2. ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

German law does not provide for specific rules on the use of OLAF-collected evidence in punitive administrative proceedings, so the general rules apply (supra 1.2 and 1.3). Therefore, the fining notice may be based upon OLAF reports and related evidence (*Freibeweis*). In contrast, court proceedings are subject to the rules of criminal proceedings (*Strengbeweis*), but the court may apply a simplified procedure for taking evidence (§ 77a OWiG, supra 1.2). The defendant can challenge the admissibility of OLAF-collected evidence during court proceedings in the manner explained above (1.4).

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

There is no case law on the admissibility of OLAF-collected evidence in punitive administrative or criminal proceedings. The only cases that deal with OLAF-collected evidence are related to customs law and customs proceedings, which do not fall under the definition of 'punitive administrative proceedings' because they do not qualify as criminal according to the *Engel* criteria of the European Court of Human Rights.[27] Nevertheless, the following case-law may be relevant for the evidentiary basis of the fining notice because the administrative authority imposing the fine is not bound by the

[24] See also Seitz and Bauer (n 12), para 10c; Lampe (n 12), para 18a.
[25] See in general with regard to this criterion: Seitz and Bauer (n 12), para 10c; Lampe (n 12), para 18a.
[26] See, with regard to the use of illegally obtained evidence in tax proceedings, Bundesfinanzhof (Federal Fiscal Court, hereinafter: BFH) *Betriebsberater* (hereinafter: *BB*) 2002, 1035 (1036); *Beck-Rechtsprechung* (hereinafter: *BeckRS*) 2014, 94392; Böse (n 9) 482.
[27] See *Engel and Others v The Netherlands* Apps nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976), paras 82ff.

strict rules on evidence that apply in criminal proceedings, but may rely on any means of proof (*Freibeweis*, supra 2.1).

The relevant cases in customs law were about goods that had been produced in China and transported to the EU without payment of the required customs duties.[28] In a case before the Fiscal Court (*Finanzgericht*) Düsseldorf, the plaintiff claimed that the OLAF report did not constitute sufficient evidence for the imported products originating from China.[29] The Fiscal Court shared this assessment and reasoned that the information contained in the OLAF report did not establish that the goods bought in China were identical to the ones transferred from Korea to the EU. This would have required an on-the-spot inspection which had been undertaken neither by OLAF nor by the national authorities. Accordingly, the examination of OLAF inspectors as witnesses would not suffice either. However, it should be noted that the court did not reject OLAF-collected evidence as such, but on the basis of an assessment of its reliability in this particular case. Like the report of a tax inspector, the OLAF report is a piece of evidence, but not a binding determination of the facts.[30]

In another case brought before the Fiscal Court Bremen, the plaintiff claimed that the OLAF travel report was not detailed enough to constitute evidence and that the goods in question had been declared correctly.[31] Here, the Fiscal Court rejected the plaintiff's argument and stated that the OLAF travel report made it possible to retrace the goods back to China. In contrast to the decision of the Fiscal Court Düsseldorf, OLAF officials had indeed travelled to the place where the goods were shipped and found irregularities on the spot. This was probably the reason why the evidence was found convincing.

However, a few weeks later the Fiscal Court Hamburg accepted OLAF reports as evidence, although the report was based on data that OLAF had obtained from Malaysian authorities instead of personal on-the-spot checks.[32] The Court stated that the report was convincing and that there was no reason to doubt the veracity of the report. In another case, the plaintiff claimed that the OLAF report did not refer to concrete evidence.[33] The Fiscal Court Hamburg did not accept this argument, but explained that the basis for the OLAF report was convincing and that there was no reason to mistrust it.[34] Apparently, it is sufficient to refer to the OLAF report rather than to the data that was the basis of the report. The reasoning seems to be the following: If the judge is satisfied that the OLAF report was based on convincing evidence, it is accepted as evidence in administrative

[28] See, eg, Finanzgericht (Fiscal Court; hereinafter: FG) Hamburg 24 July 2017 – 4 K 162/15, *BeckRS* 2017, 124276; FG Hamburg 17 May 2017 – 4 K 147/15, *BeckRS* 2017, 117003; FG Bremen 18 August 2015 – 4 K 24/14 2, *BeckRS* 2015, 95745; FG Düsseldorf 2 October 2013 – 4 K 1568/12 Z, *BeckRS* 2015, 94265.
[29] FG Düsseldorf 2 October 2013 – 4 K 1568/12 Z, *BeckRS* 2015, 94265.
[30] Ulrich Schrömbges, 'OLAF-Untersuchungen zum Präferenzursprung' (2012) *Außenwirtschafts-Praxis* (hereinafter *AW-Prax*) 276 (277).
[31] FG Bremen 18 August 2015 – 4 K 24/14 2, *BeckRS* 2015, 95745.
[32] FG Hamburg 9 September 2015 – 4 K 141/14, *BeckRS* 2015, 96091.
[33] FG Hamburg 24 July 2017 – 4 K 162/15, *BeckRS* 2017, 124276. See, also, FG Düsseldorf 2 October 2013 – 4 K 1568/12 Z, *BeckRS* 2015, 94265.
[34] FG Hamburg 24 July 2017 – 4 K 162/15, *BeckRS* 2017, 124276.

proceedings regardless of whether it is based on hearsay or findings of an on-the-spot check, even if it contains conclusions by OLAF officials.

In a similar case before the Fiscal Court Hamburg, the plaintiff raised several issues with regard to the OLAF final report.[35] First, the plaintiff considered the report to be unconvincing, incorrect, and not proving the Chinese origin of the goods. These arguments are similar to others raised before and refer to the individual quality of the evidence, which must be assessed by the court, and are not of interest here. However, the plaintiff also maintained that the report and the facts allegedly contained in the report had not been disclosed directly to the plaintiff. A similar point was raised in another case before the Fiscal Court Hessen when the plaintiff complained that it was not clear how OLAF had come to its conclusions.[36] In this case, the Court did indeed come to the conclusion that not all the points contained in the report were convincing.[37] In contrast, the Fiscal Court Hamburg did not deal with the issue of non-disclosure and did not object to the use of the OLAF report instead of the data that was the foundation of this report.[38] A third point made by the plaintiff before the Fiscal Court Hamburg was that OLAF ought to have undertaken an on-the-spot inspection of the 'goods register' instead of relying on other data.[39] Again, this argument relies on reasoning similar to the prohibition to replace the examination of witnesses by records of a prior interrogation (supra 1.1), ie to ensure the reliability of the collected evidence. Nonetheless, the Court claimed that there was no need for an inspection by OLAF officials and that the presented evidence was convincing.

The case-law clearly reveals that OLAF reports are admissible evidence in fiscal court proceedings, but it is for the court to evaluate the report and to assess its accuracy and consistency. This approach corresponds to recent case-law of the Court of Justice of the European Union (CJEU).[40] Nevertheless, it is obvious from these cases that the standards of evidence in customs law are much laxer than in criminal law. No case was found where the OLAF report was rejected on principle. OLAF reports have been rejected in two cases only for being unconvincing.[41] Although this result is not surprising in itself, it is remarkable to see how willingly the courts accept the OLAF report as convincing and how little attention is paid to principle-based objections of the plaintiff. While this may be acceptable in administrative law, it would hardly be accepted in proceedings before a criminal court. In this respect, the case-law does not allow for conclusions on the use of OLAF-collected evidence in criminal proceedings (see, on this issue, infra 4).

[35] FG Hamburg 17 May 2017 – 4 K 147/15, *BeckRS* 2017, 117003.
[36] FG Hessen 15 April 2015 – 7 K 440/12, *BeckRS* 2015, 95543.
[37] FG Hessen 15 April 2015 – 7 K 440/12, *BeckRS* 2015, 95543.
[38] FG Hamburg 17 May 2017 – 4 K 147/15, *BeckRS* 2017, 117003.
[39] FG Hamburg 17 May 2017 – 4 K 147/15, *BeckRS* 2017, 117003.
[40] Case C-47/16 *Veloserviss*, EU:C:2017:220, paras 44–50; Case C-407/16 *Aqua Pro*, EU:C:2017:817, paras 54–62.
[41] FG Düsseldorf 2 October 2013 – 4 K 1568/12 Z, *BeckRS* 2015, 94265; FG Hessen 15 April 2015 – 7 K 440/12, *BeckRS* 2015, 95543.

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

As has been stated above, there is no case law on the admissibility of OLAF-collected evidence in administrative punitive or criminal proceedings. Nor are there specific provisions on OLAF-collected evidence. As a consequence, the general rules of criminal procedure apply (supra 1.1).

In German law, it is accepted that the criminal court can refuse to admit evidence in criminal proceedings, even if this evidence was collected legally (so-called *selbständiges Beweisverwertungsverbot*, supra 1.1). The same is true for administrative authorities in the context of regulatory fines because they have to apply criminal procedural law (§ 46 OWiG). The prohibition to admit evidence can either stem from an explicit provision in the Code of Criminal Procedure, or from a violation of fundamental rights. The latter option is the one that could apply in the case of OLAF-collected evidence.

The decision on the admissibility (or exclusion) of evidence must be based upon a balancing test that weighs the fundamental rights of the defendant against the public interest in effective law enforcement.[42] The jurisprudence is rather restrictive, particularly when the defendant is suspected of having committed serious offences.[43]

In case of OLAF-collected evidence, it would depend on which guarantee was not taken into account. As the first Hercule III study has shown, the Member States have different rules on the procedural safeguards that apply in mixed investigations.[44] However, in the case of the legal professional privilege (LPP) of in-house lawyers that was given as an example for this study, German law does not offer better protection than EU law. After a controversial debate, the legislator finally decided to change the law in order to exclude in-house lawyers from the scope of the right to refuse to testify (see § 53(1) No 3 StPO).[45] It should be noted that, under German law, the rules on the protection of professional secrecy and confidentiality within the framework of a criminal investigation refer back to the right to refuse to testify. Accordingly, the change of law also excluded in-house lawyers from the scope of the rules giving protection from seizure or wiretapping for certain types of professionals (see §§ 97(1) and 100d(5) StPO).

Nonetheless, German law recognizes rights to confidentiality that are not explicitly accepted in EU law, such as the right to refuse to testify of certified public accountants (*Wirtschaftsprüfer*) and tax accountants (*Steuerberater*), see § 53(1) No 3

[42] See, in more detail, Beulke and Swoboda (n 2) 468; Kühne (n 1) 908ff.
[43] Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht* (29th edn, CH Beck 2017) § 24, para 30.
[44] Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017).
[45] Law for Restructuring the Rights of In-House Lawyers and Changing the Code of Procedure of Fiscal Courts of 21 December 2015 (*Gesetz zur Neuordnung des Rechts der Syndikusanwälte und zur Änderung der Finanzgerichtsordnung*), Bundesgesetzblatt (Federal Law Gazette) 2015 I, 2517.

StPO.[46] Particularly the latter could hamper the effectiveness of OLAF investigations into tax fraud if higher German standards prevailed over EU standards. However, it is doubtful whether German courts would actually refuse OLAF-collected evidence on the basis of a violation of the professional privilege of professions other than lawyers or medical personnel contained in § 53(1) No 3 StPO. This is because such a refusal would have to be based on a violation of fundamental rights. In the past, the German Constitutional Court (*Bundesverfassungsgericht*) has been reluctant to accept a constitutional obligation to protect the professional secrecy of, for instance, certified public accountants or tax consultants. The right to refuse testimony of these persons has been considered by the Court to be 'barely' justified if weighed against the public interest in effective criminal law enforcement.[47] Another provision, § 160a(1) StPO, which prohibits any investigative measure against (among others) non-defense lawyers, has, on balance, also been considered to be barely justified.[48] This means that such a strong protection of other professional secrecies would probably not be justified any more.

In effect, the German Constitutional Court uses a balancing test in order to decide whether the fundamental rights of the professionals concerned require a better protection. The circumstances that are taken into account in this test are the nature and severity of the penalty, the expected sanction, other possibilities of investigation, the importance of the evidence, and the intensity of the infringement upon privacy rights.[49] The same test

[46] The right to refuse testimony on professional grounds is granted to the following persons (cf § 53(1) StPO):

1. clergymen, concerning the information that was entrusted to them or became known to them in their capacity as spiritual advisers;
2. defence counsel of the accused, concerning the information that was entrusted to them or became known to them in this capacity;
3. attorneys (but not in-house lawyers), patent attorneys, notaries, certified public accountants, sworn auditors, tax consultants and tax representatives, doctors, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives, concerning the information that was entrusted to them or became known to them in this capacity.
3a. members or representatives of a recognized counselling agency pursuant to sections 3 and 8 of the Act on Pregnancies in Conflict Situations, concerning the information that was entrusted to them or became known to them in this capacity;
3b. drugs dependency counsellors in a counselling agency recognized or set up by an authority, a body, an institution or a foundation under public law, concerning the information that was entrusted to them or became known to them in this capacity;
4. members of the Federal Parliament, of the Federal Convention, of the European Parliament from the Federal Republic of Germany or of a Land parliament, concerning persons who have confided certain facts to them in their capacity as members of these bodies, or to whom they have confided facts in this particular capacity, as well as concerning the facts themselves;
5. individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion.

[47] BVerfGE 33, 367, 383.

[48] BVerfGE 129, 208, 264.

[49] See BVerfGE 33, 367, 375:

Eine solche Einschränkung des Zeugniszwangs im Hinblick auf Art. 2 Abs. 1 i. Verb. m. Art. 1 Abs. 1 GG kann jeweils nur als Ergebnis einer vom Richter vorzunehmenden konkreten und fallorientierten Abwägung zwischen den Belangen der Strafrechtspflege und den Geheimhaltungsinteressen des Einzelnen festgestellt werden, wobei – insbesondere unter dem Gesichtspunkt des Verhältnismäßigkeitsgebots – alle Umstände des Falles in die Prüfung einzubeziehen sind. Dazu

would probably be applied in order to decide whether OLAF-collected evidence could be admitted as evidence.

Another area of law where problems are likely to occur is the privilege against self-incrimination.[50] This principle enjoys absolute protection under constitutional law as the guarantee of human dignity (Article 1(1) GG) prohibits any interference with this right.[51] Accordingly, it would be difficult for a German court to accept OLAF-collected evidence that has been obtained by forced cooperation.[52] In case of interviews with a person who later becomes the defendant, a conflict is not likely to occur because Article 9(2) of Regulation No 883/2013 explicitly recognises the privilege against self-incrimination. However, problems could arise with regard to production orders. An obligation to present documents for inspection in criminal proceedings is considered to be in breach of the privilege against self-incrimination and could not be used as evidence.[53] It is not clear to what extent this reasoning applies to obligations to present documents in administrative cases. In one case, the German Constitutional Court decided that an obligation to disclose incriminating information in case of insolvency was not in breach of fundamental rights provided that the information could not be used as evidence in criminal proceedings.[54] A similar rule is found in tax law where information that had to be disclosed must not, in principle, be used for purposes other than prosecuting tax crimes.[55] In contrast, documents that had to be presented to the authorities in the area of banking supervision have been accepted as evidence in criminal proceedings by the courts.[56] The situation is far from clear. Still, a violation of fundamental rights leading to a prohibition to use the evidence in criminal proceedings might be found in case of OLAF-collected evidence.

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gehören z.B. Art und Schwere der in Rede stehenden Straftat, die Höhe der Straferwartung, das Vorhandensein anderer Aufklärungsmöglichkeiten, die Bedeutung des Beweisthemas für die Beurteilung der Tat-, Schuld- oder Strafmaßfrage und die Intensität des durch die Zeugenvernehmung bewirkten Eingriffs in die Privatsphäre des Betroffenen.

In English:

Such a restriction, founded on Article 2(1) and Article 1(1) GG, to the obligation to testify as a witness can only be the result of a concrete and case-based balancing test between the interests of the criminal justice system and individual rights to secrecy. In the light of the principle of proportionality, all circumstances of the case must be taken into account. These include the nature and severity of the penalty, the expected sanction, other possibilities of investigation, the importance of the evidence for the determination of guilt or the sentence, and the intensity of the infringement upon privacy rights of the person concerned. (Translation by the author Schneider).

[50] See also Luchtman and Vervaele (n 44) 325.

[51] General opinion, see only Andreas Ransiek and André Winsel, 'Die Selbstbelastung im Sinne des „nemo tenetur se ipsum accusare"-Grundsatzes' (2015) *Goltdammer's Archiv* 620ff; Petra Schmitt, *Die Berücksichtigung der Zeugnisverweigerungsrechte nach §§ 52, 53 StPO bei den auf Beweisgewinnung gerichteten Zwangsmaßnahmen* (Duncker & Humblot 1993) 53.

[52] See Frank Peter Schuster, 'Verwertbarkeit von Beweismitteln bei grenzüberschreitender Strafverfolgung' (2016) *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS) 564, 568ff.

[53] General opinion, see, for instance, Jörn Hauschild, '§ 95' in Hans Kudlich (ed), *Münchener Kommentar zur Strafprozessordnung*, vol 1 (1st edn, CH Beck 2014), para 12.

[54] BVerfGE 56, 37, 48ff.

[55] See Martin Böse and Anne Schneider, 'Germany' in Luchtman and Vervaele (n 44) 72ff.

[56] ibid 68ff.

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

As punitive administrative proceedings follow the rules on criminal proceedings in German law, it is the (criminal) courts' task to evaluate OLAF-collected evidence according to the general rules on evidence. The same is true for the administrative authority when taking a decision on whether or not to issue a regulatory fining notice.

In general, a violation of the law when obtaining evidence can give rise to a prohibition to use the evidence for criminal proceedings (so-called *unselbständiges Beweisverwertungsverbot*). However, illegally obtained evidence is not per se excluded from punitive administrative proceedings. Depending upon the outcome of the balancing test, the evidence might still be used, in particular if the rule concerned did not aim at the protection of the defendant from incriminating evidence.[57] However, if the case-law on purely domestic cases applies accordingly, the violation of the procedural safeguards identified in the first Hercule III report (privilege against self-incrimination, access to a lawyer) will likely result in the exclusion of the collected evidence.[58] As far as evidence has been obtained by illegal investigative measures (eg a search without the required authorization), the outcome of the balancing test is less predictable, but a deliberate disregard of formal and/or substantive requirements will usually render the evidence inadmissible (supra 1.1).

In Germany, the criminal court has to evaluate the evidence ex officio. In the inquisitorial system of criminal procedure that is the foundation of German criminal procedure, it is not the task of the prosecution service or the defendant to present legal arguments and evidence. However, the Federal Court of Justice has established an unwritten requirement in the context of evidence law: If the accused person is represented by a defence counsel, the counsel (or the defendant him-/herself) must object to the use of evidence immediately, otherwise an appeal against the final judgement on grounds of law (*Revision*) cannot be based upon the inadmissibility of this evidence (supra 1.4 – *Rügepräklusion*).[59] This requirement, however, does not apply to evidence obtained by illegal searches (supra 1.4). In any case, the aforementioned rules are not special to OLAF-collected evidence, but apply generally to evidence in criminal proceedings.

In addition, the exclusion of OLAF-collected evidence raises specific problems linked to OLAF's position as a supranational entity. If a court decides that evidence cannot be admitted because it was obtained by OLAF in violation of EU rules and safeguards, it decides on the lawfulness of an action by an EU body.[60] This, however, falls within the exclusive jurisdiction of the Court of Justice of the European Union which ought to be involved by preliminary question (see Article 267 TFEU). Accordingly, the

[57] See Björn Gercke and Dieter Temming, 'Introduction' in Björn Gercke and others (eds), *Heidelberger Kommentar zur StPO* (6th edn, CF Müller 2019), para 111.
[58] BGHSt 38, 214, 220ff – privilege against self-incrimination; BGHSt 38, 372, 373f – access to a lawyer; BGHSt 44, 46, 48f – legal professional privilege.
[59] For an overview, see Beulke and Swoboda (n 2) 460a.
[60] Stefan Strobel, *Die Untersuchungen des Europäischen Amtes für Betrugsbekämpfung (OLAF)* (Nomos 2012) 333.

majority of scholars consider the national courts to be barred from deciding on the lawfulness of the investigation by OLAF.[61] The same is true for questions about the interpretation of an OLAF report.[62]

In this respect, some authors refer to the judgement by the Civil Service Tribunal in *Violetti and Schmit v Commission*.[63] In this judgement, the Tribunal had to decide on the possibility of judicial review against several OLAF measures in internal investigations, among them the transfer of evidence by OLAF. It held that, in the absence of effective judicial review: 'The national court would retain before it the information forwarded to it by OLAF, even though the implication of any finding by the Community judicature of such illegality on account of failure to observe the rights of the defence is that the national court should be barred from acting on the basis of such information'.[64] For this reason, the Tribunal accepted a legal remedy against the transmission of information, even though judicial review of OLAF measures is problematic in EU Law.[65] According to the Tribunal, the national court would 'retain' the illegally transmitted information before it. The Tribunal does not consider the possibility that the national court might decide on its own not to act on the basis of such information, even if it ought to be barred from doing so. This shows that the Tribunal does not accept an indirect judicial review of the transmission of data itself.

However, this judgement was not final but has been overruled on appeal.[66] There, the appellate court, the Court of First Instance, refused to admit a direct action against the transmission of evidence.[67] Nonetheless, it stated:

> That finding does not have the effect of making it impossible for the official concerned by that breach to dispute the decision. Any unlawful act committed by OLAF which is not an act adversely affecting an official may be open to sanction in an action for damages. Furthermore, should they decide to open an investigation, the national authorities will assess the conclusions to be drawn from that unlawful act, and their assessment may be challenged using national legal remedies, with all the safeguards provided by domestic law, including those deriving from fundamental rights. If they do not open criminal proceedings against the official concerned or close these proceedings without taking an act that adversely affects the official, the illegality by OLAF will have no consequences for the legal position of the official. Accordingly, having only recourse to damages will suffice to guarantee the protection of the official's fundamental rights in that he or she gets compensated for any harm suffered by OLAF's conduct.[68]

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[61] Jan FH Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)* (Europa Law Publishing 2011) 226ff; Cathrin Silberzahn, 'Rechtsschutz gegen OLAF' (2016) *Juristische Arbeitsblätter (*hereinafter: *JA*) 205, 208; Strobel (n 60) 333.
[62] Inghelram (previous n) 227.
[63] Joined Cases F-5/05 and F-7/05 *Violetti and Schmit v Commission*, EU:F:2009:39 (Judgment of the Civil Service Tribunal). See the references in Inghelram (n 61) 227f; Strobel (n 60) 333.
[64] Joined Cases F-5/05 and F-7/05 *Violetti and Schmit v Commission*, para 78.
[65] See, eg, Inghelram (n 61) 203ff.
[66] Case T-261/09 P *Commission v Violetti and Others*, EU:T:2010:215.
[67] ibid, para 58.
[68] ibid, para 59. The original quotation is in French:

This view is in direct opposition to what the Tribunal stated and what German scholars have claimed. According to the Court of First Instance, the national courts are free to assess the illegality of OLAF evidence and take appropriate measures under domestic law. Even if this assessment leads to a refusal to open criminal proceedings for lack of (admissible) evidence, the Court does not see a problem.

The view of the Court of First Instance is somewhat supported by Article 11(2) of Regulation No 883/2013 that prescribes the same evidentiary value to OLAF reports as to reports by national agencies.[69] It is also understandable that the Court, having refused a direct action against the transmission of evidence under EU law, wants to establish an indirect one at national level. It is doubtful whether damages would be considered an effective remedy against violations of fundamental rights which might have occurred during illegal evidence gathering by OLAF.[70] Nonetheless, the fact remains that national courts lack the competence to assess the legality of OLAF measures in itself.[71] If the national courts could freely assess the legality of OLAF measures, this would threaten the effectiveness and uniform interpretation of EU law. This shows that this is a case of Article 267 TFEU, ie a case for a preliminary question.[72] This means that national courts can refer the matter to the CJEU and, if taking a final decision or believing in the invalidity of an OLAF act, must, in fact, do so (see Article 267(3) TFEU).[73]

Accordingly the illegality of OLAF measures can be challenged in national criminal proceedings and should indeed be assessed by the court ex officio. However, the national court usually ought to refer the question to the CJEU and is thus barred from assessing the OLAF-collected evidence only by domestic standards. The only exception is if it is merely the interpretation of OLAF-collected evidence that is in question.

Il convient d'observer que cette conclusion n'a pas pour effet de rendre impossible toute contestation de la part des fonctionnaires concernés par cette violation. En effet, toute illégalité commise par l'OLAF qui ne concerne pas un acte faisant grief est susceptible d'être sanctionnée dans le cadre d'un recours en indemnité. Par ailleurs, les autorités nationales, dans le cas où elles décident d'ouvrir une enquête, apprécieront les conséquences qu'il convient de tirer de cette illégalité et cette appréciation pourra être contestée, avec toutes les garanties prévues par le droit interne, y compris celles qui découlent des droits fondamentaux, en utilisant les voies de recours nationales. Dans l'hypothèse où celles-ci n'ouvriraient pas de procédure pénale à l'encontre du fonctionnaire concerné ou clôtureraient celle-ci sans adopter d'acte faisant grief, l'illégalité commise par l'OLAF serait néanmoins restée sans conséquence sur la situation juridique dudit fonctionnaire, de sorte que l'ouverture du seul recours en indemnité suffit à garantir la protection de ses intérêts en lui permettant d'obtenir la réparation de tout préjudice éventuel découlant du comportement de l'OLAF.

The English translation is partly taken from the official Case Summary and partly by the author Schneider.

[69] See Sabine Gleß, 'Das Europäische Amt für Betrugsbekämpfung (OLAF)' (1999) *Europäische Zeitschrift für Wirtschaftsrecht* (hereinafter: *EuZW*) 618, 621, on Article 9 of the former OLAF Regulation.

[70] See also Inghelram (n 61) 210ff.

[71] Case 314/85 *Foto-Frost*, EU:C:1987:452, para 15.

[72] ibid, para 16.

[73] Inghelram (n 61) 227f.

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

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

Punitive administrative proceedings in the field of banking supervision and SSM follow the legal framework for regulatory offences (*Ordnungswidrigkeiten*), see § 120 Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) and § 56 Banking Act (*Kreditwesengesetz – KWG*). As a consequence, the procedural framework refers to the OWiG and, thereby, to the code of criminal procedure rather than to the act on administrative proceedings (see 2.1). The competent authority for administrative sanctions in this context is the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*, see § 121 WpHG, § 60 KWG). There are no special rules about the use of information provided by the ECB in punitive administrative proceedings. Nor was it possible to find any case dealing with evidence collected by the ECB.

As there are no specific rules for evidence collected by the ECB, the general rules apply (supra 2.3). Accordingly, higher national standards may prevail if the use of the evidence is considered to violate fundamental rights. Article 136 SSM, which provides the foundation for the transmission of information to the BaFin, refers to national law and thus allows for an assessment of evidence according to the general rules for punitive administrative proceedings, which, in case of court proceedings, come from criminal procedure law. There are no specific rules on illegally obtained ECB-collected evidence either. Accordingly, the general rules apply (see 2.4).

As far as the exclusion of evidence is based upon the illegality of ECB measures and the interpretation of ECB acts, the CJEU has exclusive jurisdiction (supra 2.4). Accordingly, the national criminal court must not declare the corresponding act of the ECB invalid, but instead, ask the CJEU for a preliminary ruling.[74]

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

The legal and procedural framework of punitive administrative proceedings under Article 64(8) EMIR is the same as for OLAF and the ECB, ie the OWiG. There are no specific provisions on ESMA collected evidence; instead, the general rules on punitive administrative proceedings apply. In particular with regard to higher national standards and illegally obtained evidence, the same rules apply for ESMA as for ECB and OLAF (see 2.3, 2.4, 3.1). There have been no cases yet where ESMA-collected evidence has been challenged under German law.

[74] See, also, Peter-Christian Müller-Graff, 'Rechtsschutz von Kreditinstituten in der Bankenaufsicht der Europäischen Zentralbank' (2018) *EuZW* 101, 107.

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

The main legal basis for imposing punitive sanctions for infringements of competition law is § 81 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*). It refers to the OWiG and, thereby, to criminal procedure law (see 2.1).

However, in contrast to the other authorities and areas of law, there are specific provisions on the use of evidence collected and transmitted by DG COMP. First, it should be noted that Article 12 of Regulation 1/2003 itself contains restrictions in paragraphs 2 and 3 on the use of evidence that was transmitted from DG COMP or other Member States' authorities to a Member State. This regulation is directly applicable in the Member States. Nonetheless, the German legislator has included a corresponding provision in § 50a GWB, which deals with cooperation within the European Competition Network. § 50a(2, 3) GWB are similar to Article 12 of Regulation 1/2003, but contain slight differences which will be explained further below. There was no case law found on the use of DG COMP-collected evidence in national punitive administrative proceedings. This might be due to the purpose-limitations set out by the provisions mentioned above.

Punitive administrative proceedings under Competition Law follow the rules of criminal procedure (see 2.3). However, there are special restrictions on the use of information gathered by the EU Commission and transmitted to national competition authorities. These are found in Article 12(2) and (3) of Regulation 1/2003 and also in § 50a GWB. Because this report aims at showing up differences in the national laws of the Member States, it will only address § 50a GWB.[75]

According to § 50a GWB, the competition authority (*Bundeskartellamt – BKartA*) may use information that was transmitted by DG COMP as evidence (§ 50a(1) No 2 GWB). However, there are inherent restrictions that aim at the protection of procedural safeguards in paragraphs 2 and 3.[76] Moreover, there is no obligation to use the information as evidence.[77]

§ 50a(2) GWB is largely based on Article 12(2) of Regulation 1/2003.[78] According to this provision, the authority may use in evidence the information received

[75] See, on this provision, also Martin Böse and Anne Schneider, 'Germany' in Michele Simonato, Michiel Luchtman and John Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities (ECN/ESMA/ECB)* (Utrecht University 2018) 59ff.

[76] Eckard Rehbinder, '§ 50a' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht* (5th edn, CH Beck 2014), para 11.

[77] Rehbinder, '§ 50a' (previous n), paras 11 and 15.

[78] The English version of § 50a(2) GWB reads as follows:

> (2) The competition authority may use in evidence the information received only for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union and in respect of the subject-matter of the investigation for which it was collected by the transmitting authority. However, information exchanged under paragraph 1 may also be used for the purpose of applying this Act if provisions of this Act are applied in accordance with Article 12 (2) sentence 2 of Regulation (EC) No 1/2003.

only for the purpose of applying Articles 101 and 102 TFEU and the subject-matter for which the evidence was collected by the transmitting authority. This means that, in principle, the information can only be used as evidence in sanctioning proceedings under EU competition law, which are directed against economic entities. This is a key feature of the European Competition Network, in which the exchange of information is largely unrestricted, but the use of information is limited to the purpose of enforcing EU competition law.[79] However, § 50a(2) sentence 2 GWB allows the use of evidence in national competition law proceedings, which follow the rules of the GWB, under the circumstances set out in Article 12(2) sentence 2 of Regulation 1/2003. This means that national competition law must be applied in the same case and in parallel to Community competition law and that it must not lead to a different outcome. Accordingly, if an infringement of EU competition law has been established, the information may be used as evidence for the prosecution of an infringement of national competition law by the same conduct.

Where the evidence collected and transmitted by DG COMP was obtained legally, it must be considered whether it might still be excluded from national punitive proceedings because national (German) law provides for a higher standard of procedural safeguards. Such an approach would establish a 'dual' standard that combines the protection under the law of the transmitting authority, ie in case of DG COMP, EU law, with the protection provided by law of the receiving authority (German law). Most legal scholars refuse such a double control in the ECN.[80] They argue that the purpose of the ECN is to provide for free exchange of evidence which would be severely hampered by double control.[81] Indeed, Article 12 of Regulation 1/2003 gives no indication that the legislator intended to establish a system of double control.[82] Nor does such a system fit with the purpose to provide free exchange of information. Moreover, the recently adopted Directive on the effective enforcement of EU competition law by national competition authorities supports the view that EU law (including procedural safeguards) takes precedence over national law.[83]

Nonetheless, national evidence law can still play a role. This is because the Member States may use transmitted evidence, but they are not obliged to do so. Therefore, a national court assessing evidence from DG COMP may exclude this evidence for a violation of fundamental rights (see 2.3).[84] At first sight, this comes close to a double control because the evidence will be evaluated twice, once by EU and once by national standards. However, a prohibition to use legally gathered evidence requires a substantial

[79] See, in more detail, Böse and Schneider, 'Germany' (n 75) 60f.
[80] Rehbinder, '§ 50a' (n 76), para 14; Hans-Hermann Schneider, '§ 50a' in Eugen Langen and Hermann-Josef Bunte (eds), *Kartellrecht*, vol 1 (13th edn, Luchterhand 2018), para 34. For a different opinion, see Bettina Bergmann, '§ 50a' in Wolfgang Jaeger and others (eds), *Frankfurter Kommentar zum Kartellrecht* (issue 82, November 2014) § 50a, para 23.
[81] Rehbinder, '§ 50a' (n 76), para 14; H-H Schneider, '§ 50a' (previous n), para 34.
[82] Rehbinder, '§ 50a' (n 76), para 14.
[83] Art 3 (Safeguards) of Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.
[84] Bergmann, '§ 50a' (n 80), para 23.

violation of fundamental rights. In other words, a violation of any national law is not sufficient. Like OLAF-collected evidence, information transmitted by DG COMP will, therefore, be excluded in exceptional cases only.

§ 50a(3) GWB contains other restrictions on the use of evidence transmitted by DG COMP for the purpose of sanctioning natural persons. § 50a(3) GWB shows similarities to Article 12(3) of Regulation 1/2003, but also differences. It reads as follows:

> (3) [1]Information received by the competition authority pursuant to paragraph 1 can only be used in evidence for the purpose of imposing sanctions on natural persons where the law of the transmitting authority provides for sanctions of a similar kind in relation to violations of Articles 101 or 102 of the Treaty on the Functioning of the European Union. [2]Where the conditions set out in sentence 1 are not fulfilled, the information may be used in evidence if it has been collected in a way which ensures the same level of protection of the rights of defence of natural persons as provided for under the law applicable to the competition authority. [3]The prohibition to use evidence pursuant to sentence 1 shall not exclude using the evidence against legal persons or associations of persons. [4]Compliance with prohibitions to use evidence which are based on constitutional law shall remain unaffected.

The first sentence copies Article 12(3) first hyphen of Regulation 1/2003. In any case, it does not apply to evidence transmitted by DG COMP because EU competition law does not provide sanctions for natural persons.[85] Furthermore, the exclusionary rule does not apply to legal persons (§ 50a(3), sentence 3 GWB).

The second sentence grants a high level of protection to natural persons. Transmitted evidence may only be used 'if it has been collected in a way which ensures the same level of protection of the rights of defence of natural persons as provided for under the law applicable to the competition authority'. Article 12(3) of Regulation 1/2003 contains the same rule, but clarifies that the evidence must not be used for the purpose of imposing custodial sentences. In German law, there was no need for this clarification because regulatory offences are not punishable by custodial sentences.[86]

According to § 50a (3) sentence 2 GWB, the transmitted information may be used in evidence if it has been collected in a way which ensures the same level of protection of the rights of defence of natural persons as provided for under German law. This assessment must not be made on the basis of the general level of protection, but of the safeguards that were applied to the investigative measure by which the evidence was obtained.[87] Defence rights include the privilege against self-incrimination,[88] witness privilege (including legal professional privilege)[89] and the right of access to a lawyer.[90]

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[85] Rehbinder, '§ 50a' (n 76), para 18; H-H Schneider, '§ 50a' (n 80), para 43.
[86] Bergmann, '§ 50a' (n 80), para 48.
[87] Rehbinder, '§ 50a' (n 76), para 19.
[88] Bergmann, '§ 50a' (n 80), para 48; Rehbinder, '§ 50a' (n 76), para 19; Dorothea Seckler, '§ 50a' in Werner Berg and Gerald Mäsch (eds), *Deutsches und Europäisches Kartellrecht* (3rd edn, Luchterhand 2018), para 20.
[89] Rehbinder, '§ 50a' (n 76), para 19.
[90] Bergmann, '§ 50a' (n 80), para 48.

If the protection of the rights of defence was sufficient, the evidence may be used even if national law is stricter in other respects.[91]

However, § 50a(3) sentence 4 GWB explicitly refers to prohibitions to use evidence that are based on fundamental and constitutional rights (*selbständige Beweisverwertungsverbote*, supra 1.1). Even if all the requirements in § 50a(2) and (3) GWB are fulfilled, the court may nonetheless refuse to admit the evidence under these circumstances. This is exactly what has been explained as a general principle of German criminal law for the use of evidence collected by OLAF, ESMA and ECB (supra 2.3).

There are no explicit rules on illegally collected evidence. Therefore, the general rules of criminal procedure that have been explained above apply (supra 2.4).[92] It should also be noted that, again, the national criminal courts do not have jurisdiction to declare investigative measures by the Commission void or illegal. Accordingly, preliminary questions would be required in these cases (supra 2.4).

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

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

As far as the transfer of information (evidence) to public prosecutors and criminal courts is concerned, the legal basis depends upon whether the information has been gathered in punitive administrative proceedings (*Ordnungswidrigkeitenverfahren*) or in administrative (supervisory) proceedings (*Verwaltungsverfahren*). In general, however, both procedural frameworks allow for the transfer of evidence: If the evidence has been obtained in punitive administrative proceedings, the administrative authority may transmit the evidence to the public prosecutor and/or the competent criminal court (§ 49a(1) No 1 OWiG; for the corresponding obligation to transfer the case to the public prosecutor see § 41 OWiG). If the evidence (information) has been gathered in the framework of administrative proceedings, the transfer to criminal law enforcement authorities is subject to the applicable sectoral rules (eg § 9(1) No 1 KWG, supra 1.1).

In as far as the exclusion of evidence may result from a violation of the law, the different legal framework and the applicable rules on gathering of evidence may become relevant: For instance, evidence obtained from an information request in the framework of monitoring or supervisory activities must be excluded if the competent authority has failed to inform the requested person about the right not to incriminate oneself and to consult with defence counsel (§ 6(15) WpHG; supra 1.2).[93]

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[91] Asja Krauser, '§ 50a' in Joachim Bornkamm and others (eds), *Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht* (2nd edn, CH Beck 2015) § 50a GWB, para 15.
[92] See, also, Rehbinder, '§ 50a' (n 76), para 14; H-H Schneider, '§ 50a' (n 80), para 35.
[93] See with regard to the corresponding obligation in tax proceedings (§ 393(1)4 AO) BFH *BB* 2002, 1035, 1036; *BeckRS* 2014, 94392; Böse (n 9) 482.

As a matter of principle, however, the information gathered and transmitted by national administrative authorities may be used as evidence in criminal proceedings. In this regard, the general rules on evidence apply, including the *numerus clausus* of means of proof (*Strengbeweis*, supra 1.3).

The officials that have collected the evidence may be examined as witnesses (§§ 48ff StPO), objects may be inspected, and documents (eg business records) may be read out (documentary evidence, § 249 StPO) during trial. As a matter of principle, the interrogation of witnesses must not be replaced by documentary evidence such as records or statements (§ 250 StPO – *Unmittelbarkeitsgrundsatz*). This applies in particular to tax investigators or tax auditors and the findings of their investigations.[94] There are, however, exceptions to this rule, in particular if the witness cannot be examined by the court within reasonable time (§ 251(1) No 3 StPO) or if the document concerns the existence or the level of an asset loss (§ 251(1) No 4 StPO).

Furthermore, the court may use expert opinions that have been rendered in administrative proceedings. In contrast to the witness, the expert will not report on observations he or she made at a certain place on a certain day, but on the current state of scientific knowledge in his or her areas of expertise and the conclusions that have been drawn from certain (given) facts on the basis of this knowledge. In other words, the expert opinion shall not prove the facts on which the opinion is based (*Anknüpfungstatsachen*), but the facts established by the expert's conclusions (*Befundtatsachen*).[95] The expert opinion may be rendered by an officer of the prosecution service,[96] but the expert must not be biased by his or her prior involvement in the investigation.[97] Like the witness, the hearing of the expert shall not be replaced by reading out the written opinion (§ 250 StPO) unless otherwise provided (§ 251 StPO).[98]

In contrast, court proceedings in fiscal (tax and customs) matters (*Finanzgerichtsverfahren*) follow a less strict approach and allow for the use of reports and other documents without formal requirements such as reading them out in a public hearing.[99] This might explain the fact that there is more case law on the use of OLAF reports in such proceedings than in the framework of criminal proceedings (supra 2.2).

Nevertheless, there are exceptions to the rule that the examination of a witness or expert must not be replaced by reading out the record of a prior examination (§ 250 StPO).

First, statements containing a certificate or an expert opinion from public authorities may be read out (§ 256 (1) No 1 lit a StPO). This exception, however, does

[94] Brigitte Hilgers-Klautzsch, '§ 385' in Günter Kohlmann (ed), *Steuerstrafrecht* (issue 53, November 2015), para 694; Armin von Döllen, 3. Kapitel: 'Unternehmensperspektive, staatsanwaltschaftliche Ermittlung und Verteidigungsstrategie, C. Ermittlungen gegen Unternehmen – Verteidigungsstrategien' in Carsten Momsen and Thomas Grützner (eds), *Wirtschaftsstrafrecht* (CH Beck 2013), para 251.
[95] Kühne (n 1) 857–858.
[96] BGHSt 28, 381–384.
[97] Hilgers-Klautzsch (n 94) 704–705.
[98] Helmut Kreicker, '§ 250' dans H Schneider (ed) (n 8), para 8.
[99] Ulrich Herbert, '§ 82' in Fritz Gräber (ed), *Finanzgerichtsordnung* (8th edn, CH Beck 2015), para 40.

not apply to mere witness statements even if the witness is a public official (eg a tax investigator, see supra).[100]

Secondly, records and statements from criminal prosecuting authorities about investigatory acts may be read out, insofar as their subject is not an examination (§ 256(1) No 5 StPO). The scope of this exception, however, is limited to 'criminal prosecuting authorities' (prosecution service, police, tax investigation service). Therefore, it does not apply to administrative authorities that are not vested with tasks and powers in a criminal investigation. Furthermore, any report that – at least in part – relies on a questioning of witnesses or suspects will not be covered by the exception either.[101]

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

German law does not provide for special rules on the admissibility of evidence collected and transmitted by supranational agencies; in this regard, the general rules apply accordingly. The admissibility of evidence is subject to the general rules of criminal procedure that apply irrespective of whether the evidence has been gathered by national authorities or by their supranational counterparts.

As a matter of principle, any evidence contained in a written document must be read out during trial; this also applies to electronic documents (§ 249(1) StPO). The court may dispense with the reading if the judges have taken cognizance themselves of the wording of the document and the other participants have had an opportunity to do so (§ 249(2) StPO). In contrast, examination records may not be read out unless permitted by the law (§§ 250 and 251ff StPO). Objects that cannot be read out may be used in evidence by the court's inspection (*Augenschein*). This may be relevant for digital forensics (eg photos or videos).[102]

In particular, the provision on reading out certificates or expert opinions from public authorities (§ 256(1) No 1 lit a StPO, supra 4.1) also applies to foreign authorities[103] and supranational agencies.[104] In contrast, the provision on statements and records of criminal law enforcement authorities (§ 256(1) No 5 StPO) does not apply to OLAF and the other supranational entities because they are, unlike the European Public Prosecutor's Office, not conducting a criminal investigation (supra 4.1).

Apparently, there is no case-law on the exclusion of evidence collected by the ECB, ESMA, DG Competition and OLAF in criminal proceedings as most of the cases (apart from those investigated by OLAF) are supposed to be related to regulatory offences.

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[100] Petra Velten, '§ 256' in Jürgen Wolter (ed), *Systematischer Kommentar zur Strafprozessordnung* (5th edn, Carl Heymanns 2016), para 20.
[101] BGH *NJW* 2010, 3383, 3384.
[102] Lothar Senge, '§ 86' in Rolf Hannich (ed), *Karlsruher Kommentar zur Strafprozessordnung* (7th edn, CH Beck 2013), para 6.
[103] BGH *NJW* 1992, 58, 59.
[104] Matthias Krüger, '§ 256' dans H Schneider (ed), (n 8), para 9.

Nevertheless, the law of criminal procedure may exclude evidence collected by these supranational institutions if the gathering of evidence is incompatible with general standards of criminal procedural law, in particular if the evidence could not have been collected in the framework of a criminal investigation (*hypothetischer Ersatzeingriff*, supra 1.1). In this regard, the rules on protection of professional secrecies (eg with regard to lawyers, tax consultants, sworn auditors) in criminal investigations (§§ 53, 97, and 160a StPO) may prohibit the use of evidence that has been collected by recourse to administrative powers that do not provide for a corresponding level of protection.[105]

Furthermore, evidence that has been gathered from the suspect by compulsory information requests must not be used in criminal proceedings because this would be in breach with the privilege against self-incrimination (*nemo tenetur se ipsum accusare*).[106] However, national standards will only be relevant where EU law does not provide for a corresponding protection, either by a right to remain silent and to consult with counsel (Article 9(2)(2) and (6) of Regulation No 883/2013) or by exclusion of such evidence from criminal proceedings against natural persons (Article 12(3) of Regulation 1/2003, § 50a(3) GWB).

The decision on the exclusion of evidence is taken by the trial court, and the court is obliged to assess the admissibility of evidence (ex officio control). The accused or his or her defence counsel may object to the use of illegally obtained evidence; if the objection is overruled by the trial court, there is no further remedy, but the accused (or his or her defence counsel) may lodge an appeal against the judgement on grounds of law, claiming that the verdict has been based upon inadmissible evidence (supra 1.4). If the exclusion of evidence is derived from a violation of EU law, the appeal court shall ask for a preliminary ruling of the Court of Justice (Article 267 TFEU; supra 2.4).

5. PROBLEMS AND PRACTICES IN DEALING WITH ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL CRIMINAL PROCEEDINGS

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

The lack of corresponding case-law suggests that the admissibility of OLAF reports as evidence in criminal proceedings is not an issue in court practice. This may be due to the fact that reports of administrative authorities may not be directly used in evidence so that the findings of the report may only be introduced by examining the author of the report (the inspector, auditor etc.) as witnesses (supra 4.1).

As a consequence, there seems to be no need for an exchange of views between OLAF and the competent authorities in Germany on issues related to the admissibility of OLAF-collected evidence in criminal proceedings either. Likewise, a parallel national report on inspections under administrative (respectively customs) law might serve as a

[105] See with regard to evidence collected in tax proceedings Böse (n 9) 339–346.
[106] BVerfGE 56, 37; see in detail Böse (n 9) 523ff and 541ff.

backup, but has no additional probative value. This does not apply to national reports in the framework of a criminal investigation. In this case, the report may be read out as a statement on investigative acts in criminal proceedings in as far as it does not rely on the examination of a witness or suspect (§ 256(1) No 5 StPO; supra 4.1)

According to the national contact point and antifraud coordination service (AFCOS), the competent national authority assists OLAF in preparing and carrying out on-the-spot inspections (eg by transmitting relevant documents). German officials may be present during the inspection, but usually do not initiate an administrative investigation under German law, but wait for the OLAF report in order to proceed on the basis of OLAF's findings. Since 2012, AFCOS has not been notified of any case where the competent authority has drafted a parallel national report on the inspection or where the admissibility of evidence has been discussed with OLAF.[107] It must be noted, however, that the available information is limited to inspections related to expenditure side (subsidies) of the EU budget and AFCOS is not informed of all inspections carried out by OLAF within German territory. In any case, the information obtained by AFCOS supports the view that the issue of admissibility of evidence in criminal proceedings does not have an impact on the cooperation between OLAF and the competent national authorities.

5.2 Duplication of OLAF activities

The admissibility of OLAF reports as evidence in criminal proceedings mainly depends upon the *numerus clausus* of means of proof (*Strengbeweisverfahren*). In other words, the question is not if, but how to introduce the report into evidence at trial. The investigative act (inspection, on-the-spot check) is not repeated, but only its findings are presented in a different manner.

A repetition of the investigative measure might be considered where the evidence has been obtained by an investigative measure violating the law and/or fundamental rights of the defendant. In this case, however, the exclusion of the evidence will significantly depend upon whether the information could have been obtained lawfully (*hypothetischer Ersatzeingriff*, supra 1.6 and 4.1). If this requirement is not met and, as a consequence, the evidence is excluded, the trial court may repeat the investigative act in order to obtain the evidence lawfully. For instance, if the suspect has not been properly informed of his or her right to remain silent and to consult with defence counsel, the court may notify the accused of his or her rights and of the inadmissibility of his or her former statement as evidence in court (*qualifizierte Belehrung*) and examine the accused person again in order to obtain a statement that may be used in evidence.[108] As far as OLAF-collected evidence is concerned, no such case has been reported to AFCOS yet.[109]

[107] The authors would like to thank Mr Martin Leuvering (Federal Ministry of Finance – *Bundesministerium der Finanzen*) for providing this information.
[108] BGH *NJW* 2009, 1427–1428.
[109] Information provided by the Federal Ministry of Finance (n 107).

6. CONCLUSION

The German legal order draws a clear distinction between punitive proceedings (criminal proceedings and punitive administrative proceedings) on the one hand and administrative proceedings on the other. This concept of administrative proceedings relies upon the objective to be pursued and the measure to be taken (termination of illegal conduct, recovery of illegally obtained subsidies). It fundamentally differs from a concept of administrative proceedings that mainly refers to the relevant actor (administrative vs judicial authority) and may cover punitive administrative proceedings as well. EU law, and the legal framework of OLAF in particular, adheres to the latter concept, as has most recently been confirmed by the Regulation on the establishment of the European Public Prosecutor's Office (EPPO).[110] According to the provision on the relations with OLAF, the EPPO may request OLAF to support its activity by conducting administrative investigations (Article 101(3)(c) EPPO Regulation). If the distinction between criminal and administrative proceedings is based upon the objective pursued (functional approach), any investigative measure intended to support a criminal investigation forms part of a criminal investigation and cannot be qualified as (merely) administrative. On the other hand, the principle of conferral and the limited legislative powers of the Union do not allow for vesting OLAF with investigative powers in the framework of criminal proceedings.[111]

Conceptual differences and tensions notwithstanding, the OLAF Regulation[112] provides for procedural guarantees such as the privilege against self-incrimination and the right to consult with counsel (Article 9(2) of Regulation No 883/2013) and, thereby, establishes a standard of protection that is an indispensable requirement for the admissibility of OLAF-collected evidence in criminal proceedings (see also Article 11(2) OLAF Regulation). There may, however, be higher standards in criminal proceedings (see supra 2.3, with regard to the privilege against self-incrimination and the production of documents). Furthermore, the admissibility of evidence does not only depend upon procedural safeguards and fundamental rights OLAF has to comply with in the course of its investigation, but is also subject to the rules on hearing evidence in a criminal trial (supra 4.2). As the comparison of court proceedings in customs matters on the one hand and criminal proceedings (and, to some extent, court proceedings on regulatory offences as well) on the other has revealed, the admissibility of OLAF reports as evidence may be subject to different rules and standards in a Member State's legal order. Thus, OLAF-reports and OLAF-collected evidence should be evaluated and used in court proceedings under the same conditions as evidence collected by the Member States' administrative authorities (Article 11(2)(2) and (3) OLAF Regulation), ie the requirements should be neither more nor less favourable than for reports drawn up by domestic administrative

[110] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1.
[111] Strobel (n 60) 321–324.
[112] 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) [2013] OJ L 248/1.

authorities. In the German criminal justice system, the rules on the admissibility and exclusion of evidence and the balancing test in particular allow for an assessment that takes the Union's interest in an effective protection of its financial interests into due consideration. This interest, however, does not justify a limitation of the court's competence to rule on the admissibility of evidence by an obligation to 'automatically' use and rely on OLAF-collected evidence.[113]

[113] See the proposed amendment of Art 11(2) OLAF Regulation, COM(2018) 338 final, 23 May 2018 ('reports … shall constitute admissible evidence in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings …'). It is not entirely clear from the wording whether the new provision shall apply to punitive administrative proceedings.

6. HUNGARY*

A. Csúri

1. GENERAL FRAMEWORK

A brief introduction should illustrate that the Hungarian legal framework for administrative procedures is in a transitional state and subject to possible and continuous amendments during and subsequent to the finalisation of this report. Some laws have only recently become effective while others will enter into force in the future. The new system in its entirety is planned to be set up by 2020.

As part of an ongoing judicial reform, the system of Hungarian procedural laws was subjected to a general overhaul in 2018. The new Codes of Civil and Administrative Procedure entered into force 1 January 2018, while the new Code of Criminal Procedure entered into force 1 July 2018. Previously, in 2016, the government had also announced plans to set up a distinct court system for administrative cases. As a first step, the Fundamental Law of Hungary[1] was amended in order to comply with a related decision of the Hungarian Constitutional Court.[2] Next, the National Assembly passed the Act on Administrative Courts in December 2018.[3] The law was supposed to enter into force in 2020, establishing a separate system of administrative courts, with a separate high court (the Supreme Administrative Court) and its own judicial council (the National Administrative Judicial Council). The law has been passed without waiting for the opinion of the Venice Commission on the draft law, which the Hungarian Minister of Justice had requested in November 2018. The Venice Commission published its opinion[4] in March 2019, acknowledging that creating a new separate legal order in the area of administrative law falls within the sovereign right of the national legislature and is fully in line with European standards and practices. The opinion states, however, that the law is fairly general as regards the jurisdiction and competence of the future administrative courts, which shall cover, among other things, administrative decisions taken by the

* The author would like to thank all the interviewed experts, who prefer to remain anonymous, for their valuable input and comments.

[1] The Fundamental Law of Hungary, 25 April 2011 (Magyarország Alaptörvénye (2011. április 25.). The translation of the Hungarian Ministry of Justice uses the term 'The Fundamental Law of Hungary'. In English texts it is also referred to as 'Basic Law' or 'Constitution'. The report indicates the full title of the legislative acts in the footnotes but uses shorter form in the text.

[2] Constitutional Court of Hungary, 17 January 2017, Decision No 1 (1/2017. (I. 17.) AB határozat). All case law cited in this report is available by searching for the case number at <https://birosag.hu/birosagi-hatarozatok-gyujtemenye> accessed 29 April 2019.

[3] Act CXXX on Administrative Courts (2018. évi CXXX törvény a közigazgatási bíróságokról).

[4] Opinion no 943 / 2018 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e> accessed 29 April 2019.

police, economic matters, disputes in the area of taxation, the issuing of building permits and planning permission, the media and market competition. The government reacted swiftly and in April 2019 made the first substantial amendments to the law,[5] which was still supposed to enter into force in 2020. This was the state of reform when this report was originally submitted. Since then, in May 2019, the government, in a rather unexpected turn, proposed suspending the establishment of administrative courts indefinitely due to the ongoing Article 7 proceedings against Hungary. The law was passed by the Parliament, thus the new courts will not be established in the near future. The national report has been revised to take account of the latest developments.

The general rules concerning administrative procedures are laid down in the 2016 Act on Administrative Procedure (hereinafter APA),[6] which entered into force in January 2018. In principle, the nature of the proceedings, such as detecting violations of law or imposing sanctions (ie administrative punitive proceedings), is irrelevant with regard to the application of the law. However, the new law defines procedures to which specific laws apply. These include procedures such as those for regulatory offences,[7] tax[8] and customs administration,[9] competition proceedings[10] and National Bank of Hungary administration[11] (Article 8 APA). These procedures were previously covered by the APA. That said, if the specific laws do not contain diverging rules, the APA applies also to the special procedures.

Administrative authorities may currently impose the following sanctions: warnings, fines and confiscations. The detailed rules of these sanctions are laid down in the 2017 Act on Transitional Provisions on Sanctions with regard to Administrative Offences.[12] As the title suggests, this law, in line with the ongoing reform, is of a provisional nature. A new separate law on Administrative Penalties[13] with new forms of administrative sanctions was to enter into force as of 1 January 2019. This did not happen and currently the law ought to enter into force on 1 January 2020.

[5] Act XXIV of 2019 on Further Guarantees regarding the Independence of Administrative Courts (2019. évi XXIV. Törvény a közigazgatási bíróságok függetlenségét biztosító további garanciákról).
[6] Act CL of 2016 on Administrative Procedure (2016. évi CL. Törvény az általános közigazgatási rendtartásról).
[7] Act II of 2012 on Regulatory Offences (2012. évi II. Törvény a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről).
[8] Act CLI. of 2017 on Tax Administration (2017. évi CLI. Törvény az adóigazgatási rendtartásról).
[9] Act CLII of 2017 on the implementation of the Union customs legislation (2017. évi CLII. Törvény az uniós vámjog végrehajtásáról).
[10] Act LVII of 1996 on the prohibition of unfair market conduct and restriction of competition (1996. évi LVII. Törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról).
[11] Act CXXXIX of 2013 on the National Bank of Hungary (2013. évi CXXXIX. Törvény a Magyar Nemzeti Bankról.
[12] The full name of the law is Act CLXXIX of 2017 on Transitional Provisions for Sanctions for Administrative Offences and Amending Certain Acts in Connection with the Reform of Administrative Procedural Law (Articles 1-4) (2017. évi CLXXIX. Törvény a közigazgatási szabályszegések szankcióinak átmeneti szabályairól, valamint a közigazgatási eljárásjog reformjával összefüggésben egyes törvények módosításáról és egyes jogszabályok hatályon kívül helyezéséről).
[13] Act CXXV of 2017 on Administrative Penalties (2017. évi CXXV. Törvény a közigazgatási szabályszegések szankcióiról).

1.1 Function of admissibility rules in national criminal law

The new Hungarian Code of Criminal Procedure[14] (hereinafter CCP) entered into force on 1 July 2018 and introduced a number of changes. Notably, the preparatory meeting (*előkészítő ülés*) has become more important in order to speed up proceedings. This meeting is now obligatory and involves the defence, the prosecutor and the judge. It sets the framework for any further action, including evidentiary issues, thereby also affecting the admissibility regime. According to the law, once charges have been brought, the court calls the defendant and the defence counsel to submit requests for taking or excluding evidence, at the latest, at the preparatory meeting (Article 497 CCP). At the meeting the defendant may plead guilty. If the defendant does not plead guilty, he or she needs to present the evidence on which the defence is based. At the same time the defendant may request the collection or exclusion of further evidence (Article 499 CCP). The aim of this exercise is to avoid later time-consuming strategies, as the possibility of gathering further evidence after the session is limited. Accordingly, after the hearing the court may, without giving reasons, reject applications which are not necessary to establish the facts or impose fines if the application, although necessary to establish the facts, has been made in a manner which unreasonably delays the proceedings (Article 500(1) CCP).

The new code also provides for a possible agreement between the prosecution and the defendant during the pretrial phase (Articles 407–410 CCP). The aim is to encourage the defendant's cooperation and confession. By agreeing to such a measure, the defendant inevitably withdraws from other defence strategies. Should the prosecution unjustifiably deviate from the agreement at a later stage, the confession and other evidence thus obtained must be excluded from the proceedings.

Function of admissibility rules

It should be noted at the outset that both the Fundamental Law of Hungary and the Code of Criminal Procedure explicitly provide for the right to a fair trial and the right to defence. In addition, the new CCP implements all adopted EU defence rights directives.

The Fundamental Law of Hungary grants everyone the right to a fair and public trial (Article XXIV) and the defendant the right to legal protection at any stage of the proceedings (Article XXVIII). The Constitutional Court has consistently held that a fair trial is an integral part of the rule of law and has established a checklist in a 1998 decision.[15] It confirmed in further decisions that the right to defence may only be restricted in accordance with the principles of necessity and proportionality, but not in its core.[16] Accordingly, procedural rights in criminal proceedings cannot be circumvented and in most cases not even restricted.

Correspondingly, the general objective of the admissibility rules in the CCP is to ensure that evidence has been collected lawfully and in full respect of fundamental rights.

[14] Act XC of 2017 on Criminal Procedure (2017. évi XC. Törvény a büntetőeljárásról).
[15] Constitutional Court of Hungary, 11 March 1998, Decision No 6 (6/1998 (III.11) AB határozat).
[16] Constitutional Court of Hungary, 23 April 1990, Decision No 8 (8/1990 (IV. 23) AB határozat); Constitutional Court of Hungary, 11 March 1998, Decision No 6 (6/1998 (III.11) AB határozat).

The guiding rule being that no information is admissible that has been obtained by the authorities in the form of a criminal offence, by other infringements of the law or by a significant limitation of the rights of the defence (Article 167(5) CCP). In addition, there are exclusionary rules in the law on the use of specific evidence (see section 1.3.1).

As a rule, evidence is obtained by the courts of first instance. The second instance intervenes only if further evidence is needed (eg additional witnesses need to be heard) or procedural mistakes are made while obtaining evidence in the first instance. The latter makes it possible to correct obvious procedural errors in the course of the trial. Accordingly, the courts of the second instance are entitled to convert findings obtained improperly or even unlawfully by the court of first instance into admissible evidence (Article 353(1) CCP), for example by requestioning accused persons who had not previously been informed of their rights. Even if the content remains the same, the evidence collected by the court of second instance will be entirely new evidence.

1.2 Function of admissibility rules in national punitive administrative law

In administrative proceedings, the authorities are obliged by law to establish the facts of the case (Article 3 APA). In most cases, a decision can be made on the basis of available facts. If the information is insufficient, the authority will seek further evidence by the means provided by law. All evidence, with the exception of evidence obtained unlawfully, may be used to establish the facts of the case (Article 62(2) APA).

A decision of the Hungarian Supreme Court (hereinafter Curia)[17] – which was taken in the regulatory context before 2018 but which is still considered to be indicative – states that if the decision of a criminal court is necessary to establish the legality of a piece of evidence (eg in the case of coercive measures), the administrative authority must exclude this evidence until a criminal court has ruled on the matter.[18] This would be the case, for example, with covert investigations such as interception of telecommunications. Due to the serious impairment of the fundamental rights of individuals, the law requires that a criminal court rules on the legality of such evidence. In the absence of a decision by a criminal court, the evidence must be excluded from the administrative procedure. This limitation of the free system of evidence serves the interests of the defendant.

The above principles also apply for the special administrative procedures, all of which exclude the admissibility of evidence gathered in violation of the law, while generally providing for a free system of proof (see for instance Article 64/A of the Act on the implementation of the Union customs legislation, Article 57(3) of the Law on Regulatory Offences or Article 58 of the Law on Tax Administration).

[17] Curia, 2016, Judgment No 594 (Kfv. I. 35.594/2016/24, [83]; [102].).
[18] Curia, 2016, Judgment No 594 (Kfv. I. 35.594/2016/24. [102].)

1.3 System of proof: Free or controlled?

1.3.1 Criminal law

Hungarian criminal procedure is based on a free system of proof in the sense that all relevant information may in principle serve as evidence. On the one hand, this allows the authorities to use any evidence permitted by law, including statements, expert opinions, records, electronic data and the opinion of probation officers (Article 165 CCP). On the other hand, the courts, prosecutors and investigating authorities are free to evaluate all evidence, both individually and collectively, in order to draw conclusions based on their convictions. Any type of information may be transferred into documentary evidence. The courts are not obliged to prove facts for which no applications have been made. In addition, undisputed issues do not have to be proved.

Nevertheless, certain evidence may not be used. The law generally prohibits the use of evidence obtained by the authorities by way of a criminal offence, other violations of the law or a substantial restriction of the defendant's procedural rights (Article 167(5) CCP). Evidence obtained by criminal means usually involves compulsory questioning (Article 303 of the Hungarian Criminal Code).[19] Other forms of infringement may be procedural deficiencies which do not constitute a criminal offence but call into question the legality (and reliability) of the evidence so collected.

To correct such violations already in the course of the proceedings the law enables the courts of second instance to take evidence in order to convert findings obtained improperly into admissible (new) evidence (Article 353(1) CCP). For example, if the witnesses were questioned in violation of their rights, the testimony might be repeated in the second instance. According to the interviewees, however, a subsequent hearing may affect the probative value of the evidence for the prosecution, as the witness may have learned facts at the first hearing of which he or she did not know previously.

Further, there are special exclusionary rules in the law concerning specific means of evidence. For example:

- Witness statements, if the record does not include that the witnesses have been informed of their rights; of the obstacles to testifying; of the obligation to tell the truth or of the consequences of false testimony (Chapter XXIX CCP).

- Statements made by the accused, the witness or the victim on the facts of the case at an expert hearing. For instance, while preparing an expert report, a psychiatrist may write down the reactions of the accused to the charges against him or her. Since such an expert hearing does not comprise a notification of defence rights, these parts of the report cannot be used as testimony (Chapter XXXI CCP).

- The defendant's testimony, if he or she was not informed of not being obliged to testify (Chapter XXX CCP).

[19] Act C of 2012 on the Criminal Code (2012. évi C. törvény a Büntető Törvénykönyvről).

- Statements made by the defendant and the victim in the mediation process (Article 414(3) CCP). [20]

1.3.2 Punitive administrative law

Administrative proceedings are also based on a free system of proof. All evidence, with the exception of evidence obtained unlawfully, may be used to establish the facts of the case (Article 62(2) APA). Thus, there are no specific impediments to the admissibility of evidence from any other administrative authority, including OLAF, and the authorities are free to assess its admissibility (Article 62(4) APA). However, there might be some limitations to the free system. Accordingly, a statute or government decree may prescribe the use of documentary evidence in specific cases and for reasons of public interest (Article 62(5) APA).

In principle, the special laws on certain administrative proceedings mentioned above, such as those regarding tax and customs or regulatory offences, follow these general rules. As an example, the Act on Regulatory Offences, in line with the APA, prohibits the admissibility of any information as evidence which was gathered by the respective authorities by means of a criminal offence, by otherwise breaching the law or by significantly restricting the procedural rights of the person concerned (Article 57(3) Act on Regulatory Offences). The law provides for specific exclusionary rules concerning special means of evidence, for example if a witness has been heard despite the existence of an impediment to testify (eg due to mental impairment or professional secrecy; Article 59 Act on Regulatory Offences) or if the witness has not been informed of the right to refuse to testify (Article 60 Act on Regulatory Offences). The competent authorities are otherwise free to choose the applicable means of evidence provided by the law (Article 57(1) Act on Regulatory Offences). The law does not list the means of evidence exhaustively, which indirectly indicates that information from other lawful proceedings may also be admissible as evidence. Finally, the Act expressly permits the use of evidence from other authorities (Article 57(2) Act on Regulatory Offences).

Article 80/C of the Act on the prohibition of unfair market conduct and restriction of competition explicitly requires evidence collected by the Commission to be substantiated for the purposes of the proceedings.

1.4 Review of the decision on admissibility

1.4.1 Criminal law

As has been repeatedly emphasised, the law generally excludes the admissibility of evidence taken by the courts, the public prosecutor's office or the investigating authorities

[20] See in further detail Petra Bárd, 'Country Reports on Hungary' in Elodie Sellier and Anne Weyembergh, 'Criminal Procedural Laws across the European Union – A Comparative Analysis of Selected Main Differences and the Impact They Have over the Development of EU Legislation' (Study for European Parliament's Committee on Civil Liberties, Justice and Home Affairs 2018) <www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977(ANN01)_EN.pdf> accessed 29 April 2019.

through a criminal offence, other prohibited means or through a substantial violation of defence rights (Article167(5) CCP). In all other cases, the court is free to decide which facts are to be admitted or excluded as evidence.

The courts of first instance may justify in their decision why certain evidence was admitted while other evidence was not. An appeal may be lodged against this decision. Based on the free system of proof, the conclusions of the court on the use of evidence are otherwise not subject to review (Article 167(4) CCP). An exception is when the decision is not properly substantiated, eg wrongly derived from a fact or from illegally obtained evidence (Article 592 CCP) or there were procedural errors (Articles 608 and 609 CCP). As mentioned above, in order to resolve procedural errors already during the proceedings the law enables the courts of second instance to obtain evidence for such purposes as well (Article 353(1) CCP). The court of second instance is obliged to set aside the judgment of the court of first instance and shall initiate a new procedure if the procedural defects had a substantial effect on the procedure, which cannot be remedied by the second instance. These include impact on the determination of guilt, the classification of the offence, the imposition of penalties and the review of the case (Article 609 CCP).

Appeals to the courts of second instance may only contain new evidence if the party proves that it became aware of it following the judgment of the first instance. In addition, appeals can include requests to consider evidence which was rejected in the first instance.

Final court decisions might be reviewed exceptionally on the basis of procedural violations. The Curia has stated that there is only a limited possibility, and only within the context of the individual appeal, to review the use of evidence.[21]

The law itself provides for exceptions where new evidence could lead to acquittals or convictions, where false or falsified evidence has been used, or where the court, prosecutor or investigating authority has violated its duties in the main proceedings by breaching the law. This may lead to the exclusion of evidence (Article 637(3) lit a)–b) CCP).

1.4.2 Punitive administrative law

At present, the judicial review of administrative decisions takes place within the framework of the court system. There have been two reforms in the area. In 2013 administrative courts and labour tribunals were set up at local court level. Within the regional courts, there are chambers, sections and divisions devoted to administrative cases. These courts are responsible for the judicial supervision of administrative decisions as well as other cases assigned to them by law. Should the 2018 law on administrative courts enter into force – with or without further amendments – the review of administrative decisions will be the competence of separate administrative courts.

As a main rule the APA generally prohibits the use of evidence obtained by the authority in violation of the law (Article 62(2) APA). The complaint system differentiates

[21] Curia, 2016, Judgment No 594 (Kfv. I. 35.594/2016/24.).

between complaint procedures on request (complaints and administrative procedures) and ex officio complaint procedures (modification or annulment of a decision within the authority's own competence). In these appeal procedures it is possible to challenge the legality of gathered evidence.

In the above-mentioned special procedures, the laws also provide for complaint mechanisms. In this regard, the special laws refer back to the APA (see Article 57/B(1) of the Act on the National Bank of Hungary; Article 80/I of the Act on the prohibition of unfair market conduct and restriction of competition; Article 124 of the Act on Tax Administration). The use of illegally obtained evidence is always prohibited (Article 58(2) of the Act on Tax Administration; Article 46(2) 11 of the Act on the National Bank of Hungary; Article 57(2) and (3) of the Act on Regulatory Offences). As a specific rule, Article 80/C of the Act on the prohibition of unfair market conduct and restriction of competition requires evidence collected by the Commission to be substantiated for the purposes of the proceedings.

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

The CCP allows for the use of evidence produced or obtained by administrative authorities in criminal proceedings, given it was gathered in the performance of their duties before or simultaneously with the initiation of the criminal proceedings (Article 167(2) CCP). The general rule excluding evidence obtained by a criminal offence, other illegal means or a substantial violation of the rights of participants in criminal proceedings (Article 167(5) CCP) also applies to evidence obtained in this way by administrative authorities.

According to the law, the courts, the prosecution and the investigating authorities are not bound by decisions or facts taken in civil, administrative, disciplinary or other proceedings (Article 7(5) CCP). On the one hand, this means that evidence declared inadmissible in administrative proceedings may still be admissible in criminal proceedings, for example in the form of documentary evidence. On the other hand, in accordance with the free system of proof (see section 1.4), evidence admissible in administrative proceedings may still be ignored in criminal proceedings.

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

The free system of evidence does not mean that evidence obtained in criminal proceedings can be used in administrative proceedings without verification of its legality. Thus, the admissibility of evidence from criminal proceedings is also examined under administrative law. In this context, evidence that does not meet the higher standards may still correspond to the lower ones.

2. ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

Among its tasks, the Supreme Court of Hungary, the Curia, examines selected appeals defined by law, which were submitted against the decisions of the county courts and the regional courts of appeal. The Curia also reviews final decisions if challenged through an extraordinary remedy and adopts uniformity decisions, which are binding for the lower courts.[22] The Curia repeatedly ruled that OLAF reports are to be considered evidence under the same conditions as the reports of national administrative authorities.[23] Nonetheless, OLAF final reports as such do not waive the obligation of the administrative authorities to investigate the facts of the case. Thus, OLAF reports as such do not constitute evidence on which the authority could automatically base a final decision.[24]

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

The Curia took a position in several of its decisions on the status of OLAF final reports in Hungarian administrative proceedings. In sum, OLAF reports qualify as a piece of evidence admissible in administrative and court proceedings in the same way and under the same conditions as an administrative report (minutes) prepared under the national law. They shall be subject to the same evaluation as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.[25] This also means that when an OLAF report is used as evidence, the defendant has the same rights to access it as in the case of any other evidence.[26]

According to the Curia, reports drawn up by administrative authorities (national or otherwise) generally describe data and intelligence gathered during their respective investigations. Even when containing concrete findings or recommendations, they do not constitute evidence in themselves.[27] Thus, OLAF final reports (and that of national administrative authorities) as such do not constitute evidence on which a final decision could be automatically based.[28] Consequently, these reports cannot define procedural

[22] See Act CLXI of 2011 on the Organisation and Administration of the Courts (2011. évi CLXI. törvény a bíróságok szervezetéről és igazgatásáról). See also the website of the Curia <https://kuria-birosag.hu/en> accessed 29 April 2019.
[23] See the Curia decisions Kfv. V .35.299/2016/7, Kfv. IV. 35.651/2016/8 and Kfv. IV. 35.543/2016/5.
[24] Curia decisions Kfv. V. 35.299/2016/7 [28] and Kfv.IV.35.543/2016/5.[26].
[25] Curia decisions Kfv. IV. 35.543/2016/5 [29]. See also Communication concerning the decision of the Curia of Hungary in administrative case no Kfv.I.35.420/2017. Available in English at <https://kuria-birosag.hu/sites/default/files/selected_case_law/administrative_case_march_2018.pdf> accessed 29 April 2019.
[26] Curia decisions Kfv. IV. 35.651/2016/8; Kfv. IV. 35.543/2016/5 or Kfv.V.35.542/2016/8 [33].
[27] Curia decision Kfv. V. 35.299/2016/7 [28].
[28] Curia decisions Kfv. V. 35.299/2016/7 [28] and [32]; Kfv.IV.35.543/2016/5.[26] and Kfv. IV. 35.651/2016/8.

steps that would change the legal position of the individual in the underlying administrative procedure.[29]

In addition, the Curia ruled that OLAF final reports and recommendations as such do not oblige national authorities to take specific measures. The Curia referred to *Camós Grau v Commission*[30] by stating that the opinion in OLAF final reports imposes no obligation, even of a procedural nature, on the authorities to which it is addressed.[31] Thus, the national authorities, each within their respective powers, decide freely on the measures to be taken.

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

The interviewees and the author are not aware of any court decisions on this subject. According to the opinion of the expert interviewed, the decision of the administrative authority would result in a breach of the law if the use of the evidence received from OLAF infringes or circumvents the basic principles of Hungarian procedural law and its safeguards.

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

The interviewees and the author are not aware of any court decisions on this subject. According to the expert interviewed, answering the question of the use of such evidence in national proceedings would only be possible by examining the specific infringement, ie the gravity of the violation and its consequences.

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

As mentioned above, the APA sets out the procedures for which special laws apply. The procedures include those concerning regulatory offences, tax and customs administration, competition proceedings and National Bank of Hungary administration. The free system of proof also applies to the special procedures (see, for instance, Article 58 Act on Tax Administration; Article 46(2) 11 Act on the Hungarian National Bank or Article 57(1) Act on Regulatory Offences).

There are no specific rules regarding the admissibility of evidence gathered by the European Central Bank (ECB), the European Securities and Markets Authority (ESMA) or the European Commission's Directorate General for Competition (DG COMP) in the administrative procedure code. In line with the general rules the law allows for the use of evidence lawfully collected by any administrative authorities, including said EU agencies. The reports of these agencies typically qualify as documentary evidence. Thus, ECB, ESMA, DG COMP-collected information might be admissible as evidence, even in the

[29] Curia decision Kfv.IV.35.698/2016/11 [41].
[30] Case T-309/03 *Camós Grau v Commission*, EU:T:2006:110, para 50.
[31] Curia decision Kfv.IV.35.698/2016/11 [40].

face of higher national standards. The only strict restriction is, as provided in all the above-mentioned special laws, if the evidence has been obtained illegally (see above section 1.4.2). In addition, Article 80/C of the Act on the prohibition of unfair market conduct and restriction of competition explicitly mentions that the national competition council 'shall substantiate in its reasoning to the resolution the admissibility of [evidence originating from DG COMP or a national competition authority of another Member State], by demonstrating that the conditions set out in Council Regulation (EC) No 1/2003 have been met'.

Notably, while assessing evidence in national administrative proceedings, the authorities are only bound by decisions and facts established in national criminal proceedings. Thus, administrative authorities are not bound by decisions made or facts established in other administrative proceedings, including ECB, ESMA and DG COMP investigations and final reports. Finally, it is possible both ex officio and on motion to challenge the admissibility of evidence that was obtained in breach of EU law. No specific provisions apply for the EU agencies in this regard, only the general rules described in section 1.4.

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

With regard to the admissibility of evidence collected by administrative authorities in criminal proceedings, the following basic rules apply. First, any information collected lawfully by national administrative authorities prior to or during the criminal proceedings may be admissible as evidence in criminal proceedings (Article 167(2) CCP). Second, all information collected in administrative proceedings is considered to have weaker evidential value in criminal proceedings. According to experts, this is due to the fact that the information was gained during administrative proceedings or, more precisely, not gained during criminal proceedings. Third, according to the law, as to whether the defendant has committed a criminal offence, the courts, the prosecution and the investigating authorities are not bound by decisions made or by facts established in administrative proceedings (Article 7(5) CCP). This covers both national and EU administrative proceedings, including those of OLAF. Fourth, in line with the free system of proof, any information gathered lawfully might be admissible as evidence in criminal proceedings.

Thus, information gathered according to lower procedural safeguards, comprising OLAF final reports, might still be admissible and used as evidence in criminal proceedings. These reports constitute documentary evidence and have 'weaker' probative value than evidence collected in accordance with the Code of Criminal Procedure. According to the law documentary evidence proves a fact, the accuracy of data and the accuracy of an event or declaration (Article 204(3) CCP). This also applies to OLAF final reports, which are admissible as documentary evidence. Documentary evidence, including OLAF final reports, may take on a stronger form, such as testimony, if it is taken up again by the prosecution service in accordance with the CCP, for instance by hearing the witness.

The interviews pointed out that in practice evidence collected by administrative authorities, and thus by OLAF, are in general repeated, supported by an investigative measure under the CCP. This repetition serves as a verification measure, but may also increase the probative value of the evidence in criminal proceedings.

The interviewees also stated that while affirming the probative value of administrative findings for the purposes of criminal proceedings, for instance by means of witness testimony, is possible, it is also rather difficult. During a subsequent hearing by the prosecution service the perception of the witness could be considered already 'influenced' by the previous OLAF hearing for the purposes of criminal proceedings.

The law allows the prosecutor and the investigating authority to call in an 'adviser' if special expertise is required to find, obtain, collect or record evidence or to clarify a technical issue (Article 270 CCP). Different to experts, advisers only give advices but do not provide for analysis (Chapter XXXI CCP). The interviews stressed that OLAF officials could best contribute to the cases as advisers. In practice, it would mean that OLAF would be informed of an investigation and the authorities could request OLAF to help by providing knowhow on what evidence needs to be collected and how.

According to the interviewees, OLAF was informed that its officials might participate best as advisers in national criminal proceedings, but the Office has not yet made use of this possibility. The reason for this could be that adviser opinions do not constitute evidence as such but only special knowledge to assist the case. To convert it into evidence, future OLAF advisers should be heard as witnesses. Thus, advisers have a weaker legal position than experts in criminal proceedings.

According to the interviews, even if OLAF gathered information in violation of its own rules of procedure, the information might still be admissible in evidence if it was not gathered in violation of the CCP. That said, it is possible both ex officio and on motion to challenge the admissibility of evidence on the ground that it was obtained in breach of EU law. There are no specific provisions in the law but the general rules apply (see section 1.3).

All of the above also applies to the admissibility of information provided by ECB, ESMA and DG COMP as evidence in criminal proceedings.

5. PROBLEMS AND PRACTICES IN DEALING WITH ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL CRIMINAL PROCEEDINGS

Various interviewees participated in OLAF meetings, which take place three to four times a year at the Office of the Prosecutor General of Hungary. These meetings serve to discuss both general as well as case-related issues. According to the interviewees, Hungarian authorities repeatedly communicated some of the above-mentioned essential requirements at these meetings. Most important, as OLAF carries out its investigation according to lower procedural standards and powers than do the national authorities in criminal proceedings, interviewees support having the national authorities carry out all investigative measures, not just coercive ones. Thus, they would prefer that, once OLAF informs them, the national authorities take over the investigation (or at least carry out the

investigative measures). In their view this would raise the probative value of the collected evidence and would avoid duplication of activities.

In this regard the interviewees stressed that in practice investigative activities of both OLAF and national authorities are repeated in accordance with the CCP – on the one hand to raise the probative value of the evidence, on the other hand because OLAF final reports often proved to contain mistakes or 'facts' based on rumours. As an example, the interviewees referred to the final report on the Budapest M4 Metro line case, an OLAF investigation lasting more than five years, where according to the interviewees most of the report proved to be erroneous.

Thus, OLAF final reports, in the form in which they are submitted, just like the reports of Hungarian administrative authorities, might be used only as documentary evidence. By taking up this evidence again in accordance with the rules of the CCP, for instance by hearing the witness, the content can be verified and the evidence can take on a stronger form (such as testimony instead of documentary evidence).

As another example, the interviewees noted that OLAF usually provides copies of documents. In line with Hungarian law, handwriting experts, however, can work only with original documents. Therefore, if the prosecution service receives copies, it either cannot commission such expertise or needs to repeat the measure.

In principle, the prosecution service tends to verify the content of OLAF final reports in the same way as it controls the content of reports of national administrative authorities.

7. Italy

M. Caianiello and G. Lasagni

1. GENERAL FRAMEWORK

In the Italian legal system, there is not an autonomous definition of 'administrative punitive proceedings', nor a single code or regulation establishing common procedures for 'administrative punitive proceedings'.

On the contrary, the attribution of a substantially criminal nature generally occurs at the national level through an ex post, case-by-case assessment of the competent judicial authorities, in application of the *Engel* case-law of the European Court of Human Rights (ECtHR),[1] also as applied by the Court of Justice (CJEU).[2]

For the purpose of this study, there are three main fields of law where a punitive nature has been attributed to (certain) national administrative sanctions: Tax law (under various provisions of Legislative Decree No 74 of 10 March 2000, hereinafter 'tax administrative punitive proceedings'),[3] financial market supervision (under various provisions of Legislative Decree No 58 of 24 February 1998 – *Testo unico delle disposizioni in materia di intermediazione finanziaria* or 'TUF', hereinafter 'financial administrative punitive proceedings'),[4] and competition law (according to Law no 287 of 10 October 1990).[5]

In this report, therefore, the term 'administrative punitive proceedings' will refer to these three kinds of proceedings, although OLAF-collected evidence is mainly relevant to administrative tax proceedings.

This does not mean that in Italy there are no other types of sectoral administrative proceedings which may fall under the definition of 'administrative punitive proceedings' (for instance, in banking supervision), but given the lack of case-law on the matter, and the sectoral fragmentation of the Italian legal framework on administrative sanctions, the present report will focus only on the three aforementioned fields of law.

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[1] *Engel and Others v the Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).

[2] Starting from the Case C-489/10 *Criminal proceedings against Łukasz Marcin Bonda*, EU:C:2012:319, paras 36–46.

[3] cf, eg, Case C-524/15 *Criminal proceedings against Luca Menci*, EU:C:2018:197.

[4] cf, eg, *Grande Stevens and Others v Italy* App no 18640/10 (ECtHR, 4 March 2014), and, for the CJEU, Case C-537/16 *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*, EU:C:2018:193; Joined Cases C-596/16 and C-597/16, *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa (Consob)* and *Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca*, EU:C:2018:192.

[5] cf *A Menarini Diagnostics S.r.l. v Italy* App no 43509/08 (ECtHR, 27 September 2011).

1.1 Function of admissibility rules in national criminal law

According to Article 190 of the Italian criminal procedure code (hereinafter CPP), courts shall admit all evidence requested by the parties of the proceedings, as long as it has neither been obtained in violation of the law, nor is manifestly superfluous or irrelevant to the *thema probandum* (as defined by Article 187 CPP). Evidence may be admitted ex officio by the court only as a residual option, and only where the law authorizes it (in particular, in the cases of Articles 70, 195, 224, 237, 422, 507, 511, and 603 CPP).

According to Article 188 CPP, moreover, techniques which may interfere with the self-determination of a person or alter his or her memory (such as lie detectors) shall not be used to collect evidence, even if such person grants his or her consent.

Lastly, Article 191 CPP states that information obtained in violation of a prohibition established by the law cannot be used as evidence at all. A party may seek to exclude any evidence obtained by illegal methods at any stage of the criminal proceedings.

The interpretation of this specific provision has given rise to different legal solutions.

For instance, it is highly debated whether 'implicit prohibitions' (whose recurrence could be deduced from an affirmative proposition, for instance if the law provides that a certain operation is admissible only respecting a specific formality) should be included in the notion of 'prohibition'.

Moreover, the meaning of the wording 'established by the law' is not very clear, as 'law' had been both narrowly interpreted with an exclusive reference to procedural law, and, more broadly, as also including substantive criminal law (although in many cases there is little doubt regarding the application of the rule: for example, when an interception of communication has been issued despite the lack of the lawful conditions).

Finally, there are some uncertainties regarding the admissibility of evidence obtained through an illegal search. The solution given by the Italian Supreme Court (*Corte di cassazione*) is to allow the use of such evidence when it constitutes the *corpus delicti* (rejecting the fruit of the poisonous tree doctrine) and to forbid the admission of any other element gathered by an illegal search.[6] This solution permits the courts to use the most relevant pieces of evidence that police or prosecutors might find as a consequence of a search – even if illegal; at the same time, it is possible to say that in some way the principle of fairness in the conduct of the investigation is preserved.

Against this background, admissibility rules in criminal proceedings have been established to highlight the adoption of an accusatorial structure in the current criminal procedure code. They are an expression of the accusatorial principle also in the matter of evidence admissibility (*principio dispositivo*), which aims at guaranteeing the equality of arms among parties of the proceedings. At the same time, the prohibition to admit evidence acquired in violation of the law aims at protecting both the dignity of all subjects potentially involved in criminal proceedings (see, in this sense, the aforementioned

[6] cf, eg, Court of Cassation, United Chambers, 27 March 1996, no 5021, Defendant: Sala.

Articles 191 and 188 CPP), and ensuring a minimum level of fairness, and thus of reliability, to the information that could potentially be put at the basis of the court's decision.

1.2 Function of admissibility rules in national punitive administrative law

In Italy the specific regulation of administrative (punitive and non-punitive) proceedings results from the combination of a general legal framework (composed essentially by Law No 241 of 18 August 1990 and by the 'code of administrative proceedings', Law Decree No 104 of 2 July 2010) with sectoral regulation which differs from public administration to public administration (and sometimes also within the same public administration, depending on the purpose of the proceedings).

The general law on administrative proceedings (Law No 241 of 18 August 1990) contains only very general minimum rules, upon which every public administration shall build its own regulation.

Concerning evidence, it establishes that the administration responsible for the proceedings shall evaluate the admissibility of information used to issue a decision and may adopt all necessary acts and apply all necessary measures to adequately perform its evaluations, including asking for oral statements, issuing production orders, and performing inspections and other technical assessments (Article 6(1), lit a and b).

Subjects which may be addressed by the administrative decision (according to Article 7) have the right to deposit written statements and documents which the administration is under the obligation to consider, as long as they are relevant to the proceedings (Article 10(1), lit b).

Very few relevant rules may be found in the code of administrative proceedings (Law Decree No 104 of 2 July 2010). In particular, according to Article 63 of this code, administrative courts may use production orders, written testimony and technical expert witnesses, require inspections, and all others means of proof established by the Civil Procedure Code, except for the oath and a specific form of interview (*interrogatorio formale*).

When it comes to the 'administrative punitive proceedings' (in the sense referred to in section 1) relevant for this study, further sectoral legal provisions apply, which differ from each other.

In addition to the general legal framework just described, tax administrative proceedings are also regulated by Legislative Decree No 546 of 31 December 1992, which at Article 7 allows competent authorities to adopt production orders, carry out technical assessments, and grants powers of access. Oath and testimony, on the contrary, are not allowed.

According to Article 75 of Presidential Decree No 633 of 26 October 1972, moreover, for what not specifically provided for in the sectoral regulation, the Italian criminal procedure code shall apply – and in particular, for the purpose of this report,

Article 191 CPP (see above section 1.1).[7] Nonetheless, in practice, such criminal code provision is rarely applied, as traditionally all evidentiary material that may be relevant for the purposes of tax proceedings is considered admissible.[8]

Financial administrative and administrative punitive proceedings are regulated, besides for the aforementioned general legal framework, also by Article 24(1) of Law No 262 of 28 December 2005, and by Law No 681 of 24 November 1981. None of these regulations, however, provides for specific rules concerning admissibility. Article 13 of Law 681/1981, in particular, only establishes that when a competent authority is investigating in proceedings which may end with the imposition of a sanction, it may acquire information and perform inspections, confiscations and all other necessary technical operations.

Lastly, again in addition to the general legal framework, according to Articles 12 and 14 of Law No 287 of 10 October 1990, in exercising its decision-making power, the Italian Antitrust authority shall take into account all elements which it may already possess, or which are communicated to it by other public administrations or by everyone who might have an interest in the cause. This authority may also perform inspections, interviews, and carry out other technical forms of assessment. Subjects that may be addressed by the Authority's decision have the right to be heard and may provide statement and documents.

Regardless of this fragmented legal framework, the control of admissibility in administrative proceedings in Italy appears therefore rather limited, due both to the applicable regulation[9] and to the case-law interpreting the latter. Indeed, in general terms, as long as the applied means of proof are provided for by the law, the information so gathered may be used as evidence at trial (critical issues may therefore arise concerning the use of evidence, but not its admissibility).

This model seems to mainly serve the need to focus the attention of the administration on relevant material; the goal of fair proceedings is then pursued, in this phase of the proceedings, through the administrative authority's obligation to consider also the elements furnished by the subjects under investigation rather than by specific admissibility rules.

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[7] On the potential applicability of Art 191 CPP to tax punitive proceedings, see, eg, Court of Cassation, Tax Chamber, 24 September 2007, no 24533; Third Criminal Law Chamber, 7 February 2007, no 403/12017; Tax Chamber, 10 June 2004, no 19689; Tax Chamber, 5 March 2007, no 9568; Tax Chamber, 20 February 2007, no 8181; Tax Chamber, 24 February 2006, no 7314; United Chambers (Civil Law), 17 October 2002, no 16424. See also District Tax Commission, Treviso (Commissione tributaria provinciale di Treviso), Sixth Chamber, 5 June 2007, no 67; Regional Tax Commission, Rome (Commissione tributaria regionale di Roma), Twenty-seventh Chamber, 12 April 2007, no 72.

[8] On this *favor fisci*, see, eg, Court of Cassation, Fifth Chamber, 16 June 2006, no 14058; Fifth Chamber, 13 October 2006, no 22035; Fifth Chamber, 5 February 2007, no 2450; Fifth Chamber, 16 April 2007, no 8990.

[9] This consideration is not substantially challenged even if considered applicable to the administrative proceedings Art 245 of the Italian civil procedure code, according to which the admissibility of witness testimony shall be evaluated according to relevance and pertinence criteria, in addition to the respect of the rule of law. Indeed, in administrative proceedings testimony may only be given in written form, and, in any case, is not allowed in tax administrative proceedings, i.e. the administrative punitive proceedings OLAF-collected evidence is most relevant to.

1.3 System of proof: Free or controlled?

1.3.1 Criminal law

In Italy, the system of proof in criminal proceedings is controlled, but with a (rather broad) opening clause.

Indeed, the Italian criminal procedure code provides for a list of means of proof, whose admissibility requirements are established by law.

However, according to Article 189 CPP, 'atypical' evidence (i.e. evidence whose mechanism of gathering is not regulated by law) can also be admitted at trial, as long as it is capable of contributing to proving the *thema probandum* and does not violate the moral liberty of subjects potentially involved in the investigations (this provision is used, for instance, in case of online searches, which are not explicitly regulated by the Italian criminal procedure code).

1.3.2 Punitive administrative law

The system of proof does not vary in the Italian legal framework for administrative punitive and non-punitive proceedings.

In general terms (as much as it is possible to generalise, against the fragmented background illustrated under section 1), systems in this field are *de facto* of free proof, although in some kinds of administrative proceedings, certain means of proof may be barred (for instance, in tax administrative proceedings, testimony and oath are not admitted, in accordance with Article 7(4) Legislative Decree No 546/1992, see above, section 1.2).

1.4 Review of the decision on admissibility

1.4.1 Criminal law

In criminal proceedings, the decision of the court on admissibility of evidence cannot be directly subject to review.

However, if a party challenges the decision of the court on culpability, he or she can complain about the non-admission of evidence he or she had previously requested be admitted.

Different conditions apply depending on which type of appeal the party decides to exercise.

No limits to this possibility have been established before Court of Appeals, as the scope of review of these Courts covers both merit and legitimacy issues.

On the other side, when appealing before the Supreme Court (*Corte di cassazione*), only the non-admission (albeit requested by the party) of a decisive counterevidence can represent a ground for appeal (cf Article 606(1), lit d CPP).

1.4.2 Punitive administrative law

In administrative (also punitive) proceedings, the possibility to review the decision on admissibility is relatively limited, due to the very broad margin of discretion granted to administrative authorities in using for their decision all means of proof provided for by the law (see above, section 1.2): The party may therefore only challenge the final decision according to the ordinary means of appeal established by Law Decree no 104/2010.

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

As the requirements to admit evidence are different and, in any case, autonomous, in criminal and administrative (also punitive) law, whether or not a piece of evidence has been admitted in other proceedings is not relevant for its admission in criminal proceedings. Also in this case, therefore, evidence may be admitted in criminal proceedings, as long as it complies with the general requirements established by the criminal procedure code (see section 1.1).

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

Similarly, as the requirements to admit evidence are different and, in any case, autonomous for criminal and administrative (also punitive) proceedings, whether or not a piece of evidence has previously been considered admissible or inadmissible in criminal proceedings is not relevant for its admission in administrative proceedings.

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

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

As noted in section 1, in Italy there is no general regulation covering administrative punitive proceedings, nor a general and ex ante classification of which administrative proceedings are substantially punitive. Therefore, there is no general distinction between admissibility rules applicable in administrative proceedings and those applicable in administrative punitive proceedings.

In some cases, such as in financial market regulation, rules may differ for proceedings which may end up imposing a sanction (regardless of it being considered substantially criminal in light of the *Engel* criteria or not). However, as noted above (see section 1.2), also in this area, there are no specific rules concerning admissibility.

In any case, so far, no specific provisions have been established with regard to OLAF-collected evidence.

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

In general terms, jurisprudence concerning OLAF-collected evidence cannot be found at the national level with regard to the field of financial market protection or competition law.

On the other hand, relevant case-law may be found concerning proceedings in tax matters. According to a settled jurisprudence, in line with the content of Article 11 OLAF Regulation, no further investigation is generally required by national authorities following the transmission of OLAF final reports of the assessment contained in such reports. The latter are indeed recognised as having the same evidentiary value as reports issued by national administrative authorities.

This jurisprudence has been confirmed both by lower jurisdictions,[10] as well as by the Italian Supreme Court,[11] according to which any information transmitted by OLAF (documents, information, and even reports of particular actions undertaken by the Antifraud Office) may be used as sources of evidence at trial.[12]

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

In Italian administrative proceedings, the admissibility of OLAF-collected evidence does not appear to be impaired by national standards on procedural safeguards.

This could derive from the fact that safeguards provided for by OLAF Regulation 883/2013 are generally higher than the guarantees established in national administrative proceedings, and more similar to the safeguards required under criminal procedural law (especially with regard to the right to remain silent).

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[10] See, eg, District Tax Commission, Milan (Commissione tributaria provinciale di Milano), Section XXXI, no 86 of 19.11.2004, in *Mass Comm. Trib. Lombardia*, 2005, 105: '*In presenza di una comunicazione dell'Ufficio europeo della lotta antifrode (Decisione 1999/352/CE, CECA EURATOM della Commissione), nessun altro obbligo di accertamento incombe sulle autorità doganali dello Stato membro, essendo compito di questo Ufficio, appunto svolgere le indagini amministrative oltre a lottare contro la frode, la corruzione ed ogni altra attività illecita lesiva degli interessi finanziari della Comunità europea. Le relazioni dell'Ufficio costituiscono elementi di prova nei procedimenti amministrativi o giudiziari dello Stato membro nel quale risulti necessario avvalersene, al medesimo titolo ed alle medesime condizioni delle relazioni amministrative redatte da ispettori amministrativi nazionali (art. 9, Reg. CE n. 1073/1999)*' ('In the presence of a communication from the European Anti-Fraud Office (Commission Decision 1999/352/EC, ECSC, EURATOM), no further obligation to conduct inspections is incumbent on the customs authorities of the Member State, since it is for this Office to carry out administrative investigations as well as to fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community. The Office's reports constitute evidence in the administrative or judicial proceedings of the Member State in which it is necessary to make use of them, in the same way and under the same conditions as the administrative reports drawn up by national administrative inspectors (Article 9, EC Reg. No. 1073 / 1999)', authors' translation).

[11] cf Court of Cassation, Fifth Chamber, 21 April 2017, no 10118; Fifth Chamber, 8 March 2013, no 5892; Fifth Chamber, 3 August 2012, no 14036; Fifth Chamber, 27 July 2012, no 13496; Fifth Chamber, order of 2 March 2009, no 4997; Fifth Chamber, 24 September 2008, no 23985.

[12] Fifth Chamber, 8 March 2013, no 5892.

This conclusion is confirmed by the aforementioned case-law on tax matters (section 2.2), according to which OLAF reports may be directly used as evidence in national proceedings (see also section 5).

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

In the absence of any specific rule, the same rules on admissibility (and the same right to challenge the admissibility of evidence) provided for other information collected in administrative proceedings shall apply also to OLAF-collected information in the context of administrative punitive proceedings (see above, section 1.4.2).

Powers concerning evidence to be used at trial may be exercised also ex officio by administrative courts, in accordance with Article 64 of Law Decree No 104/2010.

3. Admissibility of evidence collected by ECB, ESMA and DG COMP in national punitive administrative proceedings

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

As noted in section 1, in Italy there is no general regulation covering administrative punitive proceedings, nor a general classification of which proceedings are substantially punitive; therefore, no general distinction between admissibility rules applicable in administrative proceedings and those applicable in administrative punitive proceedings may be found in the Italian legal system.

As with OLAF-collected evidence, no specific provisions concerning the admissibility of information collected by the ECB and transmitted to national authorities according to Article 136 SSM Framework Regulation (FR), or regarding its use in administrative punitive proceedings relevant for this study may be observed.

In addition, in the specific case of ECB-collected information, the referral mechanism (from ECB to national competent authorities-NCAs) of Article 136 SSM FR concerns 'criminal offence[s]'. The admissibility and use of such information, therefore, is not for the administrative authorities to check, but rather for the judicial authorities.

In this sense, however, at the national level no critical issues have been reported so far specifically concerning the admissibility of ECB-collected evidence in criminal proceedings (on the contrary, for critical considerations arising from the use in criminal proceedings of evidence collected in administrative proceedings, see section 4.1).

Lastly, it is relevant to point out that Article 136 SSM FR does not impose an obligation for NCAs to refer such information to judicial authorities but leaves the matter to national legislation.

In Italy, such a regulation may be found in Article 331 of the criminal procedure code, and in Article 7 of the Italian Consolidated Law on Banking (Legislative Decree no 385 of 1 September 1993 – *Testo Unico Bancario*, hereinafter 'TUB'), which establishes the powers and obligations of the *Banca d'Italia*, the Italian NCA.

According to Article 331 CPP, public officials and persons in charge of public services have a duty to report, without delay, any suspicions of crime which arise in the course of carrying out, or because, of their functions or their service.

According to Article 7(2) TUB, employees of *Banca d'Italia* in the exercise of their supervisory functions are to be considered public officials. Moreover, the professional secrecy generally applicable to such *Banca d'Italia* personnel cannot be opposed to judicial authorities when the information requested is necessary for the investigation or prosecution of criminal offences.[13]

However, the same provision also establishes that all irregularities detected, even when they might involve criminal offences, shall be reported by employees exclusively to the collegial managing body of *Banca d'Italia* (*Direttorio*).

This reporting duty refers to the information itself, as well as, in the most significant cases, where accuracy in the referral and effective cooperation between *Banca d'Italia* and judicial authority are all the more necessary, to potential insights into the case, aimed at corroborating at technical and legal level the relevance of the suspicions of a crime.

From the wording of Article 7(2) TUB, however, it is not clear whether such a provision represents an exception to the general reporting duty established by Article 331 CPP. In particular, it is not clear whether the obligation to refer the *notitia criminis* to judicial authorities, which is exceptionally, not directly, applicable to public officials working for *Banca d'Italia*, exists for the *Direttorio* of *Banca d'Italia*.

Although it would be appropriate to amend Article 7 TUB in order to make such an obligation explicit, legal scholars (and, to a certain extent, also *Banca d'Italia* itself)[14] generally believe that the *Direttorio* remains indeed bound by duty to refer suspicions of crime to judicial authorities. The procedure of Article 7(2) TUB, therefore, shall be interpreted not as a real derogation to Article 331 CPP, but only as a precautionary reporting mechanism to prevent or reduce an unregulated dissemination of potential *notitiae criminis* having detrimental effects on the stability of the financial markets.[15]

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

As noted in section 1, in Italy there is no general regulation covering administrative punitive proceedings, nor a general classification of which proceedings are substantially punitive; therefore, no general distinction between admissibility rules applicable in

[13] cf Art 7(1) TUB.

[14] Luigi Federico Signorini, 'Attività di Vigilanza e Giurisdizione Penale' (Associazione Italiana dei Professori di Diritto Penale. II Convegno Nazionale – 'Economia e diritto penale nel tempo della crisi', Palermo 15 November 2013) 11 <www.bancaditalia.it/pubblicazioni/interventi-direttorio/int-dir-2013/Signorini-151113.pdf> accessed 19 April 2019. The author was, at the time, Vice-President of *Banca d'Italia*.

[15] Antonella Antonucci, 'Articolo 7' in Concetto Costa (ed), *Commento al Testo Unico delle Leggi in Materia Bancaria e Creditizia*, vol 1 (Giappichelli 2013) 58–59.

administrative proceedings and those applicable in administrative punitive proceedings may be found in the Italian legal system.

As with OLAF or ECB-collected evidence, no specific provisions concerning the admissibility of information collected by ESMA and transmitted to national authorities according to Article 64(8) EMIR, or regarding its use in administrative punitive proceedings relevant for this study may be observed.

Article 64(8) EMIR, moreover, explicitly considers the case in which ESMA 'shall refer matters for criminal prosecution to the relevant national authorities'. In such cases, therefore, the admissibility of information referred by ESMA shall be addressed by judicial, rather than by administrative authorities.

In this sense, however, no critical issues have been reported so far which specifically concern the admissibility of ESMA-collected evidence in criminal proceedings (on the contrary, for critical considerations arising from the use in criminal proceedings of evidence collected in administrative proceedings, see section 4.1).

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

As noted in section 1, in Italy there is no general regulation covering administrative punitive proceedings, nor a general classification of which proceedings are substantially punitive; therefore, no general distinction between admissibility rules applicable in administrative proceedings and those applicable in administrative punitive proceedings may be found in the Italian legal system.

As with OLAF, ECB or ESMA-collected evidence, no specific provisions concerning the admissibility of information collected by DG COMP and transmitted to national authorities according to Article 12 of Regulation 1/2003, or regarding its use in administrative punitive proceedings relevant for this study may be observed.

In this sense, no critical issues have been reported so far in the case-law specifically concerning the admissibility of DG COMP-collected evidence.

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

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

The Italian criminal procedure code allows for the admissibility of information gathered by national administrative authorities as evidence in criminal proceedings.

Generally, information gathered by national administrative authorities taking the form of a report or document can be admitted as documentary evidence in criminal proceedings, according to Articles 234 (documents) and 234-*bis* (electronic documents) CPP.

According to Article 234 CPP, written and other types of documentary evidence (such as pictures, video, or audio) concerning facts, persons or things may be admitted as evidence at trial, in accordance with the general requirements established for the admission of evidence (see section 1.1). However, according to Article 234(3) CPP, documents containing anonymous information or which concern the morality of the parties of the proceedings cannot be used as evidence. In case of electronic documents (Article 234-*bis* CPP), the possibility to use documents at trial extends also to data stored abroad, as long as the subject who retains the ownership gives his or her consent.

In all these cases, the admission of documentary evidence is therefore quite straightforward (as is in the case of OLAF reports).[16]

However, the situation in which it is not clear whether the report produced by the administrative authority has really only a documentary nature, or whether it also contains evaluations made by the administrative authority could be problematic.

Information gathered by a national administrative authority may also be introduced at trial through the testimony of the administrative officials that carried out the investigative act, following the regulation applicable to the testimony of law enforcement (which provides for some limitations in case of hearsay testimony ex Article 195(4) CPP).

In any case, a general limit to the admissibility of information collected by administrative authorities is provided for by Article 220 of the rules implementing the CPP. According to this, if during inspections or supervisory tasks performed by administrative authorities, suspicions of a crime emerge, then all the subsequent investigative acts shall be carried out in accordance with the rules of the criminal procedure code (and not the rules, usually less safeguarding, established for the administrative proceedings at stake).

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

No specific rules are laid down in the Italian legal framework concerning the admissibility in criminal proceedings of information collected by OLAF, ECB, ESMA or DG COMP. The general rules illustrated under section 4.1 apply also in these contexts.

This consideration holds true also with regard to the rights of the concerned person to challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards.

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[16] cf Tribunal of Marsala, Mixed Chamber (Sezione promiscua), 17 December 1998, according to which: '*Gli atti di accertamento si qualificano come atti promananti da un organo pubblico di controllo e come tali posseggono tutti i requisiti prescritti dall'art. 234 c.p.p. per l'inserimento nel fascicolo del dibattimento*' ('Such reports qualify as acts originating from a public investigating authority body and as such posses all the requisites prescribed by Article 234 CPP for their inclusion in the trial file', authors' translation). See Ernesto Lupo, 'La Protezione dei Diritti Fondamentali nella Giurisprudenza Italiana' in Valentina Bazzocchi (ed), *La Protezione dei Diritti Fondamentali e Procedurali. Dalle Esperienze Investigative dell'Olaf all'Istituzione del Procuratore Europeo* (Fondazione Lelio e Lesli Basso 2013) 71 <www.europeanrights.eu/public/eventi/eppo_ita.pdf> accessed 19 April 2019.

In the absence of any specific rule related to information collected in OLAF/ECB/ESMA/DG COMP proceedings at the national level, the same rules on admissibility (and rights to challenge the admissibility of evidence) provided for information collected in national administrative proceedings shall apply.

According to the latter, parties may discuss admissibility of evidence through an adversarial procedure before the judge(s) of the trial (Articles 189ff CPP). Judges may exercise ex officio powers in this regard, where so allowed by the law – i.e. at least theoretically, in residual cases.

Where the admissibility of an exculpatory piece of evidence had been .requested by a party, in order to challenge the evidence presented by the counterparty, but such a request had not been admitted by the judge, the party is entitled to challenge the final decision (in which the exculpatory evidence was not taken into account) before the Supreme Court, in accordance with Article 606(1), lit d) CPP.

With regard to OLAF-collected evidence, in particular, no specific critical issue on admissibility arising from different procedural safeguards in OLAF and in criminal law proceedings has been reported in the Italian case-law, when the evidence is merely documentary (but see above, section 4.1 about Article 220 of the rules implementing the CPP).

Where, on the other hand, a different kind of evidence is at stake, lower standards of safeguards could in principle impair the admissibility of such evidence at criminal trial.

As highlighted below in section 5, however, the problem has scarcely emerged in the Italian case-law with regard to OLAF investigations, possibly due to the relatively high procedural standards contained in Regulation 883/2013 with regard to the privilege against self-incrimination (under Article 9(2)) and to the reported practice of OLAF investigators performing activities in Italy of taking into account in advance the procedural safeguards established in the Italian criminal procedure code, precisely to avoid creating admissibility issues.

5. PROBLEMS AND PRACTICES IN DEALING WITH ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL CRIMINAL PROCEEDINGS[17]

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

No consistent practice of previous discussions between OLAF and national authorities concerning the prospective admissibility of the OLAF report in criminal proceedings has been reported in the Italian legal system. That is due to several reasons.

First of all, usually discussion about the legal requirements to be fulfilled under national law in order to make a piece of evidence admissible at the national level are not carried out between OLAF and national authorities, but rather inside OLAF itself (thanks to the Judicial and Legal Advice Unit, operational until 2012, and also thanks to Eurojust

[17] All the answers under this section follow interviews with national practitioners (judges).

or to Italian national members – judges, law enforcement – that are part of OLAF personnel).

In this way, in most cases, the team that has to perform the investigative act is reportedly made aware in advance of the conditions they have to fulfil and will follow such recommendations while performing the act (although no structural mechanism is put into place to ensure that such an exchange of views occurs in each and every investigation).

Secondly, again in most cases, OLAF does not reportedly proceed to on-the-spot checks or inspections together with national authorities, but it rather carries out its investigations independently and only at the end transmits the report to national authorities.

National authorities, acting only in their administrative capacity, may assist OLAF during on-site inspections or on the spot checks, in case OLAF requires such an assistance (for instance, to force access to a location), but in this case they do not act on their own initiative to seek evidence. Therefore, in such situations, no practice of previous discussion has been reported.

Being public authorities, members of national authorities assisting OLAF (eg *Guardia di Finanza*) shall draft a report illustrating their activity even in these circumstances. Such report, however, does not contain evidence, as reportedly the latter is collected only by the authority who promotes the investigative act (i.e. OLAF). After the conclusion of the investigative act, a national authority may ask that OLAF be sent relevant gathered information, but the evidence is then collected only by OLAF, and not by national authorities.

Moreover, in application of the aforementioned Article 220 of the rules implementing the CPP, law enforcement cannot assist OLAF in its administrative function if suspicions of a crime have already emerged. In such cases, national judicial authorities shall directly act in application of the rules and safeguards provided for by the criminal procedure code.

There are (reportedly residual) cases where a criminal investigation is ongoing in parallel to an OLAF investigation. If OLAF is aware of this circumstance, its notification of the intention to perform an inspection/on-the-spot check to the national contact authority (which, however, is usually different from the proceeding judicial authority involved in criminal investigation) could in principle come to the attention of the proceeding judicial authority, in time for this latter to be able to join OLAF during the operations: This option, however, is limited to cases where the investigative act to be carried out takes place in Italy (and not abroad, as often is the case, considering that OLAF investigations have a broad scope). Moreover, also in this case, no exchange of information between OLAF and national authorities is reportedly carried out during the execution of the investigative act: Clearly both authorities assist in the act, but again, also in this case the information is collected by OLAF, and not jointly by OLAF and national judicial authorities.

Reported cases in which the investigative act is carried out following the initiative of national judicial authorities (eg a search), and it is OLAF that joins the operation are different. In such situations, the applicable rules are those of the Italian criminal procedure, so no specific issue arises as to the admissibility of the collected evidence.

5.2 Duplication of OLAF activities

No national provision requires a repetition of the investigative acts performed by OLAF in order for their results to be used in national proceedings.

In this sense, in the Italian legal system an indictment (*rinvio a giudizio*) may be based solely or decisively on the OLAF final report, and the same goes for the subsequent criminal trial.

Nonetheless, in some cases, investigative acts performed by OLAF are reportedly repeated due to practical, rather than normative reasons. There appear to be two main reasons for this.

Firstly, this may occur due to a reported unawareness of some part of the prosecution and judicial service of the exact value of OLAF final reports (Article 11 of Regulation 883/2013), which suggests the need for more training of national authorities on the matter (and in general, on the interactions with European authorities when it comes to evidence circulation).

Secondly, the different aims of OLAF investigations and criminal proceedings shall also be taken into account. Indeed, especially in case of interviews, the need to repeat an investigative act to collect a piece of evidence may depend on which questions had been asked in the specific circumstances at stake – as it often happens that the prosecutor is interested in different or additional information to that asked for by OLAF.

Therefore, if the person interviewed by OLAF is also the defendant in the criminal proceedings, the interview is generally repeated; with witnesses, on the other hand, there is a case-by-case assessment depending on the specific information needs of the prosecutor.

Lastly, in case of other kind of evidence collected by OLAF (due to the aforementioned preclusion of Article 195(4) CPP), also contained in the final report, it is quite common to examine the OLAF investigator who drafted the final report as a witness at trial.

8. LUXEMBOURG

K. Ligeti and F. Giuffrida[1]

1. GENERAL FRAMEWORK

Before discussing the Luxembourgish rules on admissibility of evidence, it is worth noting that only a few OLAF cases have concerned Luxembourg so far.

In the area of EU Traditional Own Resources, Luxembourg is the only EU country where, between 2013 and 2017, there were *no* OLAF investigations closed with recommendations and *no* fraudulent and non-fraudulent irregularities were detected.[2] Likewise, in the area of the European Structural and Investment Funds and Agriculture, between 2013 and 2017 there were no OLAF investigations closed with recommendations in Luxembourg and only two cases of irregularities were detected.[3] In addition, Luxembourgish judicial authorities took action following OLAF's recommendations issued between 2010 and 2017 in five cases.[4]

The most relevant Luxembourgish criminal procedure rules are to be found in the *Code de procédure pénale* (CPP), which was adopted in December 1808 and has been amended several times over the years.

As for Luxembourgish administrative law, proceedings before administrative courts (*Tribunal administratif* and *Cour administrative*) are regulated by the Law of 7 November 1996 on the organisation of administrative jurisdictions (*Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administrative*) and the Law of 21 June 1999 (*Loi portant règlement de procédure devant les juridictions administratives*; hereinafter: '1999 Law on proceedings before administrative courts').

Administrative proceedings that do not take place before courts are instead regulated by a plethora of sectoral pieces of legislation, although the Law of 1 December 1978 (*Loi réglant la procédure administrative non contentieuse 1/12/1978*) and the Regulation of 8 June 1979 (*Réglement grand-ducal relatif à la procedure à suivre par les*

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[2] OLAF, 'OLAF Report 2017' (2018) 40.

[3] ibid 41.

[4] ibid 43.

administrations relevant de l'État et des communes) lay down some common rules. For the purpose of this report, 'administrative proceedings' are those that do not take place before administrative courts, unless otherwise specified.

Among the sectoral regulations, the Law of 23 October 2011 (*Loi du 23 octobre 2011 relative à la concurrence*) ought to be mentioned. It bestows upon the Competition Council (*Conseil de la concurrence*) investigating and sanctioning powers in the field of competition law.[5] In the tax law domain – with exclusive reference to VAT for the purposes of this report – similar powers are attributed to the 'VAT Administration' (*Administration de l'enregistrement, des domaines et de la TVA*), the rules on which can be found in the Law of 10 August 2018 (*Loi du 10 août 2018 portant organisation de l'Administration de l'enregistrement, des domaines et de la TVA*) and in the Regulation of 5 December 2018 (*Règlement grand-ducal du 5 décembre 2018 fixant l'organisation des services d'exécution de l'Administration de l'enregistrement, des domaines*). For matters concerning VAT proceedings that are not regulated by these two recent pieces of legislation, the general rules (ie those enshrined in the Law of 1 December 1978 and the Regulation of 8 June 1979 on administrative proceedings) apply.[6]

As some interviewees confirmed, Luxembourgish law does not expressly refer to 'administrative punitive proceedings', yet the doctrine and the case law have sometimes extended the typical criminal law guarantees to administrative proceedings having a punitive nature. For instance, the Council of State (*Conseil d'État*), which has a consultative function in Luxembourg, has often noted that administrative sanctions may be regarded as having a penal nature, in the light of the criteria established by the European Court of Human Rights (ECtHR).[7] Administrative courts have taken a similar stance with respect to some administrative proceedings, such as those before the *Commission de Surveillance du Secteur Financier* (CSSF), when a sanction is issued at the end of these proceedings. Established by the Law of 23 December 1998, the CSSF supervises the financial sector in Luxembourg and is the competent authority for the purpose of the Market Abuse Regulation[8] and the European Market Infrastructure Regulation (EMIR).[9]

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[5] See more in Philippe-Emmanuel Partsch and Joe Zeaiter, 'La Sanction en Droit de la Concurrence' (2017) 50 *Journal des Tribunaux* 53.

[6] Fernand Schockweiler, *La Procédure Administrative non Contentieuse et le Contrôle de l'Administration en Droit Luxembourgeois. Le Citoyen et l'Administration* (Paul Bauler 2004) 26–27; Alain Steichen, *Manuel de Droit Fiscal. Droit Fiscal Général* (5th edn, Éditions Saint Paul 2015) 136–137. The latter author acknowledges that sometimes Luxembourgish courts do not apply the Law of 1 December 1978 and the Regulation of 8 June 1979 to VAT proceedings because of the alleged special nature of VAT.

[7] See Georges Wivenes, 'Les Sanctions Administratives au Luxembourg' in *Les Sanctions Administratives en Belgique, au Luxembourg et aux Pays-Bas. Analyse Comparée* (2011) 22ff <www.raadvst-consetat.be/?page=about_competent_electroniclibrary&lang=en&q=sanctions+administratives> accessed 19 April 2019. See also Marc Thewes, 'Quel Régime Juridique pour les Sanctions Administratives?' (2017) 50 *Journal des Tribunaux* 41.

[8] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1.

[9] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L 201/1. See Art 1(1) of the Law of 23 December 2016 on market abuses (*Loi du 23 décembre 2016 relative aux abus de marché*, Mémorial A –

In a case that was eventually referred to the Court of Justice for a preliminary ruling,[10] the CSSF ordered Mr DV, the director of an entity regulated by the CSSF, to resign on the ground that he was no longer trustworthy because of alleged links with Bernard Madoff and his fraudulent activities. The Luxembourgish Administrative Court of Appeal (*Cour administrative*), which was requested to review the validity of the CSSF's decision not to grant Mr DV access to documents possessed by the CSSF, expressly acknowledged that the administrative procedure before the CSSF was a 'procedure within which the rights of defence deserve the most scrupulous respect, especially when the sanction is [the order for Mr DV to resign as soon as possible] and resembles, in view of the requirements of Article 6 ECHR, a *procedure having penal nature*'.[11]

In a similar vein, the Administrative Tribunal (*Tribunal administratif*) has applied, by analogy, some principles laid down by the ECtHR in the criminal law domain and concerning the right to be tried within a reasonable time to the administrative proceedings at the end of which the Competition Council issued financial penalties against the Luxembourgish post and telecommunications company.[12]

Finally, the Constitutional Court has clarified that the *nullum crimen, nulla poena sine lege* applies to criminal penalties as well as to administrative sanctions.[13]

1.1 Function of admissibility rules in national criminal law

As discussed further below, Luxembourgish criminal procedure is based on the principle of freedom of proof. Any evidence is in principle admissible. However, if an investigative act is carried out in violation of the law, which includes the provisions of the European Convention of Human Rights (ECHR), the interested party can require the competent courts to declare that act – as well as the acts that are adopted as a consequence of that act – null and void.[14] If the request is granted, the evidence so collected will be declared inadmissible and discarded.[15] Even if this request is not lodged (or if it is rejected), trial

No 279 de 2016); Art 1(1) of the Law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories (*Loi du 15 mars 2016 relative aux produits dérivés de gré à gré, aux contreparties centrales et aux référentiels centraux,* Mémorial A – No 39 de 2016); Art 1(2) of the Law of 30 May 2018 on markets in financial instruments (*Loi du 30 mai 2018 relative aux marchés d'instruments financiers*, Mémorial A – No 446 de 2018). For an overview of the CSSF and its punitive powers, see André Lutgen and Marie Marty, 'La Pratique des Sanctions Administratives en Matière Financière' (2017) 50 *Journal des Tribunaux* 46–53.

[10] Case C-358/16 *UBS Europe*, EU:C:2018:715.

[11] Administrative Court of Appeal (*Cour administrative*), 16 December 2014 <www.ja.etat.lu/30001-35000/34766C.pdf> accessed 19 April 2019 (translation of the authors; emphasis added). Some authors have noted that, in the field of market abuse, the CSSF can also order the restitution of the advantage gained by committing infractions, and that this measure is entirely equivalent to the confiscation that criminal courts may order (Lutgen and Marty (n 9) 47).

[12] Administrative Tribunal (*Tribunal administratif*), 21 November 2016 <www.ja.etat.lu/35001-40000/35847a.pdf> accessed 19 April 2019.

[13] For some references, see Thewes (n 7) 39.

[14] See immediately below in the text.

[15] Valentina Covolo, 'Luxembourg' in Silvia Allegrezza and Valentina Covolo (eds), *Effective Defence Rights in Criminal Proceedings* (Wolters Kluwer-CEDAM 2018) 337.

courts keep nonetheless the power to 'assess freely the admissibility and probative value of evidence'.[16]

According to a 2007 leading case by the Luxembourgish Court of Cassation (*Cour de Cassation*), criminal courts cannot base a conviction on evidence that has been unlawfully obtained if: i) the respect of given formal requirements is imposed by law under penalty of nullity; ii) the committed irregularity has tainted the credibility of evidence; or iii) the use of evidence is contrary to the defendant's right to a fair trial.[17] It is for the court to assess the admissibility and reliability of evidence that has been unlawfully obtained, taking into account the elements of the case considered as a whole, including the way in which evidence has been obtained.

The wording of this judgment would imply that, in principle, evidence that has been unlawfully obtained could be admitted at trial, if none of the three above-mentioned conditions are met.[18] However, it is worth mentioning that the *Cour de Cassation* specifies that the defendant's right to a fair trial can only be ensured if legality in the administration of evidence is respected. In the same case that gave rise to the 2007 decision of the *Cour de Cassation* and after this judgment, the Court of Appeal stressed indeed that the principle of legality in the administration of evidence is the fundamental requirement to ensure the right to a fair trial.[19] Hence, judicial authorities should evaluate the admissibility of evidence mostly with respect to the third above-mentioned criterion (use of evidence that is contrary to the right to a fair trial), with the further consequence that, in practice, '[i]llegally or improperly obtained evidence cannot be used at trial or before the *chambre du conseil* [ie the pretrial chamber]'.[20] In a recent case, for instance, the *Cour de Cassation* noted that neither the procedural rules that had been violated were prescribed under penalty of nullity nor the reliability of evidence was at stake, yet the lack of legality in the administration of evidence should lead to declaring the evidence inadmissible.[21]

It follows that admissibility rules in national criminal procedural law are mostly intended to safeguard the rights of the parties involved in the proceedings. In addition, admissibility rules aim to ensure the fairness of the proceedings by preventing judicial authorities from reaching a decision on the basis of acts and measures that are forbidden by law or not reliable enough.[22] For instance, the testimony of persons who are legally incapable of being a witness is not admissible (Articles 156-1 and 189 CPP).

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[16] ibid 366.
[17] Court of Cassation, 22 November 2007, No 2474 available at <www.stradalex.lu> (this webpage, which is further mentioned in some footnotes below, was last accessed on 19 April 2019). This judgement is often mentioned in Luxembourgish decisions where the issue of admissibility of evidence comes up (see, for instance, Court of Cassation, 20 December 2017, No 493/17 available at <www.stradalex.lu>).
[18] Séverine Menetrey, 'Preuve et Droits Fondamentaux en Droits Europeén et Luxembourgeois' (2013) 23 *Annales du droit luxembourgeois* 23, 33.
[19] Court of Appeal, 26 February 2008, No 106/08 available at <www.stradalex.lu>.
[20] Martin Petschko, Marc Schiltz and Stanislaw Tosza, 'Luxembourg' in Katalin Ligeti (ed), *Toward a Prosecutor for the European Union*, Vol 1 (Hart 2013) 466.
[21] Court of Cassation, 20 December 2017 (n 17).
[22] See, in that respect, Court of Cassation, 28 April 2015, No 158/15 available at <www.stradalex.lu>.

The rules and procedures laid down in Articles 24-2, 48-2, and 126 CPP shall be followed in order to declare the invalidity (or nullity, '*nullité*') of acts of pretrial proceedings, and thus to exclude inadmissible evidence that was collected via those acts. In general, a nullity can be 'formal', ie it is provided for by the law,[23] or 'substantial/virtual'. Substantial/virtual nullities have been introduced via case law, when serious irregularities, including irregularities affecting the rights of defence, occur.[24] In line with the monist approach adopted by Luxembourgish courts,[25] alleged violations of the rights enshrined in the ECHR, especially the rights of defence, could determine the nullity of a given procedural act.[26]

The public prosecutor, as well as any interested party with a legitimate interest, can ask the pretrial chamber of the district court (*chambre du conseil du tribunal d'arrondissement*) to decide on the validity of acts (*requête en nullité*) of the *instruction*, ie the investigation conducted by the investigative judge (*juge d'instruction*) (Article 126 CPP). As in a few other countries in Europe, the *juge d'instruction* is still a party to the pretrial proceedings. Once he or she is seised by the prosecutor – which is mandatory for the most serious crimes[27] – the investigative judge 'has the exclusive authority to decide whether and how to investigate the case'.[28] If the investigation was carried out by the public prosecutor without involving the investigative judge (*enquête préliminaire*), and an *instruction* is then not opened at the end of the *enquête préliminaire*, the defendant shall ask the district court (*tribunal d'arrondissement*) to rule on the invalidity of acts of the investigation before raising any other argument (save for the exception of incompetence).[29]

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[23] In regulating investigative measures, the CPP provides that some formalities shall be respected under penalty of nullity ('*à peine de nullité*'). For instance, if the investigative judge fails to inform the suspected person of the right to be assisted by a lawyer before questioning him or her, such questioning is invalid (Art 81(2) and (12) CPP; see Petschko, Schiltz and Tosza (n 20) 469).

[24] Covolo, 'Luxembourg' (n 15) 366.

[25] On the monist approach of Luxembourgish courts, see ibid 330–331. Covolo notes that 'Luxembourg judges give direct effect to the fundamental rights guaranteed under the Convention as well as to EU Directives harmonising defence rights in criminal proceedings, which prevail over national legal provisions' (ibid 331).

[26] See, for instance, Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 16 May 2012, No 301/12 available at <www.stradalex.lu>; Court of Cassation, 31 January 2013, No 7/2013 <https://juricaf.org/recherche/+/facet_pays%3ALuxembourg> accessed 19 April 2019; Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 12 February 2014, No 102/14 available at <www.stradalex.lu>; Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 24 December 2015, No 1017/15 available at <www.stradalex.lu>.

[27] According to Luxembourgish law, '*crimes*' are the most serious infractions, which are subject to a '*peine criminelle*' such as imprisonment from a minimum of five years to life imprisonment, financial penalty of minimum €250 ('*amende*'), or confiscation (Arts 1(1), 7, 8(1), and 9 of the Luxembourgish Penal Code). '*Délits*' are less serious than *crimes* and are punished with a '*peine correctionnelle*' such as imprisonment between eight days and five years, financial penalty of minimum €250 ('*amende*'), or confiscation (Arts 1(2), 14, 15(1), and 16 of the Luxembourgish Penal Code). Finally, '*contraventions*' are the least serious offences and they are punished with a '*peine de police*', which does not include imprisonment but only sanctions such as a financial penalty of between €25 and €250 or confiscation (Arts 1(3), 25, and 26 of the Luxembourgish Penal Code).

[28] Petschko, Schiltz and Tosza (n 20) 452.

[29] Art 48-2(3) CPP. See more in Covolo, 'Luxembourg' (n 15) 365–366. The same rule applies to acts of the *mini-instruction*, if no *instruction* is eventually opened (Art 24-2(3) CPP). '*Mini-instruction*' refers to

As anticipated, if the *requête en nullité* is well-founded, the pretrial chamber of the district court annuls the act as well as the acts that have been adopted after, and as a consequence of, the act that has been declared null and void.

The above rules lead to two final considerations. First, if no control on illegally or improperly obtained evidence is triggered on time (or at all), such evidence becomes valid ('*purge de nullité*').[30]

Second, the legislator clearly aims to ensure that the objections to the admissibility of evidence are confined to the pretrial phase. The fact that the *requête en nullité* cannot – save for exceptional circumstances – be lodged before the trial court is meant to ensure the good administration of justice within a reasonable time, as decisions taken within the pretrial phase cannot be called again into question during the trial.[31]

1.2 Function of admissibility rules in national punitive administrative law

Admissibility rules in national administrative law aim to ensure that the competent authorities take decisions on the basis of relevant evidence and information. More broadly, they are meant to ensure the fairness of the proceedings.

The Regulation of 8 June 1979 does not contain any specific provision on admissibility of evidence, while Article 1 of the Law of 1 December 1978 provides – in rather general terms – that the rules on administrative proceedings shall ensure the respect of the defence rights of the individuals subject to the administration (*administré*) by arranging, as much as possible, their participation in the decision-making process of public bodies. This implies, among other things, the right of individuals to be heard. Article 5 of the Regulation of 8 June 1979 indeed requires that interested persons shall have the possibility of bringing their observations to the attention of the public administration.

In competition law, as well in financial market regulation and in banking supervision, the Council of competition and the CSSF have a wide array of powers to collect all evidence needed to reach a decision (eg request information, inspections, etc).[32]

Admissibility rules of administrative court proceedings are not very strict either (see more in section 1.3.2 below). For instance, Article 8(2) of the 1999 Law on proceedings before administrative courts states that the elements on which the defendant

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the procedure in which the public prosecutor is 'entitled to ask the investigative judge to perform certain acts without formally opening an investigation … This procedure is generally used for cases which appear to be clear and may be sent directly to the *chamber du conseil* or the Court (for lower crimes (*délits*)) without a formal investigation being open, but the public prosecutor needs a piece of evidence that only the investigative judge may obtain (eg the video recording from a CCTV camera)' (Petschko, Schiltz and Tosza (n 20) 464–465; see also Jeannot Nies, 'Detecting Economic and Financial Crime: A Special Toolkit of Investigation Techniques in Luxembourg' in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart 2017) 88–89).

[30] Petschko, Schiltz and Tosza (n 20) 466–467; Covolo, 'Luxembourg' (n 15) 366.

[31] Court of Appeal, 28 February 2017, No 9/17 available at <www.stradalex.lu>. See also Court of Cassation, 28 April 2016, No 17/2016 available at <https://juricaf.org/recherche/+/facet_pays%3ALuxembourg> accessed 19 April 2019.

[32] See Arts 14–19 of the Law of 23 October 2011 (competition), Art 45 of the Law of 30 May 2018 (financial market), and Art 53 of the Law of 5 April 1993 on the financial sector.

or a third party wishes to rely shall be indicated in the statement of case (*mémoires en réponse*) and deposited at the court's registry (*greffe*) together with those *mémoires*. There is no specification or limit on the nature and content of these elements.[33] In addition, Article 8(5) of the same Law requires the administration that adopted the act that is subject to judicial review to submit the full dossier to the court's secretariat. Parties to the proceedings can obtain a copy of the documents of the dossier, in line with the adversarial principle ('*principe du contradictoire*').[34]

1.3 System of proof: Free or controlled?

1.3.1 Criminal law

While *contraventions* shall be proved by means of either official reports or witnesses in the absence of official reports, or in support of those reports,[35] the Luxembourgish system is proof free as far as *crimes* and *délits* are concerned.[36] The Court of Cassation posits that the principle of freedom of proof ('*liberté de la preuve*') is linked to the fact that criminal proceedings require the proof of the material and psychological elements of a given fact rather than that of a legal act, as is instead the case in civil or commercial proceedings.[37]

According to Luxembourgish criminal law, it is however of the essence that evidence is useful,[38] 'loyally' obtained,[39] and subject to the adversarial principle (*contradictoire*).[40]

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[33] As far as tax matters are concerned, however, Art 59(3) of the 1999 Law on proceedings before administrative courts excludes the oath from the admissible means of proof (see more in section 1.3.2 below).

[34] In exceptional cases, the court may limit the parties' access to the dossier.

[35] Art 154 CPP.

[36] Court of Cassation, 12 October 2016, No 481/16 available at <www.stradalex.lu>. See also Court of Cassation, 14 March 2017, No 112/17 available at <www.stradalex.lu>.

[37] Court of Cassation, 12 October 2016 (previous n).

[38] See, for instance, Art 53(1) CPP, which allows the public prosecutor to ask the investigative judge to undertake any act that he or she deems useful to find the truth ('*utiles à la manifestation de la vérité*'). Likewise, the investigative judge carries out all the measures that he or she deems useful to find the truth (Art 51(1) CPP). See also Art 218 CPP. The defendant has the right to present all the elements that he or she believes are useful for his or her defence (see, in this respect, Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 6 February 2009, No 91/10 available at <www.stradalex.lu>).

[39] For example, evidence by means of '*provocation policière*' is inadmissible. In other words, the police shall not encourage someone to commit a crime in a way that the police's manoeuvres determine that person to commit the crime and dominate his or her will to such an extent that he or she could have not behaved differently (Court of Cassation, 12 June 2007, No 304/07 available at <www.stradalex.lu>; see also Petschko, Schiltz and Tosza (n 20) 462). Luxembourgish case law refers in similar instances to the necessary 'loyalty' ('*loyauté*') in the administration of evidence (see, for instance, Court of Cassation, 26 February 2008, No 106/08 available at <www.stradalex.lu>; District Court (*Tribunal d'arrondissement de Luxembourg*), 2 July 2014, No 1872/2014 available at <www.stradalex.lu>).

[40] For example, unilateral expert reports are admissible as long as the parties have the possibility to freely discuss them (Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 6 December 2013, No 699/13, available at <www.stradalex.lu>; see also Court of Appeal, 28 February 2017 (n 31)).

Evidence that has been legally obtained in another Member State or even in third countries is admissible in Luxembourgish criminal proceedings,[41] as long as it has been duly communicated to the defence.[42]

1.3.2 Punitive administrative law

The Luxembourgish administrative law system is proof free,[43] as long as the adversarial principle (*contradictoire*) is respected with regard to each piece of admitted evidence.[44] There are however a few exceptions. In tax matters, Article 59(3) of the 1999 Law on proceedings before administrative courts allows any kind of evidence with the exception of the oath. Likewise, in VAT administrative proceedings, the VAT Administration can prove taxpayers' violations by means of any evidence with the exception of the oath.[45]

1.4 Review of the decision on admissibility

1.4.1 Criminal law

In principle, decisions on admissibility cannot be subject to judicial review as such.[46] However, decisions of the pretrial chamber of the district court, including those concerning the nullity of pretrial measures, can be appealed before the pretrial chamber of the Court of Appeal (*chambre du conseil de la Cour d'appel*) (Article 133 CPP).[47] On the other hand, once the district court decides on a case, its decision can be appealed before the Court of Appeal. The appeal is the last opportunity for the interested party to challenge the admissibility of evidence. If no control on illegally or improperly obtained evidence is requested, that evidence cannot be further challenged before the Court of Cassation.[48]

[41] Petschko, Schiltz and Tosza (n 20) 467.
[42] See, for example, Court of Cassation, 7 July 2000, No 235/00 available at <www.stradalex.lu>, where the Court – despite the differences between US and Luxembourgish law in the field of evidence gathering – declared admissible the testimony given by witnesses before US federal courts, which was duly communicated to the defence.
[43] According to Administrative Court of Appeal (*Cour administrative*), 16 December 2014 (n 11), for instance, administrative courts can order all the measures they deem necessary to resolve the case pending before them. As for the proof free nature of tax proceedings, see Steichen (n 6) 213.
[44] See Arts 14, 30, and 51 of the 1999 Law on proceedings before administrative courts. On the importance of the adversarial principle (*contradictoire*) in Luxembourgish administrative law, see Schockweiler (n 6) 52–53 and 64–65; Jérome Guillot and Marc Feyereisen, *Procédure Administrative Contentieuse* (4th edn, Larcier 2018) 111–112 and 259.
[45] Art 68 of the Law of 12 February 1979 on VAT (*Texte coordonné de la loi du 12 février concernant la taxe sur la valeur ajouté telle que modifiée en dernier lieu par la loi du 26 mai 201,* Mémorial A – No 93 de 2014.1444).
[46] See Covolo, 'Luxembourg' (n 15) 370.
[47] ibid 338.
[48] ibid 374.

1.4.2 Punitive administrative law

As for administrative court proceedings, there are no specific rules concerning the review of admissibility decisions, which can thus be subject to appeal together with the decision on the merits of the case.

Likewise, there are no specific rules concerning the review of admissibility decisions in non-judicial administrative proceedings. Issues concerning admissibility of evidence could be discussed before the competent judicial authorities, if administrative decisions are subject to judicial review. For instance, decisions taken by the CSSF and the Competition Council can be appealed before the Administrative Tribunal,[49] which can quash or reform those decisions.[50] VAT Administration decisions that impose financial penalties ('*amendes fiscales*') are instead first subject to the so-called '*reclamation*', by which the individual requires the Administration to reconsider its decision. This further decision of the Administration may then be challenged before the civil chamber of the district court of Luxembourg.[51]

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

In principle, evidence that has been declared inadmissible in administrative proceedings can be used in criminal proceedings, due to the principle of autonomy of criminal law. On a case by case basis, however, national criminal courts can exclude such evidence.

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

In principle, evidence that has been declared inadmissible in criminal proceedings can be used in administrative proceedings. In the field of tax law, it has been noted that, in the light of the principle of independence of the procedures, irregularities that occur in criminal proceedings do not have any influence on tax proceedings.[52]

2. ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

There are no specific provisions on the admissibility of OLAF-collected evidence in punitive administrative proceedings. OLAF-collected evidence is thus subject to the ordinary rules of administrative law (see section 1 above). As mentioned, the system of Luxembourgish administrative law is one of free proof and is based on the adversarial

[49] See, for the Council of Competition, Art 28 of the Law of 23 October 2011, and, for the CSSF, Art 2-1(5) of the Law of 23 December 1998 and Art 65 of the Law of 30 May 2018.
[50] See Georges Ravarani, 'Les Sanctions Administratives en Jurisprudence Luxembourgeoise' (2012) 35 *Publications du Benelux* 673, 691.
[51] Art 79 of the Law of 12 February 1979 on VAT.
[52] Steichen (n 6) 153.

principle (*contradictoire*), which requires public authorities (CSSF, Council of Competition, etc) to share their files with the other parties to the proceedings, and vice versa.

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

No case law has been found.

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

No case law has been found.

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

The concerned person in an OLAF investigation can challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards in accordance with the ordinary rules of national administrative proceedings. In other words, issues concerning admissibility of evidence could be discussed before the competent judicial authorities, if administrative decisions are subject to judicial review.

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

As far as national administrative proceedings are concerned, in Luxembourg there are no specific provisions concerning the admissibility of evidence collected and transmitted by: a) the European Central Bank (ECB), in accordance with Article 136 SSM Framework Regulation;[53] b) the European Securities and Markets Authority (ESMA), in accordance with Article 64(8) EMIR; and c) the Commission's Directorate-General for Competition (DG COMP) according to Article 12 of Regulation No 1/2003.[54] The general rules will thus apply (see section 1 above).

No information has been found on cases where such evidence has been expressly declared inadmissible, nor are higher national standards in relation to procedural safeguards believed to impact its admissibility.

In addition, it shall be noted that Article 136 of the SSM Framework Regulation requires the ECB to request the relevant national competition authority (NCA) to refer the matter to the appropriate authorities for investigation and possible *criminal* prosecution. Hence, it is for national *criminal* – and not administrative – authorities to check the admissibility of evidence that may be shared by the ECB, in accordance with

[53] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] L 141/1.

[54] 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 L 1/1.

the general principles discussed above. At the national level, Article 33(3) of the Organic Law of the Central Bank of Luxembourg[55] provides that Article 23 CPP applies to board members and Central Bank staff members. Pursuant to Article 23(2) CPP, any public official or person charged with public service functions who becomes aware of facts that may amount to a criminal offence shall inform without undue delay the public prosecutor's office.

Likewise, Article 64(8) EMIR requires ESMA to refer matters for *criminal* prosecution to the relevant national authorities. Hence, it is for national *criminal* – and not administrative – authorities to check the admissibility of evidence that may be shared by ESMA, in accordance with the general principles discussed above. At the national level, a similar duty to inform public prosecutors – as enshrined in Article 23(2) CPP – is bestowed upon the CSSF, which is the competent authority for the purpose of EMIR.[56]

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

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

The Luxembourgish system of criminal law allows for the admissibility of information gathered by national administrative authorities as evidence in criminal proceedings. As the system is one of free proof, these pieces of information are admissible in accordance with the general conditions discussed in section 1 above (eg, evidence shall be useful, collected in a loyal way, etc). There are neither sectoral nor general rules on the matter in the code of criminal procedure, so the general principles on evidence apply.

It is worth adding that, pursuant to Article 16(1) of the Law of 19 December 2008 on the cooperation between tax administrations,[57] the VAT Administration shall transmit to judicial authorities – upon their request – relevant pieces of information that may be used within a criminal procedure.

[55] Law of 23 December 1998 on the monetary regime and on the Central Bank of Luxembourg (*Loi du 23 décembre 1998 relative au statut monétaire et à la Banque centrale du Luxembourg,* Mémorial A – No 112 de 1998).

[56] CSSF, 'Rapport d'Activités 2017' (2018) 108 and 138 <www.cssf.lu/fileadmin/files/Publications/Rapports_annuels/Rapport_2017/CSSF_RA_2017.pdf> accessed 19 April 2019.

[57] Law of 19 December 2008 on the interadministrative and judicial cooperation and on the enhancement of the means of the Administration of direct taxes, the Administration of the registration and estates, and the Administration of customs and excise (*Loi du 19 décembre 2008 ayant pour objet la coopération interadministrative et judiciaire et le renforcement des moyens de l'Administration des contributions directes, de l'Administration de l'enregistrement et des domaines et de l'Administration des douanes et accises*, Mémorial A – No 206 de 2008).

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

There are no specific rules on the admissibility of evidence collected by EU bodies in criminal proceedings. Hence, the general principles on evidence apply. This also means that the ordinary rules on the *requête en nullité* should apply, including those concerning the time limits for lodging the *requête*.[58] According to recent case law, these time limits apply to all cases of invalidity, independently of whether such invalidity allegedly derives from the violation of national or supranational rules.[59] Although there is no case law on inadmissibility of OLAF-collected evidence, one would however imagine that – in line with the *Sigma Orionis* case[60] and with the case law of other Member States, eg France[61] – the *requête en nullité* would aim to exclude such evidence from the case file, if it was gathered illegally: in other words, OLAF-collected evidence could not be used by national criminal law authorities to adopt their decisions but would still remain valid in the EU legal order.

5. PROBLEMS AND PRACTICES IN DEALING WITH ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL CRIMINAL PROCEEDINGS

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

OLAF has been reported to carry out its investigations in a way that pays considerable attention to defence rights and avoids any risk of inadmissibility of its reports. Our interviewees explained that OLAF usually gets in touch with national authorities (*police judiciaire* and public prosecutors) in the early phase of its investigations and transmits the file to them, who then continue with the investigation. This takeover of investigations by national authorities has been explained as a way to enhance the admissibility and credibility of evidence.[62] Reports by Luxembourgish judicial police officers, indeed, are presumed true until it is proven that the officer falsified the report ('*jusqu'à inscription de faux*').[63] Reports by other agents (such as OLAF ones) are also admissible yet their content may be denied simply by proving that facts stated therein are not true ('*preuve du fait contraire*').[64]

[58] See more in section 1.
[59] Valentina Covolo, 'National Report: Luxembourg' in Serena Quattrocolo and Stefano Ruggeri (eds), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and* in Absentia *Trials in Europe* (Springer 2019) 302, who refers to Court of Cassation, 19 February 2013, No 3/13.
[60] Case T-48/16 *Sigma Orionis v Commission*, EU:T:2018:245.
[61] See French report, section 4.2.
[62] A consequence of the fact that national authorities usually take over OLAF investigations is that joint on-the-spot checks are reported to be very rare in Luxembourg.
[63] Art 154 CPP.
[64] Petschko, Schiltz and Tosza (n 20) 467.

5.2 Duplication of OLAF activities

Activities already performed by OLAF are not repeated according to the relevant national rules of criminal procedure as OLAF-collected evidence is admissible as such in national criminal proceedings.

In a case decided in 2015, the defendant complained that the investigative judge limited himself to including OLAF's report in the dossier without carrying out his own investigations. Article 51 CPP requires the investigative judge to conduct investigations by gathering inculpatory ('*à charge*') and exculpatory ('*à décharge*') evidence, while OLAF allegedly only carried out investigations *à charge*.

The pretrial chamber of the Court of Appeal rejected the defendant's argument by expressly recognising that the *juge d'instruction* can base his or her decisions on OLAF-collected evidence without any need to repeat activities already performed by OLAF.[65] In addition, it recognised that OLAF had carried out its investigations *à charge* and *à décharge*, so that no violation of the right to a fair trial occurred.

According to our interviewees, especially bearing in mind that Luxembourg is a monist system,[66] the need not to repeat OLAF investigative activities also follows from the general principle of *effet utile* of EU law. The fact that OLAF-collected evidence is admissible in national criminal proceedings does not imply, however, that such evidence is always enough to indict or convict the suspect. It may also be the case that national authorities consider OLAF-collected evidence insufficient to prove the suspect's criminal liability.

[65] Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 6 January 2015, No 09/15 available at <www.stradalex.lu>.
[66] See n 25.

9. THE NETHERLANDS

A.P.W. Duijkersloot, A.J. de Vries and R.J.G.M. Widdershoven

1. GENERAL FRAMEWORK

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

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

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

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

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

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

1.1 Function of admissibility rules in national criminal law

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

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

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

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

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

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

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

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

1.2 Function of admissibility rules in national punitive administrative law

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

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

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

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

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

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

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

1.3 System of proof: Free or controlled?

1.3.1 Criminal law

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

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

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

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

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

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

1.3.2 Punitive administrative law

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

1.4 Review of the decision on admissibility

1.4.1 Criminal law

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

1.4.2 Punitive administrative law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[49] Handboek Douane, section 45.00.00 Samenwerking met OLAF, 4.3.1. See also Joske Graat, 'The Netherlands' in Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017) 93–94.
[50] See Corstens and Borgers (n 6) 76.
[51] Handboek Douane, section 45.00.00 Samenwerking met OLAF, 4.3.5.
[52] ibid, 4.4.1.
[53] In national case law concerning decisions based on OLAF reports, the national report is never mentioned.

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

5.2 Duplication of OLAF activities

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

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

10. THE UNITED KINGDOM[1]

P. Alldridge

1. GENERAL FRAMEWORK

1.1 Function of admissibility rules in national criminal law

The function of admissibility rules in criminal procedure is, partly at least, a function of the jury system. The system in England and Wales reveres the jury, but is very concerned to avoid it being given any evidence which might be irrelevant or prejudicial. In criminal procedure, the exclusion of an item of evidence may be for one or more of the following reasons:

(a) to prevent irrelevant information going into the proceedings;
(b) to ensure the fairness of the proceedings;
(c) to exercise control over the enforcement authorities; or
(d) to provide more widely acceptable decisions.

1.2 Function of admissibility rules in national punitive administrative law

Broadly speaking, administrative proceedings, including administrative proceedings that may have penal consequences (and are not an independent category), are civil proceedings and the function of rules excluding evidence is to enable fact finding by excluding irrelevant evidence. Rules of admissibility are permissive. In principle, any evidence, howsoever obtained, which is relevant to a fact in issue, is admissible. There are general 'fairness' exclusionary reasons, which are restrictively applied.

1.3 System of proof: Free or controlled?

The English law of evidence, which historically did not differentiate civil from criminal proceedings, is one of free proof, at least in principle, in two senses. First, in principle any relevant evidence may be adduced as to any fact in issue, and any single item of evidence may prove, without more, any *probandum*. There are few exceptions in civil cases, including cases before tribunals. Public Interest Privilege and Legal Professional Privilege (LPP) are among them. There are some exceptions in criminal cases, including the ones available in civil law cases, and also some exclusionary principles to do with the reliability of the evidence or the treatment of criminal defendants. Second, there is no established hierarchy of categories of evidence (written does not necessarily override oral evidence, or vice versa, and so on).

[1] Any reference to the UK should be understood as referring to the English and Welsh legal system.

It follows from the free proof precept that evidence gathered in non-punitive administrative proceedings may be admitted in punitive administrative proceedings unless one of the exceptions applies.

1.4 Review of the decision on admissibility

1.4.1 Criminal law

Where a trial judge in a Crown Court admits evidence adverse to a defendant that may constitute a matter rendering the conviction 'unsafe' within the terms of the Criminal Appeal Act 1968, the conviction may be quashed altogether or a retrial may be ordered. Appeal before the Court of Appeal is by way of review not rehearing. That is, the Court of Appeal asks itself whether the Crown Court adopted correct procedures, admitted only admissible evidence, applied the right tests for the definition of the offence and the allocation of the burden of proof.

Where a trial judge in a Crown Court admits evidence adverse to the prosecution, it is possible (though rare) for the trial to be paused and an appeal taken against that decision,[2] or for the Attorney-General to refer an issue of law arising from an acquittal to the Court of Appeal.[3]

1.4.2 Punitive administrative law

The default position is that a decision in administrative proceedings to admit evidence may be challenged by a judicial review of that decision. The basis of the challenge is that the decision was one which no reasonable tribunal, properly directed as to the applicable law (including the law on the admissibility of evidence) could have arrived at that conclusion. This is appeal by way of review, as distinct from appeal by way of rehearing. The effect of a successful judicial review is, in principle, that the original decision-taking body has to take the decision again, having regard to the correct evidence. The decision in administrative proceedings may also be challenged by an appeal, if the decision is one against which appeals may be made, usually to a higher court or tribunal. In that event the higher court or tribunal has the choice between substituting its own view of the facts (which it does rarely), remitting the case to the original tribunal or a new tribunal for rehearing (or deciding that the error was not significant).

The allocation of appeals, within the structure of courts and tribunals, is partly a matter of expense, court time and court availability. Appeals to higher courts are more expensive. For example, under section 137 of the Financial Services and Markets Act 2000, as enacted, appeal from the administrative tribunal with penal powers lay on a matter of law (ie appeal by way of review) to the Court of Appeal, which, in practical terms, is the final court of appeal in the UK (the UK Supreme Court hears only about 60 cases a year). The repeal (in 2010) of section 137 has the effect that appeal is now by way

[2] Code for Crown Prosecutors <www.cps.gov.uk/legal-guidance/prosecution-rights-appeal> accessed 25 March 2019.
[3] Criminal Justice Act 1972, s 36.

of judicial review to the Divisional Court (below the Court of Appeal in the court structure), with the expectation that cases can be dealt with more cheaply and expeditiously.

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

The fact that evidence is declared inadmissible in administrative proceedings will not necessarily prevent its use in criminal proceedings, but the reasons that prevent it being admitted in administrative proceedings (for example, fairness reasons) may also provide reasons to exclude in criminal proceedings. In general, the rules of criminal evidence are stricter. In practice, the administrative proceedings, including those of OLAF, would be stayed pending resolution of the criminal proceedings.

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

The fact that evidence is declared inadmissible in criminal proceedings will not necessarily prevent its use in administrative proceedings, but the reasons that prevent it being admitted in criminal proceedings may also provide reasons to exclude in administrative proceedings.

2. ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings

The default position is that relevant evidence is admissible regardless of its provenance. Therefore no special provision is needed to render admissible evidence gathered by OLAF. In such proceedings the bald admissibility criteria are relevance and absence of unfairness.

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

The answer to the previous question being as it is, one would not expect extensive deliberations. There are references to the fruits of OLAF investigations in the following cases:

1. *Belgravia Trading v Revenue and Customs*[4] where OLAF-supplied information to HMRC (Her Majesty's Revenue and Customs), which statements were reported to the tribunal as evidence of their truth. The statements before the tribunal were therefore multiple hearsay, but, the proceedings being civil, conducted under the more permissive rules of evidence under the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009, there was no reason to exclude. HMRC put

[4] [2014] UKFTT 31.

in evidence statements in the OLAF report which relied on something that the Sri Lankan authorities stated to an OLAF officer in relation to something which the Sri Lankan authorities were apparently told by the Indian authorities. In proceedings governed by the stricter rules of criminal evidence there would have been hurdles to surmount to secure the admissibility of the evidence.[5] In the tribunal, the doctrine of free proof runs more strongly. In para 37 of the decision, the judge stated:

> I accept that the fact that OLAF is an EU institution charged with a particular relevant remit and that it is built into the architecture of the European Regulation … are matters which indicate the OLAF report is likely to be a relevant matter to consider. But, this is distinct from saying that the Tribunal's discretion to exclude evidence is curtailed and it is obliged to consider the OLAF evidence whatever the circumstances by which it came about. The *Faroe Seafood and Others* cases confirm the Tribunal *may* take the OLAF mission report into account but do not go as far as suggesting that the Tribunal *must* take them into account.[6]

That is, the judge still has a discretion to exclude (either on the ground of relevance or under the fairness discretion) evidence gathered by OLAF, as he would have for any other evidence.

2. *FMX Food v HM Revenue and Customs*[7] where OLAF had furnished evidence of the fraudulence of certificates of origin, as to whose admissibility there was not a problem; and

3. *Kam Leisurewear v HM Revenue and Customs*[8] in which OLAF customs investigators gave evidence under oath as to similar issues.

In none of these cases was there any direct question as to its admissibility.

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

Assuming the other conditions to be satisfied on the basis of which LPP would be available to the in-house lawyer where the investigation is under UK law, the communications will be privileged. The state of the law of legal professional privilege is in all important respects the creature of common law, and is known to be unsatisfactory and in need of legislative reform. One of the issues that will need to be addressed is that of the in-house lawyer.[9] Clearer guidance is also needed on what exactly is the 'legal' element of LPP,[10] and the relationship between lawyers acting for corporates and those

[5] Criminal Justice Act 2003, s 121.
[6] *Belgravia Trading v Revenue and Customs* [2014] UKFTT 31, para 37.
[7] [2018] EWCA Civ 2401.
[8] [2011] UKFTT 726 (TC).
[9] Currently the privilege extends equally to in-house and contracted-out lawyers. See *Alfred Crompton Amusement Machines Ltd v Customs and Excise* [1972] 2 QB 102.
[10] In *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610, the House of Lords gave 'legal advice' a fairly wide reading, holding

acting for individual employees.[11] OLAF would not be able to collect evidence in breach of LPP from an in-house lawyer. Any difference in the rules between in-house and contracted-out lawyers is far more likely to affect the practices of the respective lawyers than the admissibility of evidence. Lawyers know which communications are privileged and alter their behaviour accordingly. That is, if the written communications of in-house lawyers are not privileged, they will communicate in another way.

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

Violations of EU rules do not, without more, provide a reason to exclude evidence, though the violations would be matters to be taken into account in determining whether it would be fair to admit the evidence.

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

The general rule is that any evidence howsoever gathered is admissible. There are no specific provisions related to evidence collected according to Article 136 SSM Framework Regulation, Article 64(8) EMIR and Article 12 of Regulation 1/2003.

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

There are no specific rules on the admissibility of evidence collected by EU bodies, and especially OLAF, in criminal proceedings. In principle, relevant evidence is admissible in criminal proceedings irrespective of who gathered it, and so long as the criminal proceedings do not constitute an abuse of state power. This is subject to the following qualifications: (i) if the violation is sufficiently gross that the criminal proceedings become an abuse of the process, then they may be stayed; (ii) any item of evidence is subject to exclusion by the trial judge under a discretion conferred by Police and Criminal Evidence Act 1984 s 78, which states:

> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

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that 'legal advice' extended to advice as to what should prudently and sensibly be done in a 'relevant legal context', which would include the presentation of a case to an inquiry.

[11] In *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006, as to legal advice privilege, the Court of Appeal stated that *Three Rivers (No 5)* had decided that communications between an employee of a corporation and that corporation's lawyers would not attract legal advice privilege unless the employee had been tasked with seeking and receiving such advice on behalf of the client. On that analysis, the interview notes (in *Eurasian*) could not attract legal advice privilege. However, had it been open to it to do so, the Court of Appeal stated that it would have been in favour of departing from *Three Rivers (No 5)*, as a matter of principle.

There is a great deal of law on the exercise of this discretion. The most likely areas which may be relevant here are the use of unlawful surveillance or the use of *agent provocateurs*.[12]

5. PROBLEMS AND PRACTICES IN DEALING WITH ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL CRIMINAL PROCEEDINGS

The OLAF report will rarely be admissible in its entirety. It is the specific items of evidence (witness statements, forensic accountancy, document analysis, etc) whose admissibility needs to be considered. If some exclusionary rule of the English law of evidence stands in the way of admitting the OLAF evidence (for example, if *Belgravia* had been before a Crown Court on a criminal charge rather than in a tribunal on appeal from a penalty notice, the multiple hearsay rules might have excluded it), it would be necessary either to secure the admissibility of the OLAF evidence (which might require OLAF officers to attend the court to avoid the hearsay issues) or to obtain it by other means.

Duplication of OLAF activities would not be necessary. The entirety of an OLAF report would be unlikely to satisfy the underlying relevance requirement for all items of evidence in criminal trials. What would be put in evidence would be individual items of evidence produced or secured by OLAF. This might, for example, be witness statements, document analysis or forensic accountancy. These kinds of items of evidence would be admissible – typically for the prosecution, and, where they are expert evidence (as they would be in the cases of document analysis or forensic accountancy), usually without the attendance of the expert.[13] Whether or not they could be deployed on their own, or whether further evidence were to be sought, would depend upon the weight attached to the OLAF evidence by the prosecutor, and the strength of the opposing evidence, if any. If unchallenged, no further evidence might be led. Typically, the more 'scientific' the statement (eg forensic document analysis showing the age or provenance of a piece of paper), the more likely that it would pass unchallenged, or challenged only on 'scientific' grounds. The more evaluative, the less likely that it would pass unchallenged. This is, I take it, why OLAF separates the different items of evidence in the annexes to its reports.

Interviews by OLAF with suspects would generally be repeated by the domestic police before criminal proceedings are brought, because the conditions under which interviews with suspects are conducted is regulated by the Police and Criminal Evidence Act 1984. But, as stated above, if criminal proceedings are envisioned, then all other enquiries, whether national or EU, would usually be stayed pending their completion.

[12] *R v Loosely* [2001] UKHL 53.
[13] Criminal Justice Act 2003 s 127.

11. COMPARATIVE ANALYSIS

*F. Giuffrida**

1. INTRODUCTION

The ADCRIM project is a comparative study involving seven EU Member States (France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom).[1] Its aim is to analyse their approach to the admissibility of evidence in punitive proceedings, with a focus on criminal proceedings, in order to identify obstacles and limits to the admissibility of OLAF reports in national procedures. Building upon the seven national reports and the two transversal reports, the present comparative analysis therefore points out common trends and significant differences that have emerged in the study of national case law and legislation concerning the admissibility of evidence in national criminal and punitive administrative proceedings. This report shines a light on issues that are relevant in assessing the admissibility of OLAF-collected evidence in national procedures and paves the way for some recommendations that could help to improve the status quo.

The next section sets the scene for the analysis by presenting the main features of national systems of criminal and administrative law. Section 3 focuses on the admissibility of OLAF-collected evidence in national punitive administrative proceedings, assessing whether some lessons can be learnt by comparison with the European Central Bank (ECB), the European Securities and Markets Authority (ESMA), and the European Commission's Directorate General for Competition (DG COMP). Section 4 discusses the admissibility of evidence collected by these EU entities, and especially OLAF, in national criminal proceedings. Section 5 then zooms in on problems and practices in dealing with OLAF-collected evidence in the framework of criminal proceedings. The main findings of the analysis are summarised in section 6.

2. RULES ON EVIDENCE IN NATIONAL LAW: AN OVERVIEW

Before delving into the specific topic of the admissibility of evidence collected by EU bodies – and especially OLAF – in national proceedings, an outline of some key rules and principles of the seven systems under analysis is necessary. This section provides such an overview by first making some remarks on the notion of 'punitive administrative

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[1] Any reference to the UK should be understood as referring to the English and Welsh legal system.

proceedings' (section 2.1). It then moves on to the analysis of the function of admissibility rules in national criminal law (section 2.2) and punitive administrative law (section 2.3). The nature of national evidentiary systems, ie whether they are 'controlled' systems adopting a *numerus clausus* of means of proof (and therefore excluding 'atypical' means) or based instead on the principle of free proof, is discussed in section 2.4. Section 2.5 concerns the reviewability of the decisions on the admissibility of evidence, while the last section addresses the possibility of using in criminal proceedings evidence declared inadmissible in administrative proceedings, and the possibility of using in administrative proceedings evidence declared inadmissible in criminal proceedings (section 2.6).

2.1 Introductory remarks on 'punitive administrative proceedings'

As explained in the introduction, national experts within the ADCRIM project have drafted their national reports on the basis of a questionnaire that was circulated at the beginning of the study. While some notions did not require any further specification, others called for some working definitions. This is the case of 'punitive administrative proceedings', which has been used to refer to national proceedings aimed at applying administrative sanctions that would qualify as having a criminal nature according to the so-called *Engel* criteria set out by the European Court of Human Rights (ECtHR),[2] which the Court of Justice of the European Union (CJEU) has recently endorsed.[3] Pursuant to these criteria, national courts consider some administrative proceedings 'punitive', with the consequence that the typical criminal law guarantees – presumption of innocence, *ne bis in idem*, *nemo tenetur*, etc – (should) apply in the context of these procedures as well.[4]

This is the case of Italy,[5] where national courts are becoming progressively more receptive to European case law on the 'punitive' nature of administrative penalties and proceedings, and Luxembourg. In the latter country, administrative courts have sometimes considered some administrative proceedings as having a penal nature, such as those before the Financial Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier*, CSSF), when a sanction is issued at the end of these proceedings. The CSSF supervises the financial sector in Luxembourg and is the competent authority for the purpose of the Market Abuse Regulation[6] and the European Market Infrastructure Regulation (EMIR).[7] In a case that was eventually referred to the Court of Justice for a

[2] See *Engel and Others v The Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).
[3] See, for instance, Case C-489/10 *Bonda*, EU:C:2012:319.
[4] For the purpose of this study, which deals with OLAF and three other EU entities from which OLAF could learn lessons (ECB, ESMA, and DG COMP), most national reports have focused on administrative proceedings concerning competition, tax, customs, banking, and financial supervision matters. 'Administrative proceedings' refer to proceedings before administrative authorities and not before courts. When the national reports refer to the latter kind of procedures, expressions such as 'proceedings before administrative courts' and the like are used.
[5] Italian report, section 1.
[6] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) [2014] OJ L 173/1.
[7] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L 201/1. See Luxembourg report, section 1.

preliminary ruling,[8] the CSSF ordered Mr DV, the director of an entity regulated by the CSSF, to resign on the ground that he was no longer trustworthy because of alleged links with Bernard Madoff and his fraudulent activities. The Luxembourgish Administrative Court of Appeal, which was requested to review the validity of the CSSF's decision not to grant Mr DV access to documents possessed by the CSSF, expressly acknowledged that the administrative procedure before the CSSF was a 'procedure within which the rights of defence deserve the most scrupulous respect, especially when the sanction is [the order for Mr DV to resign as soon as possible] and resembles, in view of the requirements of Article 6 ECHR, a *procedure having penal nature*'.[9]

The status quo is not so different in France, although the notion of 'administrative proceedings' seems to a certain extent misleading. Proceedings such as those entrusted to the Competition Authority are 'administrative' insofar as this entity is an administrative authority, yet its punitive action is often carried out under the supervision of ordinary – and not administrative – courts.[10] Ordinary courts can then assess the real nature of proceedings before them to evaluate whether the criminal law safeguards should be taken into account.[11] The Constitutional Council (*Conseil Constitutionnel*) can also carry out such an assessment and, when it does so, relies on the concept of 'sanction having the character of punishment', which the Council itself introduced and which requires the respect of defence rights and the principles of legality, necessity and proportionality of the sanction.[12] Sanctions having the character of punishment can be issued by courts or administrative authorities[13] and have a mainly punitive purpose, independently of whether they are formally of a criminal, administrative, civil or disciplinary nature.[14]

In France, Luxembourg, and Italy, the application of the *Engel* criteria by national courts goes hand in hand with a highly fragmented legislative scenario. There is indeed no single code on 'punitive administrative proceedings' in these systems,[15] nor is there in Hungary,[16] but different pieces of legislation lay down the relevant provisions concerning

[8] Case C-358/16 *UBS Europe*, EU:C:2018:715.

[9] Luxembourgish Administrative Court of Appeal, 16 December 2014 (Luxembourg report, section 1; emphasis added). The Administrative Tribunal has applied, by analogy, some principles laid down by the ECtHR in the criminal law domain to the administrative proceedings at the end of which the Competition Council issued financial penalties against the Luxembourgish post and telecommunications company. Likewise, the Constitutional Court has clarified that the *nullum crimen, nulla poena sine lege* principle applies to criminal penalties as well as to administrative sanctions (Luxembourg report, section 1).

[10] French report, section 1. Administrative courts are however competent to review the sanctions issued in the field of tax law and financial market supervision. Nonetheless, 'this jurisdiction is partly shared with the judicial judge since it is he who, during the proceedings, authorises or controls the use of certain investigative measures' (ibid).

[11] French report, section 1. Although the French courts overall apply the ECtHR's case law, 'it is not uncommon for the administrative or judicial judge to identify solutions whose compatibility with the case law of the Court can be discussed' (ibid).

[12] ibid.

[13] For instance, the Financial Market Authority or the Competition Authority.

[14] French report, section 1.

[15] See especially section 1 of: French report; Italian report; Luxembourg report.

[16] In Hungary, the new Act on Administrative Procedure has recently entered into force. It lays down the general rules concerning all administrative procedures. However, in case of specific procedures such as those concerning tax, customs, and competition matters it also refers to special rules, which are to be found in separate laws (Hungarian report, section 1).

administrative procedures in the fields of competition, tax, financial supervision, customs, etc. In Germany, rules on administrative fines and punitive administrative proceedings are instead to be found in the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*), which applies to all 'regulatory offences' – ie offences that may be punished with a fine – under federal and state law.[17] According to the Act, the law of criminal proceedings applies to regulatory offences rather than administrative law. In addition, while it is for administrative authorities to investigate regulatory offences, the judicial review of the fines issued at the end of such investigations is bestowed upon the competent local criminal court. If administrative authorities do not withdraw the regulatory fining notice, the public prosecutor replaces them in the proceedings before the criminal court and criminal procedural rules in principle apply.[18]

Finally, in the Netherlands, the General Administrative Law Act (GALA) contains general rules on administrative decision-making, administrative enforcement, and procedural law, and also defines the notion of 'punitive sanction' and 'administrative fine'. According to Dutch legislation and case law, administrative fines – which are the most important administrative sanctions imposed in the area of competition and in banking/financial supervision[19] – fall within the remit of Article 6 ECHR ('criminal charge') and qualify as 'sanctions of a criminal nature' under EU law.[20]

This bird's eye view shows, first, that national systems deal with issues related to 'punitive administrative law' in different ways. Supranational standards apply to different national legal realities, so that they are codified in some Member States while their application looks much more fragmented in others. Whereas systems like the Dutch and the German apply directly the *Engel* criteria, others adapt (or are in the process of adapting) to them via national case law (France, Luxembourg, Italy). Therefore, although the *Engel* criteria had a strong harmonising impact, a unified interpretation and application of them is still missing and Member States have different approaches to the matter. Second, 'external' differences, ie *among* Member States, are sometimes accompanied by 'internal' legislative fragmentation, which makes it difficult to find consistent or homogenous rules *within* the Member States themselves. This can have two consequences for OLAF and the admissibility of its reports in national proceedings, if the rule on such admissibility will continue to be based on the assimilation between OLAF reports and those of national inspectors.[21]

First, the assimilation principle per se and in all its forms, including the traditional assimilation of sanctions as inaugurated by the *Greek Maize* case of the Court of Justice,[22]

[17] German report, section 1.
[18] ibid.
[19] Dutch report, section 1. In addition to fines, Dutch administrative law contemplates administrative sanctions of a reparatory nature, ie aimed at restoring a lawful situation, such as tax surcharges and the recovery of unlawfully paid subsidy (ibid).
[20] Tax and customs authorities can also impose administrative fines (ibid).
[21] Art 11(2) 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) [2013] OJ L 248/1 (hereinafter also 'OLAF Regulation').
[22] Case 68/88 *Commission v Greece* ('*Greek Maize*'), EU:C:1989:339.

implies that disparities among Member States will continue to exist.[23] OLAF reports have different status and follow-up in the Member States, according to the specificities of each national system. The assimilation between national and EU rules (or authorities) favours the process of EU integration in a way that minimises the EU's impact on national systems and assuages Member State concerns over the loss of sovereignty. Perhaps surprisingly, there is considerable room for assimilation even in the context of the recently created European Public Prosecutor's Office (EPPO): in the light of the extensive interplay between national and EU law within the EPPO and of a clear political will to keep the EPPO close to national systems,[24] the Regulation refrains from equipping the Office with a broad set of powers defined autonomously at the EU level but mostly aims to ensure that the EPPO can use the same powers as national prosecutors can.[25] The extensive reliance on national legislation sits uneasily with – and could hamper the achievement of – the mission with which OLAF and the EPPO are tasked, namely that of protecting a quintessentially supranational legal interest such as the EU budget.[26]

Second, the assimilation principle requires comparable rules or authorities at the national level. If national rules do not per se pass muster, their ineffectiveness will unavoidably extend to the EU setting in which they apply.[27] Moreover, if 'assimilable' national rules or authorities do not exist or are difficult to pinpoint, eg because national legislation is fragmented, the application of the assimilation principle risks being stalemated.[28] Indeed, as for OLAF reports, Ligeti points out that Article 11(2) of Regulation 883/2013 'presupposes the existence at national level of an administrative authority comparable, in its functions and powers, to OLAF. If there is no such

[23] Katalin Ligeti, 'The Protection of the Procedural Rights of Persons Concerned by OLAF Administrative Investigations and the Admissibility of OLAF Final Reports as Criminal Evidence' (Study for the European Parliament's Committee on Budgetary Control 2017) 27. See also, with respect to the assimilation principle in the aftermath of the *Greek Maize* case, Giovanni Grasso, 'Relazione Introduttiva' in Giovanni Grasso and Rosaria Sicurella (eds), *Per un Rilancio del Progetto Europeo. Esigenze di Tutela degli Interessi Comunitari e Nuove Strategie di Integrazione Penale* (Giuffrè 2008) 13–16.

[24] For an overview on this interplay and some of its potential consequences, see Fabio Giuffrida, 'The European Public Prosecutor's Office: King without Kingdom?' CEPS Research Report No 2017/03 (2017) <www.ceps.eu/ceps-publications/european-public-prosecutors-office-king-without-kingdom/> accessed 30 June 2019.

[25] See Art 30(1) and (4) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] OJ L 28/1 (hereinafter 'EPPO Regulation'), especially in comparison with Art 26 of the Commission's Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final, 17 July 2013.

[26] On OLAF's extensive reliance on national law, see the in-depth analysis of the first Hercule III study, Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017).

[27] See, with respect to the 'traditional' assimilation principle as per the *Greek Maize* case, 'Explanatory Memorandum' in Mireille Delmas-Marty (ed), Corpus Juris *Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Economica 1997) 16.

[28] Ligeti (n 23) 27. Similar difficulties in finding a comparable offence, when it comes to the assimilation principle concerning crimes against national and EU budgets, have been mentioned by Petter Asp, 'European Criminal Law and National Criminal Law' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar 2016) 318; André Klip, *European Criminal Law. An Integrative Approach* (3rd edn, Intersentia 2016) 76.

administrative actor at national level, the assimilation provision will remain an *empty box* leading to the potential inadmissibility of the OLAF Final Report'.[29]

2.2 Function of admissibility rules in national criminal law

As Vervaele notes in his transversal report, the rationale behind admissibility rules in national criminal law varies from country to country, although some broad categorisations are possible.[30] Despite such differences, one can agree with the UK report's remarks, according to which,

> [i]n criminal procedure, the exclusion of an item of evidence may be for one or more of the following reasons:
>
> (a) to prevent irrelevant information going into the proceedings;
>
> (b) to ensure the fairness of the proceedings;
>
> (c) to exercise control over the enforcement authorities; or
>
> (d) to provide more widely acceptable decisions.[31]

What the UK report does not expressly mention, unlike the French, German, Hungarian, and Luxembourgish reports, is the relevance of admissibility rules for the protection of *human rights* of persons involved in criminal proceedings, although this is somehow implied in the reference to the fairness of the proceedings. The Italian report does not include a formal reference to human rights either, yet it underlines that admissibility rules in national criminal proceedings aim to ensure the equality of arms among the parties, the protection of the dignity of all individuals potentially involved in criminal procedures, and the fairness of the proceedings.[32]

The German and Dutch reports highlight the link between the rules on admissibility of evidence and the *rule of law*. As we read in the latter, 'Punishment of a citizen by the state is only accepted if it has been established in a proper way and according to the applicable rules of law that an offence has really been committed and that the accused can be held responsible for that offence'.[33] The German report also clarifies that German admissibility rules are based on what could be called a 'balancing approach',[34] since in principle the exclusion of evidence should follow an overall

[29] Ligeti (n 23) 27 (emphasis added). For further remarks on the assimilation principle as enshrined in Art 11(2) of Regulation 883/2013, see the transversal report by Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt on 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings', section 6.3; transversal report by John Vervaele on 'Lawful and Fair Use of Evidence from a European Human Rights Perspective', section 6.

[30] Vervaele, transversal report, section 2, where there is a distinction among countries adopting: the 'vindication of rights approach' (evidence is excluded because its admissibility would infringe fundamental rights); the 'deterrence approach' (rules on evidence aim to ensure that law enforcement authorities do not collect evidence in an illegal way); and the 'judicial integrity (or balancing) approach' (evidence is declared inadmissible after a balancing exercise between the violation of individual rights and the Member State's interest in convicting the alleged offenders) (ibid).

[31] UK report, section 1.1.

[32] Italian report, section 1.1.

[33] Dutch report, section 1.1.

[34] Vervaele, transversal report, section 2.

balancing exercise between the gravity of individual rights' violations and the impact of admitting that evidence on the fairness of the proceedings, as well as on the public interest in enforcing criminal law.[35]

In a way confirming that Member States have divergent takes on evidentiary matters, German and Dutch rules are however different with regard to, among other things, the examination of witnesses before and during the trial. In Germany, the examination at trial cannot in principle be replaced by reading reports of a pre-trial interrogation, although there are some (limited) exceptions. This rule shows that the record of an interrogation carried out before a judge is considered more reliable than that of the examination conducted by public prosecutors or police officers.[36] In the Netherlands, on the contrary, the Supreme Court accepted several decades ago that a written statement obtained during pre-trial investigations can be used as evidence at trial, so that witnesses no longer have to come to court to give evidence; an official report containing their statements collected during the pre-trial phase is in principle sufficient.[37]

In a recent CJEU judgment on admissibility of evidence in criminal proceedings (*Dzivev*),[38] the Court stressed both the human rights and the rule of law dimensions behind the rules on admissibility.[39] In the frame of Bulgarian investigations on serious VAT-related crimes, the recording of some conversations involving the defendant had been ordered by a court that was not competent to do so and, apparently, without sufficient reasons to justify it. The Specialised Criminal Court of Bulgaria thus required the CJEU to rule on whether the national rule providing for the inadmissibility at trial of such a recording was at variance with Article 325(1) TFEU, ie with the obligation of Member States to adopt effective and dissuasive measures to counter illegal activities affecting the Union budget. It was clear that, without the recording, the defendant would be acquitted of the serious PIF crimes for which he had been indicted in Bulgaria.[40]

Sharing in essence the Advocate General's view,[41] the Court of Justice argues that the Bulgarian court is not required to disapply national legislation on the admissibility of evidence, as the protection of EU financial interests cannot trump respect for fundamental rights and general principles of the EU. As for the former, in particular, the CJEU emphasises the importance of the principles of legality and of the rule of law, which forbid national courts from acting beyond the legal limits set out by national legislation.[42] Furthermore, the Court reiterates that the interception of telecommunication entails a

[35] German report, section 1.1. For instance, the failure to inform the defendant of the right to free legal assistance would not lead to the exclusion of evidence collected by interrogating him or her, if the defendant was properly informed of the right to consult with a defence counsel and has sufficient means to afford a defence lawyer (ibid).
[36] ibid.
[37] Dutch report, section 1.1.
[38] Case C‑310/16 *Dzivev and Others*, EU:C:2019:30.
[39] For further remarks on *Dzivev* see Vervaele, transversal report, section 2.
[40] Reference for a preliminary ruling from the Spetsializiran nakazatelen sad (Bulgaria) lodged on 31 May 2016 — Criminal proceedings against Petar Dzivev (Case C-310/16). PIF stands for '*protection des intérêts financiers*'.
[41] Case C‑310/16 *Dzivev and Others*, Opinion of AG Bobek, EU:C:2018:623.
[42] Case C-310/16 *Dzivev*, paras 33–35.

violation of the right to privacy enshrined in Article 7 of the Charter of Fundamental Rights of the European Union (CFR). Hence, as the interception was authorised by a court lacking the necessary jurisdiction, it amounts to a limitation of the right to privacy that is not in accordance with the law and thus violates Article 52(1) CFR.[43] In other words, 'Article 325 TFEU cannot be used as the legal base for introducing a balancing test between EU effectiveness and applicable legal safeguards in case of unlawful evidence'.[44]

Finally, some reports link criminal law rules on admissibility with *core features* of national criminal justice systems.[45] For instance, in Italy, such rules mirror the adversarial structure that the 1988 Code of Criminal Procedure (CCP) introduced, radically departing from the previous inquisitorial tradition; they aim to ensure that each party is in a position to put forward the relevant evidence that is useful for the courts to decide on a case.[46] This is the bulk of the principle of equality of arms, which in turn is the cornerstone of accusatorial systems.[47] In a similar vein, admissibility rules are a function of the jury system in the UK, at least partly. The English and Welsh system reveres the jury but is very concerned to avoid it being given any evidence which might be irrelevant or prejudicial.[48]

The strict link between the very nature of national criminal justice systems and rules on admissibility of evidence is a testament to the matter's sensitivity, which currently escapes the European harmonisation even in its cross-border dimension, ie when evidence is collected in one Member State and is to be used in another. Although Article 82(2)(a) TFEU allows the Council and the Parliament, to the extent necessary to facilitate mutual recognition of judgments, to adopt minimum rules concerning the mutual admissibility of evidence between Member States, to date there is no relevant EU legal instrument that deals with the issue.[49] It goes without saying that the Member States' resistance to approximate the rules on evidence, which the laconic EPPO Regulation's provision on the matter further confirms,[50] can represent an obstacle to OLAF's delivery of coherent and efficient results.

[43] 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be *provided for by law* and respect the essence of those rights and freedoms …' (Art 52(1) CFR; emphasis added).
[44] Vervaele, transversal report, section 2. For further remarks on *Dzivev*, see also Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.5.
[45] See also Vervaele, transversal report, section 2.
[46] Italian report, section 1.1.
[47] For further detailed remarks on the equality of arms in Europe, see Marloes C van Wijk, *Cross-Border Evidence Gathering. Equality of Arms within the EU?* (Eleven International Publishing 2017) 13ff.
[48] UK report, section 1.1.
[49] See also Vervaele, transversal report, section 3.
[50] ibid. Reference is meant to Art 37 of the EPPO Regulation ('Evidence'). For further remarks on this provision see Silvia Allegrezza and Anna Mosna, 'Cross-Border Criminal Evidence and the Future European Public Prosecutor. One Step Back on Mutual Recognition?' in Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 157–160. See more in section 5.3 below.

2.3 Function of admissibility rules in national punitive administrative law

The transversal report on 'Lawful and Fair Use of Evidence from a European Human Rights Perspective' notes that, in general,

> the conceptual framework of evidence is related to the finality of the punitive process, based on the formal and substantive *truth* sustained by evidence/proof that does respect due process. This therefore includes the *legality of the proceedings* from the start of the pre-trial investigations and respect for *fundamental rights* and procedural guarantees during the proceedings.[51]

When discussing the function of admissibility rules in national punitive administrative law, all national reports touch upon – either alternatively or cumulatively – these issues. With slightly different nuances, they stress that regulating the process of seeking the truth is the rationale behind the rules on admissibility, especially as such rules require the exclusion of information that is not relevant to the final decision that the competent administrative authorities should adopt. Likewise, the majority of national reports mention that rules on (in)admissibility of evidence are also linked with the need to ensure adequate protection of the rights of persons involved in punitive administrative proceedings, either as such or as part of the fairness of the proceedings.

At the same time, rules concerning the admissibility of evidence in national administrative proceedings are overall rather *scarce* in the Member States, as the Dutch, French, Italian, and Luxembourgish reports explicitly note.[52] Furthermore, punitive administrative proceedings seem to have an unclear identity within the EU. In countries like Germany, they are closer to criminal than civil proceedings, and the criminal law rules on admissibility apply accordingly.[53] At the other end of the spectrum, administrative proceedings, including punitive ones (which are not an independent category), are civil proceedings in the UK.[54] Likewise, in France,

> the general tendency is to use the ordinary law of civil procedure when the judicial judge is competent; this may be surprising given the punitive nature of the procedure and the sanction. As for administrative case law, it should also be noted that it has evolved to move closer to civil procedure and, in so doing, away from criminal case law.[55]

Finally, in Italy, procedures before administrative courts are based on civil procedure rules, as these courts can rely on all means of proof established by the Civil Procedure

[51] Vervaele, transversal report, section 2 (emphasis added).
[52] See section 1.2 of: Dutch report; French report; Italian report; and Luxembourg report. In a similar vein, the Hungarian report mentions that administrative authorities, when they need to establish the facts of a case for their decisions, are free to choose from the means of evidence provided for by law and all evidence may be used to this end, save for that obtained unlawfully (Hungarian report, section 1.2).
[53] German report, section 1.2. However, the provisions on the quality and reliability of evidence are less strict than in criminal law and allow for a simplified procedure of taking evidence, eg they allow the reading of previous statements by witnesses rather than examining them anew (ibid).
[54] UK report, section 1.2.
[55] French report, section 1.2.

Code, with a few exceptions.[56] However, in tax administrative proceedings in the field of VAT, the rules of the CCP apply to fill the gaps of sectoral rules.[57]

Once again, the scenario described so far can have a bearing on OLAF activities and on the assimilation rule enshrined in Article 11(2) of Regulation 883/2013. The lack of clear rules at the national level obscures the fate of OLAF-collected evidence once transmitted to national authorities. This may change with the forthcoming amendment of Regulation 883/2013, as further discussed in section 5.3 below.

2.4 Free or 'controlled' systems of proof

Having discussed the rationale behind the admissibility rules in national systems, it is now appropriate to look more closely at such rules, in order to understand how they (can) impact OLAF-collected evidence. This section offers a panorama of the key principles of the seven Member States under analysis, assessing whether these countries are systems of free or controlled proof, both in criminal (section 2.4.1) and punitive administrative law (section 2.4.2).

2.4.1 Criminal law

France, Hungary, Luxembourg, and the UK are free proof systems.[58] Any kind of evidence is admissible and can be accepted and taken into account by criminal courts when deciding a case. However, 'free' does not mean 'unconditional'. Even if there is no *numerus clausus* of means of proof, evidence collected shall meet some requirements to be admissible. In general, such requirements are justified by the need to protect the fundamental rights of persons subject to criminal investigations and, more broadly, the legality and fairness of the proceedings.

In France, the principle of freedom of evidence is tempered by those of lawfulness and fairness. As stated in French literature, '[E]vidence may be obtained *beyond* legal provisions, but not *against* legal provisions'.[59] If the law is violated in the collection of evidence, such evidence is inadmissible (principle of lawfulness). In addition, even when the procedure of gathering evidence is lawful, the principle of fairness may still come into consideration and lead to the exclusion of evidence. As the French rapporteur notes, the principle of fairness

> sanctions the unfairness of public authorities beyond mere lawfulness … Although lawful, if [a scheme by public authorities] irreparably impairs the rights of the defence, it

[56] Italian report, section 1.2.
[57] ibid.
[58] The Luxembourgish criminal justice system is one of free proof as long as the most serious offences (ie *crimes* and *délits*) are concerned, while *contraventions* (ie less serious offences) shall be proved by means of either official reports or witnesses in the absence of official reports, or in support of those reports (Art 154 of the Luxembourgish CCP; see Luxembourg report, section 1.3.1). In a similar vein, French doctrine is divided on whether freedom of evidence is restricted with respect to *contraventions* (French report, section 1.1, fn 16).
[59] Etienne Vergès, Géraldine Vial and Olivier Leclerc, *Droit de la Preuve* (Presses Universitaires de France 2015) no 272 (translation by Juliette Tricot in French report, section 1.1).

> must lead to the exclusion of the evidence gathered … In a way, in the silence of the law of criminal procedure … *fairness frames the limits of lawfulness* (what is not permitted by the CCP is not prohibited: one must demonstrate either the misuse of procedure or an interpretation *contra legem* of the procedure).[60]

An example of an unfair scheme by public authorities is incitement to commit an offence.[61] This disloyal way to obtain evidence determines its inadmissibility also in Luxembourg, along the lines of the ECtHR's case law.[62] To be admitted at trial, evidence shall be 'loyally' obtained, useful, and subject to the adversarial principle ('*contradictoire*').[63] According to a 2007 leading case by the Luxembourgish Court of Cassation, criminal courts cannot base a conviction on evidence that has been unlawfully obtained if: i) the respect of given formal requirements is imposed by law under penalty of nullity; ii) the committed irregularity has tainted the credibility of evidence; or iii) the use of evidence is contrary to the defendant's right to a fair trial.[64] The wording of this judgment would imply that, in principle, evidence that has been unlawfully obtained could even be admitted at trial, if none of these conditions is met. However, the Court of Cassation clarifies that the defendant's right to a fair trial can only be ensured if legality in the administration of evidence is respected. In the same case that gave rise to the 2007 decision and after this judgment, the Court of Appeal stressed indeed that the principle of legality in the administration of evidence is the fundamental requirement to ensure the right to a fair trial.[65] Hence, in practice, illegally or improperly obtained evidence cannot be used at trial.[66]

By the same token, the UK free proof system is tempered by some exclusionary principles to do with the reliability of the evidence or the treatment of criminal defendants.[67] In particular, evidence can be declared inadmissible either when public authorities' violations are so gross that the criminal proceedings become an abuse of the process or when, 'having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.[68] Finally, Hungarian law, while opting for a system of free proof, generally denies the admissibility of evidence gathered by means of a criminal offence, by otherwise breaching the law or by a substantial restriction of the defendants' procedural rights.[69] In

[60] French report, section 1.1 (emphasis added).
[61] ibid. When private parties present unlawful and unfair evidence, however, such evidence is in principle admissible. Subject to an adversarial debate, its probative value is to be assessed by the judge in accordance with the principle of unfettered evaluation of evidence (ibid, section 1.3.1).
[62] See more in Vervaele, transversal report, section 5.1.
[63] Luxembourg report, section 1.3.1.
[64] ibid. Reference is meant to Court of Cassation, 22 November 2007, No 2474.
[65] Court of Appeal, 26 February 2008, No 106/08.
[66] Luxembourg report, section 1.3.1.
[67] UK report, section 1.3.1.
[68] Police and Criminal Evidence Act 1984 s 78. See UK report, section 4.1.
[69] Hungarian report, section 1.3.1. Violations of law in the collection of evidence may be repaired in second instance proceedings: for example, if a witness was examined without the usual warnings, he or she can be heard again before the second instance courts, although this may affect the probative value of the testimony (ibid).

addition, it provides for specific exclusionary rules, such as those concerning witnesses' and defendants' statements collected in violation of their rights.[70]

Unlike the countries mentioned so far, Germany, Italy, and the Netherlands are controlled systems. According to Dutch law, admissible means of evidence are only: i) the court's own observations; ii) the statements of the defendant; iii) the statements of a witness, including experts; and iv) written materials.[71] By the same token, there is an exhaustive list of means of proof in Germany (examination of witnesses, expert opinion, inspection, documentary evidence, and defendant statements)[72] and in Italy.[73] In the latter country, however, Article 189 CCP also allows for 'atypical' means,[74] insofar as they contribute to proving the *thema probandum* and do not breach the moral freedom of subjects potentially involved. The mentioned provision is used, for instance, in case of online searches, which the Italian CPP does not explicitly regulate. Hence, the Italian system can be defined as one of controlled proof with a rather broad opening clause.[75]

As further discussed below, it ought to be noted that both proof-free and controlled systems in principle consider OLAF reports admissible. In the former, this conclusion is straightforward, as freedom of proof implies that reports drawn up by OLAF – as long as the other requirements are met (eg fairness, *contradictoire*, etc) – are admissible. In controlled systems, OLAF reports usually fall within the notion of 'written materials'/'documents', the admissibility of which is not contentious. Therefore, the nature of the criminal justice system – ie whether it is a controlled system or one of free proof – does not seem to have a bearing on the *de iure* admissibility of OLAF-collected evidence in national criminal proceedings.

2.4.2 Punitive administrative law

All punitive administrative systems under analysis are of free proof, although in some countries there are exceptions in specific sectors. For instance, Italian legislation forbids the oath in tax administrative proceedings.[76] Likewise, in Luxembourgish VAT administrative proceedings, the VAT Administration can prove taxpayers' violations by means of any evidence with the exception of the oath.[77] Some reports also clarify that the usual requirements concerning fairness/lawfulness of the procedures or the adversarial principle (*contradictoire*) shall be respected in order for the evidence to be admissible

[70] ibid.
[71] Dutch report, section 1.3.1, where the few further Dutch rules concerning evidence are also discussed.
[72] German report, section 1.3.1. These are the only means of proof on which decisions on the *merits* of the case can be based, while procedural decisions (eg whether to place a witness under oath) can take into account any other means of evidence (ibid).
[73] Italian report, section 1.3.1.
[74] ibid.
[75] ibid.
[76] ibid, section 1.3.2.
[77] Luxembourg report, section 1.3.2. See also the Dutch report, section 1.3.2, where it is stated that sectoral laws may require that certain facts are proved with specific (authentic) documents, and the Hungarian report, section 1.3.2, where we read that 'there might be some limitations to the free system' since 'a statute or government decree may prescribe the use of documentary evidence in specific cases and for reasons of public interest'.

(eg, France and Luxembourg).[78] Similarly, Hungarian administrative law considers in principle inadmissible evidence that was gathered by the competent administrative authorities by means of a criminal offence, by otherwise breaching the law or by significantly restricting the procedural rights of the person concerned.[79] As noted above, OLAF-collected evidence is in principle admissible in systems of free proof.

2.5 Review of the decisions on admissibility of evidence

It can be gleaned from the previous sections that each Member State approaches the issue of the admissibility of evidence in a different way. When it comes to the possible review of the decisions on the (in)admissibility of evidence, a certain degree of consistency seems to exist throughout the EU.

In the seven Member States' criminal justice systems there is reportedly no decision on admissibility as such that may be subject to judicial review. The only and limited exception seems to be the UK, in cases where a trial judge in a Crown Court admits evidence adverse to the prosecution. In this situation, 'it is possible (though rare) for the trial to be paused and an appeal taken against that decision'.[80]

A control on evidence and its admissibility may nonetheless be triggered in two different ways. First, the admissibility of evidence can be contested by *appealing the decision* that criminal courts adopt at the end of the criminal proceedings. While this is a general principle, there are some specificities in each Member State. In Italy, for instance, only the non-admission of decisive counter-evidence can represent a ground for appeal before the Court of Cassation, while the same limitation does not stand with respect to the appeal lodged before the Courts of Appeal.[81] In Germany, the defence counsel shall raise the objection that inadmissible evidence has been accepted and used during the trial, otherwise the potential appeal of the court's decision cannot contest issues related to the admissibility of that evidence.[82]

Second, in most Member States it is usually possible to challenge, already during the pre-trial phase, an investigative measure carried out by public authorities (eg, public prosecutors or judicial police). If this action is successful, the evidence collected through that investigative measure shall not be included in the case file. This scheme is known in most countries as '*nullity*' (or 'invalidity') of investigative acts.[83] The French system is a case in point. Acts or documents of the procedure – a notion that covers not only the procedural acts performed by the investigative judge and his or her delegates, but also

[78] See, respectively, French report, section 1.3.2 (where it is specified that lawfulness and fairness are interpreted strictly in this context, ie, any evidence that is unlawfully or unfairly gathered by private or public parties is not admissible; cf n 61 above), and Luxembourg report, section 1.3.2.
[79] Hungarian report, section 1.4.
[80] UK report, section 1.4.1.
[81] Italian report, section 1.4.1.
[82] German report, section 1.4.1. The German rapporteurs however note that such a requirement has been highly criticised and does not apply, according to recent case law, to inadmissible evidence that has been collected by illegally searching private premises (ibid).
[83] Vervaele, transversal report, section 2. See also Martyna Kusak, *Mutual Admissibility of Evidence in Criminal Matters in the EU. A Study of Telephone Tapping and House Search* (Maklu 2016) 169ff.

acts of investigations and prosecutions – can be annulled by the investigating chamber (and not by the investigative judge), in principle upon request of the interested parties.[84] The nullity ('*nullité*') of an act can be provided for by the law, such as when given measures shall comply with a given requirement 'under penalty of nullity', but can also depend on the failure to abide by a substantive formality enshrined in a rule of criminal procedure, when such a failure adversely affected the concerned party's interests.[85]

Likewise, in Luxembourg, nullities can be 'formal', ie provided for by the law, or 'substantial/virtual'. Substantial/virtual nullities have been introduced via case law, when serious irregularities, including irregularities affecting the rights of defence, occur.[86] Luxembourgish public prosecutors, as well as any interested party having a legitimate interest, can ask the pre-trial chamber of the district court, within strict deadlines, to decide on the invalidity of acts ('*requête en nullité*') of pre-trial investigations. The legislator aims to ensure that objections to the admissibility of evidence are confined to the pre-trial phase, since the *requête en nullité* cannot – save for exceptional circumstances – be lodged before the trial court. If no control on illegally or improperly obtained evidence is triggered in time (or at all), such evidence becomes valid ('*purge de nullité*').[87] Similar possibilities to challenge the legality of investigative acts such as searches and seizures or surveillance measures are mentioned in the German report, which clarifies, 'If the court quashes the seizure, the public prosecutor must return the seized documents to the appellant. Upon request, the public prosecutor must delete corresponding data … and the applicant may bring the matter before court if the public prosecutor's office does not comply with its obligation'.[88]

Finally, as in the criminal law domain, there is reportedly no decision on admissibility as such in administrative proceedings that may be subject to judicial review. Again, issues concerning the admissibility of evidence can be contested when challenging the decision adopted by administrative authorities at the end of the administrative proceedings.[89] Administrative courts are usually competent for this review, but in some cases a first review is carried out within the administrative authorities themselves.[90]

The possibility to challenge the admissibility of evidence – even if not as such but together with the merits of the case or by indirectly challenging an investigative measure

[84] French report, section 1.1. The notion of 'acts or documents of the procedure' is highly discussed in French doctrine and does not cover mere means or proof of information, which cannot be annulled but are subject to adversarial debate during the trial and to the unfettered evaluation of the judge (ibid).
[85] ibid.
[86] Luxembourg report, section 1.1. In line with the Luxembourgish courts' monist approach, alleged violations of the ECHR rights, especially the rights of defence, could determine the nullity of a given procedural act (ibid).
[87] ibid. See also Vervaele, transversal report, section 2.
[88] German report, section 1.4.1.
[89] The above-mentioned criminal law rules on the judicial review of investigative measures apply as well, as long as a given investigative measure is available in punitive administrative proceedings (German report, section 1.4.2).
[90] In Luxembourg, for instance, VAT Administration decisions that impose financial penalties are first subject to the so-called '*reclamation*', by which the individual requires the Administration to reconsider its decision. This further decision of the Administration can then be challenged before the civil chamber of the district court of Luxembourg (Luxembourg report, section 1.4.2).

– is of the essence to ensure both adequate protection of the parties' rights and the lawful functioning of punitive systems. This becomes all the more important vis-à-vis OLAF reports, which are acts of an EU body that, albeit often adopted at the end of investigations that build on a blend of national and supranational law, enter national punitive proceedings. Precisely because of the nature of OLAF as an EU body, the right to challenge its reports should take into account the well-established CJEU case law according to which national courts cannot invalidate EU acts and decisions.[91]

2.6 Use of evidence declared inadmissible in different sets of proceedings

The present study has also discussed the possibility of using evidence gathered in one set of proceedings – for example criminal – in another set of proceedings – for example, administrative – and vice versa. After all, Article 11(2) of Regulation 883/2013 is inherently based on such a 'migration' of evidence: OLAF carries out administrative investigations, yet the results of its activities can (or at times should) be used in criminal proceedings. The nub of the issue is whether and to what extent the different rules and standards of the different sets of proceedings hamper the transfer and use of evidence. The question has not come often to the attention of the Court of Justice, and when it has, the solution has not always been clear-cut. In the light of national law (and consequent different approaches to the issue), therefore, there seem to be loopholes and gaps leaving the fate of OLAF-collected evidence unpredictable.

In one of the few cases where the CJEU addressed the issue of the 'migration' of evidence from one set of proceedings to another, *WebMindLicenses*,[92] the Court in essence ruled that the transfer of evidence obtained in the frame of criminal proceedings to parallel administrative procedures concerning violations of VAT rules does not breach EU law, and especially the fundamental rights enshrined in the Charter, as long as some requirements are complied with.[93] However, if they are not respected, national courts *must* disregard the evidence so collected. This case thus seems to suggest that

> the Luxembourg approach towards the appreciation of unlawfully obtained evidence in criminal proceedings is different from that of 'Strasbourg' … The latter court has held that violations of the right to privacy do not necessarily render a trial unfair, not even when these violations concern the use of intrusive techniques, such as covert listening devices without a legal basis … After all, a violation of Article 8 ECHR does not necessarily amount to a violation of Article 6 ECHR. Yet for 'Luxembourg', serious violations of procedural safeguards do seem to have an impact on, particularly, Articles

[91] See more in sections 3.3 and 4 below.

[92] Case C-419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, EU:C:2015:832.

[93] 'EU law does not preclude the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, provided that the rights guaranteed by EU law, especially by the Charter, are observed' (ibid, para 68; in the following paras the CJEU explains how such rights should be protected). For further remarks on this case, see Luchtman, Karagianni and Bovend'Eerdt, transversal report, sections 2.3 and 3.3, and Vervaele, transversal report, section 5.2.

> 41 CFR (good administration) and 47 CFR (fair trial). If correct, the argument is, presumably, that proceedings in which the investigative or prosecutorial bodies can afford *not* to follow the 'rules of the game' cannot be considered 'fair', nor can one maintain that such a situation is in line with the principles of a good administration.[94]

Against this backdrop, it has been first queried whether, at the Member State level, evidence declared inadmissible in administrative proceedings can be used in *criminal* proceedings. In Germany, this would not be in principle possible, as the same rules on the admissibility of evidence apply to criminal and punitive administrative procedures. Nonetheless, the admissibility of (any) evidence in criminal proceedings eventually depends on the criminal courts' balancing exercise: if they find that the interest in effectively prosecuting crimes trumps conflicting interests, they may even admit evidence that has been declared inadmissible in punitive administrative proceedings.

In the other countries, the approach is the opposite: despite a few caveats that have been put forward, evidence declared inadmissible in administrative proceedings is in principle admissible in criminal proceedings. According to the Italian and Luxembourgish reports, this is linked with the principle of autonomy of criminal and administrative proceedings, which, as in the UK,[95] does not oblige criminal courts to align themselves with administrative authorities' decisions. However, it is still possible that, on a case-by-case basis, evidence that has been declared inadmissible in administrative proceedings is not admitted in criminal proceedings either.[96] The Hungarian rapporteur adds that the above-mentioned autonomy may also lead to the opposite situation, ie evidence that has been declared admissible in administrative proceedings may be excluded from criminal proceedings on a case-by-case basis.[97]

In the Netherlands, criminal courts are in principle not bound by a prior administrative decision on admissibility of evidence either. According to the dominant position of Dutch doctrine,[98] evidence that has been unlawfully seized in non-criminal investigations, and not (yet) declared inadmissible, could only be excluded in criminal proceedings if: i) it has been seized in a way that runs so much against the proper acting of government that every use is intolerable; ii) the use of the evidence would violate the fair trial requirement; iii) the proper conduct of procedure has (severely) been violated; or iv) fundamental rights have been excessively infringed.[99] Similarly, the French rapporteur notes that legal texts do not provide a clear answer to the problem at stake, and court decisions are scattered and sometimes obsolete. As anticipated, the principle is that evidence declared inadmissible in administrative proceedings can be admitted in criminal proceedings and is then subject to the criminal judge's unfettered evaluation. If

[94] Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.3.
[95] UK report, section 1.5.
[96] Italian report, section 1.5; Luxembourg report, section 1.5; UK report, section 1.5, where it is added that, in practice, administrative proceedings are stayed pending resolution of the criminal proceedings.
[97] Hungarian report, section 1.5.
[98] Courts have rarely touched upon the matter (Dutch report, section 1.5).
[99] ibid.

administrative specialised officials have used their powers for purposes other than those provided for by the law, however, the evidence may be annulled.[100]

The French approach is different in the opposite scenario: when acts or documents of the criminal procedure are annulled, they are removed from the file and cannot be invoked any longer in other proceedings, whether criminal or *administrative*. This has been recently restated by the French Constitutional Council, which 'prohibited the tax and customs services from using documents obtained by an administrative or judicial authority under conditions subsequently declared illegal by the judge'.[101] A similar approach can be found in Germany where, in general, evidence declared inadmissible in criminal proceedings cannot be used in administrative ones. However, this is not always true, as there may be cases where a given criminal law rule that is violated does not apply in administrative proceedings, hence the evidence collected is still admissible in administrative proceedings. For instance, the obligation to inform the suspect of the right to consult a lawyer does not apply to punitive administrative proceedings. Hence, 'the evidence that has been illegally obtained in a criminal investigation could have been legally obtained in the framework of punitive administrative proceedings … Therefore, the evidence might be used in order to impose an administrative fine'.[102]

In the other Member States, evidence that has been declared inadmissible in criminal proceedings seems to be in principle admissible in administrative proceedings.[103] This is again linked with the principle of autonomy of different procedures.[104] The Dutch report extensively addresses the issue, by highlighting that, in accordance with established case law, unlawfully obtained evidence is in principle admissible in non-criminal proceedings,[105] *unless* the procedural rights of the suspects have been violated. Even if procedural rights are violated, evidence will not be automatically declared inadmissible, as the Dutch Supreme Court clarified that the use in administrative proceedings of evidence unlawfully obtained in criminal proceedings is not allowed '*only* in case that evidence is obtained in a way that runs so counter to what may be expected of a properly acting administrative authority … that the use of evidence should be considered inadmissible in all circumstances'.[106] This is the so-called '*zoozer indruist*' criterion, roughly translated as the 'manifest improper criterion', which leads to the exclusion of evidence only in a few cases, as it is a rather high threshold. Especially

[100] French report, section 1.5.
[101] ibid, section 1.6. The author refers to the decision of the Constitutional Council, 4 December 2013, no 2013-679 DC, recital 33, and adds that such a reservation 'seems to be of a general nature and is in line with the rules of criminal procedure … which deprive annulled acts of the possibility of being used in separate proceedings' (French report, section 1.6).
[102] German report, section 1.6.
[103] This evidence will usually be examined under the rules of administrative law and, as the latter can set lower standards than those of criminal law, evidence declared inadmissible in criminal proceedings may be admissible in administrative ones (see, eg, Hungarian report, section 1.6). The UK rapporteur however specifies that the reasons that prevent evidence from being admitted in criminal proceedings may also lead to its exclusion in administrative proceedings (UK report, section 1.6).
[104] See especially Italian report, section 1.6; Luxembourg report, section 1.6.
[105] If the administrative court decides to admit such evidence, in this way contradicting the criminal court's stance, it shall state the reasons for this (Dutch report, section 1.6).
[106] ibid (emphasis in the original).

infringements of fundamental rights such as those enshrined in Articles 6 and 8 ECHR may result in the inadmissibility of evidence.[107]

The scenario described so far lacks homogeneity and seems overall inspired by a case-by-case approach. With few exceptions, the transfer of (inadmissible) evidence from one set of proceedings to another is allowed. The violation of criminal law rules does not imply, at least per se, the inadmissibility of evidence in administrative proceedings, and vice versa. It is difficult to draw lessons for OLAF from this multifaceted state of affairs. One might for instance expect that – although clear and conclusive data are not available – the more national systems have an open attitude towards the 'migration' of evidence from criminal to administrative proceedings (and vice versa), the fewer problems the admissibility of OLAF-collected evidence would encounter when passing from EU to national level. In addition, the more the issues dealt with in this section are left to the decision of national courts rather than being regulated by the legislator, the less foreseeable is the eventual admissibility of OLAF reports in domestic proceedings. At the same time, however, fundamental rights of individuals concerned by these proceedings may be better protected thanks to the involvement of national courts and their assessment of the admissibility of evidence on a case-by-case basis. In a way, as mentioned, this also seems required by the *WebMindLicenses* decision by the CJEU.

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

This section examines how the general principles discussed above play out in the context of national punitive administrative proceedings where OLAF-collected evidence is to be used. After an overview of national legislation and case law (section 3.1), the focus of the analysis shifts to the issues of whether potentially higher national standards on procedural safeguards have an impact on the admissibility of OLAF-collected evidence (section 3.2) and of the challenges to OLAF-collected evidence by interested parties (section 3.3). Section 3.4 concludes by looking at other EU entities that may provide evidence to be used in punitive administrative proceedings, namely the ECB, ESMA, and DG COMP, in order to assess whether their experience may provide useful examples for OLAF.

3.1 OLAF-collected evidence and punitive administrative proceedings: Legislation and case law

In all legal systems under analysis, there is *no specific rule* concerning OLAF-collected evidence and its admissibility in punitive administrative proceedings. The general rules apply. Especially since all seven national systems of punitive administrative law are based on the principle of free proof,[108] OLAF-collected evidence should be in principle admissible, as long as it complies with the specific requirements that may be provided for by each system. The Hungarian report however specifies that OLAF reports as such do not absolve administrative authorities from the obligation to investigate the facts of the

[107] ibid.
[108] See above, section 2.4.2.

case. Therefore, 'OLAF reports as such do not constitute evidence on which the authority could automatically base a final decision'.[109] As OLAF reports are treated in the same way as reports of national administrative authorities,[110] this is a clear example of the risks attached to the assimilation principle. As further discussed in section 5, such a restrictive approach by Hungarian authorities, which requires OLAF activities to be substantiated by further investigations by national authorities, has also come to light with respect to criminal proceedings.

The French report mentions instead a decision where the Paris Court of Appeal held exactly the opposite stance, at least insofar as customs proceedings are concerned. In a case decided in March 2014, '[T]he judge was … careful to reject the company's arguments that the customs administration had relied solely on the OLAF report … This source alone may be sufficient to form the basis for the offence notification report'.[111] Likewise, the Italian rapporteurs clarify that, as far as tax proceedings are concerned,[112] established case law abides by the rules of Article 11(2) of Regulation 883/2013. Italian courts do not require national authorities to conduct further investigations following the transmission of OLAF final reports. All kinds of information transmitted by OLAF (documents, information, and even reports of the single actions overtaken by the Office) can be used as sources of evidence.[113]

The fact that OLAF reports are *admissible* in punitive administrative proceedings, however, does not automatically imply that this evidence will suffice to adopt an administrative sanction or that this evidence will be *used* altogether. While all national rapporteurs mention that, for the time being, there is no case law on the inadmissibility of OLAF reports in national punitive administrative proceedings, they give some interesting examples of judgments where the use of OLAF-collected evidence was challenged before national courts, mostly in customs cases.[114]

For instance, the UK report lists three cases where OLAF provided evidence that was eventually admitted in non-criminal proceedings.[115] In none of them was there any direct question as to its admissibility. *Belgravia Trading Co Ltd & Others v Revenue & Customs* is worth mentioning in this context, although it does not concern the admissibility and use of OLAF-collected evidence in 'punitive administrative proceedings' as such but rather in proceedings before the UK first-tier tribunal (tax chamber). In that case, OLAF provided the Revenue & Customs authority (HMRC) with, among other things, multiple hearsay, the admissibility of which before the tribunal was contested by the interested company and supported by the HMRC. The tribunal endorsed the stance of the latter. In accordance with its rules of procedure, which are less strict than

[109] Hungarian report, section 2.1.
[110] ibid, section 2.2.
[111] French report, section 2.2. The same goes for Germany, as may be inferred from the German report, section 2.1.
[112] The same applies to customs proceedings (cf n 10 of the Italian report, section 2.2).
[113] Italian report, section 2.2.
[114] As the German rapporteurs note, customs proceedings 'do not fall under the definition of "punitive administrative proceedings" because they do not qualify as criminal according to the *Engel* criteria' (German report, section 2.2).
[115] UK report, section 2.2.

those of criminal procedure,[116] the tribunal can exclude evidence if it would be unfair to admit it. This was precisely the company's request with respect to OLAF reports, because of the hearsay included therein. The tribunal rejected such a request, pointing out that the company could cross-examine a Commission official to obtain further information on OLAF activities and could also 'invite the Tribunal through submissions to place whether weight, if any, on that evidence in view of any shortcomings identified by the appellants'.[117] Hence, as long as the *contradictoire* on OLAF-collected evidence is ensured, the admissibility of this evidence cannot be denied, especially because OLAF's findings – as well as any other evidence – are not binding on the tribunal. The tribunal indeed clarifies that the duty of sincere cooperation between EU institutions and Member States implies that the tribunal '*may* take the OLAF mission report into account but [does] not go as far as suggesting that the Tribunal *must* take them into account'.[118] The tribunal is thus free to exclude these reports, as well as any other evidence, if the circumstances so require.

Customs cases where the admissibility of OLAF-collected evidence has been upheld are also mentioned by the Dutch, French, and German reports. In the Netherlands, there are several judgments concerning the '*uitnodigingen tot betaling*' (tax surcharges) in customs cases, in which OLAF reports play a role. In these decisions, which are not punitive, the unlawfulness of the OLAF investigation has never been questioned by the parties and/or assessed by the court.[119] The rapporteurs however argue that, should this be the case in the future, it is likely that the OLAF report would be excluded as evidence only if it had been obtained by OLAF 'in a way which runs so counter to what can be expected of a properly acting administrative authority that the use of it should be considered inadmissible in all circumstances (the "manifestly improper criterion")'.[120] This seems in line with a customs case decided by the Customs Chamber of the Amsterdam Court of Appeal in 2012, where the Dutch court rejected the plaintiff's challenge to the use of OLAF reports, noting, 'Setting aside the findings of a fact-finding mission by OLAF is such a far-reaching act that in general this will only be justified if the plaintiff's allegations against the findings of OLAF's fact-finding mission are *so serious* that no credibility can any longer be attached to the findings of OLAF'.[121]

In France, while it is not contentious that OLAF reports are admissible as evidence in customs proceedings, the challenges raised by the parties relate sometimes to language issues. In some cases, OLAF reports have been the basis upon which the French liberty and custody judge ('*juge des libertés et de la détention*', JLD) ordered – upon request by the customs administration – searches and seizures. According to an old French legal text, procedural documents shall be drafted in French. Hence, interested parties have often

[116] On the contrary, 'In proceedings governed by the stricter rules of criminal evidence there would have been hurdles to surmount to secure the admissibility of the evidence' (ibid).
[117] *Belgravia Trading Co Ltd & Others v Revenue & Customs* [2014] UKFTT 31 (TC), para 29.
[118] ibid, para 37 (emphasis added).
[119] Dutch report, section 2.2.
[120] ibid, section 2.1.
[121] NL:RBHAA:2011:BV1238, case no 11/00839 (emphasis added), as reported and translated by Vervaele, transversal report, section 6.

argued that the JLD cannot base his or her decisions on OLAF reports, which are drafted in English and usually not translated before the JLD adopts search and seizure orders. However, French courts systematically dismiss these arguments, as only documents of the procedure as such shall be drafted in French, while this does not exclude that documents in a foreign language may be produced and may form the basis of a decision by a JLD who is able to understand them.[122]

In other French cases, the interested party has complained about the competent authorities' failure to disclose OLAF reports. Hence, the challenge here does not touch upon the admissibility of evidence collected by OLAF but rather 'the conditions under which national authorities can rely on such evidence and *use it as a basis for a sanction decision*'.[123] In a case decided in 2013, the Court of Appeal of Pau found that the customs proceedings against a company were irregular because 'annexes to an OLAF report used as the basis for the customs proceedings against this operator were not communicated to him (before the notice of recovery) and … only extracts from the OLAF report were transcribed in the Customs records, whereas they should have been included in their entirety'.[124] The Commercial Chamber of the French Court of Cassation subsequently upheld this judgment.[125] Therefore, the issues that OLAF reports raise do not relate to their EU origin but rather to their use at the national level and to the breach of defence rights that can follow from their late disclosure to the interested party.

Interested parties have at times challenged the non-disclosure of OLAF reports in Germany as well. In a case before the Hessen Fiscal Court, the plaintiff argued that it was not clear how OLAF reached its conclusions and the court agreed that not all the points included in the OLAF report were convincing.[126] There were other instances where German fiscal courts did not find OLAF reports convincing. In a case concerning the shipment to the EU of goods produced in China without the payment of the due customs duties, the Düsseldorf Fiscal Court agreed with the plaintiff that OLAF reports were insufficient to issue a fine, because on-the-spot checks would have been necessary but were not carried out by national authorities or OLAF. In another case where OLAF officials had instead travelled to the place where irregularities were detected, and reported these irregularities accordingly, another German fiscal court was convinced by the findings of OLAF reports.[127] The German rapporteurs thus comment on this case law by noting, 'OLAF-reports are admissible evidence in fiscal court proceedings, but it is for the court to evaluate the report and to assess its accuracy and consistency … No case was found where the OLAF report was rejected on principle'.[128]

[122] French report, section 2.2.
[123] ibid (emphasis added).
[124] ibid.
[125] ibid.
[126] German report, section 2.2.
[127] ibid.
[128] ibid. They also add that 'it is remarkable to see how willingly the courts accept the OLAF report as convincing and how little attention is paid to principle-based objections of the plaintiff. While this may be acceptable in administrative law, it would hardly be accepted in proceedings before a criminal court' (ibid), as in criminal proceedings the standards of evidence are much higher than in customs law.

Therefore, in Germany as well as in the other Member States, the admissibility of OLAF reports as such does not automatically entail that they will be used by national administrative authorities or by domestic courts. Once an OLAF report is admitted in national proceedings, the use that domestic courts or authorities can make of it will mostly depend on its quality and on the reliable evidence that it can provide. As this study will further demonstrate, the admissibility of OLAF reports is only one side of the coin, and not necessarily the most contentious.

3.2 Impact of higher national standards on admissibility of OLAF-collected evidence

If national administrative law provides for higher standards in relation to procedural safeguards than EU law provides, this may in principle hinder the admissibility of OLAF-collected evidence in domestic punitive administrative proceedings. Such a situation could for instance occur in the field of competition law, where, according to the case law of the Court of Justice, in-house lawyers are not covered by legal professional privilege (LPP).[129] If national law accords such a privilege also to in-house lawyers, it may be thus the case that evidence collected in competition proceedings regulated by EU law is not admissible in national proceedings where there are higher standards of procedural safeguards. It has thus been queried whether the same could happen in the frame of OLAF activities. The issue is crucial in assessing the effectiveness of OLAF investigations, especially from the perspective of their follow-up in national systems. As the OLAF Supervisory Committee argued in 2017,

> [T]he standard of protection of fundamental rights and procedural guarantees of the persons concerned has a *direct influence on admissibility of evidence* in subsequent proceedings before national authorities. Special attention should be paid to avoiding *differences in standards*, *especially if the standards of relevant national proceedings … are higher*. This would avoid situations where OLAF investigations and the evidence collected within become devalued.[130]

The differences in standards may be especially relevant when OLAF-collected evidence is to be used in criminal proceedings. One may also wonder to what extent the provisions of the OLAF Regulation on evidence still allow for higher national standards. The guiding principle should in any case be the one singled out by the CJEU in *Melloni*, and namely that higher national standards are allowed as long as 'the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[131]

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[129] See more in Mira Scholten and Michele Simonato, 'EU Report' in Luchtman and Vervaele (eds) (n 26) 38 and 51. For further remarks on competition proceedings, see Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 4.

[130] OLAF Supervisory Committee, 'Opinion 2/2017 Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19)' (2017), para 35 (emphasis added).

[131] Case C-399/11 *Melloni*, EU:C:2013:107, para 60. See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.1; Vervaele, transversal report, section 7.

Be that as it may, as far as national punitive administrative proceedings are concerned, none of the national reports mentions a case where the disparity between EU and national standards led to the inadmissibility of OLAF-collected evidence in such proceedings. The German and Dutch reports make some remarks on the LPP. In the Netherlands, all lawyers who are members of the Dutch Bar Association enjoy this privilege. Hence, national standards of protection are higher than EU standards. The Dutch rapporteurs note however that, on the one hand, LPP-connected issues have never arisen with respect to OLAF. On the other, they wonder what would happen if OLAF carries out an investigation in another Member State, in which the LPP does not apply to in-house lawyers (unlike the Netherlands), and evidence collected by the Office is then used in the Netherlands. They argue that the 'manifest improper criterion' would apply, ie evidence would be excluded only if it was obtained in a way that runs so excessively counter to what may be expected of an administrative authority that its use should be considered inadmissible in all circumstances. However, as mentioned above, this is a rather high threshold; hence, one may expect that Dutch courts would declare OLAF reports admissible, because the violation of the LPP is likely neither to qualify as a breach of the right to fair trial nor to affect the essence of the right to privacy.[132]

The German report draws a similar conclusion. The LPP does not cover in-house lawyers in Germany, yet it applies to other categories of professionals who are not taken into account by EU law, such as tax accountants. The German rapporteurs note however that it is unlikely that evidence collected by OLAF in violation of the accountants' LPP would lead to its inadmissibility, as previous national case law suggests that – in the balancing exercise that characterises the German system of evidence – the interest in effective law enforcement would trump the safeguarding of the privilege at hand.[133] The privilege against self-incrimination may instead bring to the fore different issues, since it enjoys absolute protection under German constitutional law as an expression of inviolable human dignity. When individuals are obliged to disclose self-incriminating information in tax or insolvency proceedings, this information cannot be used in criminal proceedings. However, criminal courts have sometimes accepted documents presented to the authorities in banking proceedings as evidence. As the German rapporteurs note, the situation is still unclear in this respect but, in principle, there should be no issues concerning the violation of the privilege at hand in OLAF interviews, as Article 9(2) of the Regulation 883/2013 recognises the right to avoid self-incrimination.[134]

Precisely in the light of the procedural safeguards provided for by Article 9 of the OLAF Regulation, the Italian rapporteurs put forward a potential explanation of the reason why higher national standards are not reported as affecting the admissibility of OLAF-collected evidence in punitive administrative proceedings. They argue that OLAF safeguards as provided for by Regulation 883/2013 are 'generally *higher* than the guarantees established in national administrative proceedings, and more similar to the

[132] Dutch report, section 2.3.
[133] German report, section 2.3.
[134] ibid.

safeguards required under criminal procedural law'.[135] This is confirmed by a number of recent studies that have voiced or reported some concerns over the excessive safeguards provided for by the OLAF Regulation. For example, Ligeti reports,

> Imposing 'quasi-criminal law' safeguards for OLAF investigations as laid down in Article 9 of Regulation 883/2013 has been seen by some practitioners interviewed for this briefing paper as being *disproportionate*. Since OLAF has no coercive powers and OLAF Final Reports have no binding legal effect, it is maintained that there are excessively strong safeguards applicable to OLAF investigations.[136]

Hence, as it is rare that national standards are higher than OLAF's, it is not surprising that national reports do not mention issues of inadmissibility of OLAF-collected evidence in punitive administrative proceedings flowing from the differences between EU and national standards. This conclusion becomes less tenable when the focus shifts to criminal proceedings, as discussed in section 4 below.

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

The first Hercule III study concerning OLAF, ESMA, the ECB, and DG COMP extensively addressed EU rules on investigatory powers (notably production orders, interviews, on-site inspections, access to traffic and telecommunication data), and procedural safeguards (legal professional privilege, privilege against self-incrimination, and access to a lawyer).[137] On this basis, the present project has thus queried whether and how – in punitive administrative proceedings – the person concerned by an OLAF investigation can challenge evidence that was allegedly obtained in violation of these EU rules. Once again, national case law offers very limited, if any, answers to the question. As there is usually no judicial review of the admissibility decision as such in national punitive administrative proceedings,[138] violations of EU rules in the gathering of evidence by OLAF could be brought to the attention of the competent courts when the interested party challenges the legality of the sanction issued at the end of punitive proceedings.

This is directly or indirectly mentioned in the Dutch, Italian, Luxembourgish, and French reports. The last also mentions that national authorities may require searches (eg of premises) on the basis of the OLAF investigations' results. Therefore, controls on OLAF investigations may also be carried out during the investigation stage, ie either at the time of the request for authorisation of the measure or at the time of the control of the progress of the measure.[139] Furthermore, in a recent case decided by the Paris Court of

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[135] Italian report, section 2.3 (emphasis added). See also Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.4.

[136] Ligeti (n 23) 20 (emphasis added). The OLAF Regulation's assessment carried out by the consultancy ICF makes similar remarks: 'the majority of stakeholders interviewed … expressed the view that Article 9 introduced a set of rights and safeguards that are disproportionate to the administrative nature of OLAF's investigations' (ICF, 'Evaluation of the Application of Regulation No 883/2013 Concerning Investigations Conducted by the European Anti-Fraud Office (OLAF)' (2017) 139–140).

[137] Luchtman and Vervaele (eds) (n 26).

[138] See section 2.5 above.

[139] French report, section 2.4.

Appeal, the interested parties challenged OLAF activities because they had been allegedly initiated in breach of the principle of confidentiality enshrined in Council Regulation 384/96.[140] This decision shows that, 'while some judges stress that they are not "judges of the European investigation", they agree to review "the nullity of OLAF's investigation" in the light of EU texts (in this case Regulation 1073/1999), since *OLAF's investigation is likely to lead to the irregularity of the French procedure*'.[141]

The clarification that national judges are not judges of the European investigations follows from the status of OLAF as an EU entity, which thus implies that – unlike the EPPO – its acts and decisions are subject to the jurisdiction of the CJEU. Although OLAF and the EPPO share the common key feature of extensively relying on national law,[142] different rules apply to their acts. Article 42 of the EPPO Regulation bestows the competence to review EPPO procedural acts and decisions having legal effects vis-à-vis third parties upon *national* courts, with limited exceptions. As we can read in the Preamble of the EPPO Regulation, the 'specific nature of the tasks and structure of the EPPO, which is different from that of all other bodies and agencies of the Union … requires special rules regarding judicial review'.[143] Subjecting an EU office to the judicial control of national courts is indeed quite exceptional.

The OLAF Regulation, however, includes no provision on the judicial review of OLAF reports. The ordinary EU principles thus apply, especially that according to which '*EU courts* alone have jurisdiction to determine that *an act of the European Union is invalid* … OLAF's report continues to be lawful in the EU legal order in so far as it has not been invalidated by the EU judicature'.[144] It is known, however, that the CJEU is reluctant to invalidate OLAF reports. According to established case law, as these reports do not bring about a distinct change in the individuals' legal position, requests to annul them are inadmissible.[145] Hence, in practice, OLAF reports cannot be subject to the CJEU's judicial review in accordance with Article 263 TFEU. At the most, the EU shall make good any damage caused by OLAF misconduct.[146] As for national courts, since

[140] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community OJ [1996] L 56/1.
[141] French report, section 2.4 (emphasis added). See more in section 4.2 of the same report, as well as in section 4.2. below.
[142] See Vervaele, transversal report, section 1.
[143] Recital 86 of the EPPO Regulation.
[144] Case T-48/16 *Sigma Orionis SA v Commission*, EU:T:2018:245, paras 62–63 (emphasis added). This principle dates back to Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452. See more in Katalin Ligeti and Gavin Robinson, 'Transversal Report on Judicial Protection' in Luchtman and Vervaele (eds) (n 26) 219ff; Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.1; Vervaele, transversal report, section 6.
[145] The leading case is Case T-193/04 *Tillack*, EU:T:2006:292. See more in, eg, Xavier Groussot and Ziva Popov, 'What's Wrong with OLAF? Accountability, Due Process and Criminal Justice in European Anti-Fraud Policy' (2010) *Common Market Law Review* 605, 609–615; Jan FH Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor's Office* (Europa Law Publishing 2011) 203ff; Ligeti and Robinson (previous n) 238–239; Vervaele, transversal report, section 6, which highlights that the principle at stake has been recently upheld in Case T-289/16 *Inox Mare Srl v Commission*, EU:T:2017:414, para 20. For the European Parliament's recent proposal to bridge this gap in individuals' judicial protection, see section 5.3 below.
[146] German report, section 2.4.

they cannot assess the legality of OLAF measures and declare them null and void, even if they violate EU (or national) law,[147] they can (or shall) refer a request for preliminary ruling, if they entertain doubt about the validity of OLAF reports,[148] or decide not to use that piece of evidence altogether if it is considered unreliable or unlawful.

3.4 Admissibility of evidence collected by ECB, ESMA and DG COMP in national punitive administrative proceedings: Lessons for OLAF?

OLAF is not the only EU administrative authority that can transmit reports and evidence to national authorities with a view to a punitive follow-up. Such transmission (and potential use) of evidence having a special 'EU origin' may take place also under the frameworks of: the ECB, in accordance with Article 136 of the Single Supervisory Mechanism (SSM) Framework Regulation;[149] ESMA, in the supervision of trade repositories, pursuant to Article 64(8) of the EMIR Regulation; and DG COMP (Article 12 of Regulation 1/2003).[150] These provisions are addressed below, to inquire whether they can provide useful lessons for OLAF.

ECB and ESMA

The wording of Article 136 SSM Framework Regulation is clear in requiring that, shall the ECB suspect that a *criminal offence* may have been committed, it shall forward the relevant information and evidence to the national competent authority. The latter has then to inform the 'appropriate authorities for investigation and possible criminal prosecution', which are arguably criminal law authorities.[151] Hence, the provision at hand concerns criminal (rather than punitive administrative) proceedings and, unlike Article 11(2) of Regulation 883/2013, does not deal with the admissibility of ECB-collected evidence as such in national proceedings.[152] This is perhaps the main reason why national reports contain scant information concerning the admissibility of such evidence in national punitive administrative proceedings, and case law on the matter is reportedly almost non-existent. Furthermore, none of the seven legal systems under analysis provides for

[147] ibid.
[148] See more in Inghelram, *Legal and Institutional Aspects* (n 145) 226–229; Ligeti and Robinson (n 144) 242–243. For further critical remarks on whether the request lodged in accordance with Art 267 TFEU is likely to fulfil the requirements of admissibility, see Valentina Covolo, *L'Émergence d'un Droit Pénal en Réseau. Analyse Critique du Système Européen de Lutte Antifraude* (Nomos 2015) 578–580.
[149] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (hereinafter 'SSM Framework Regulation') [2014] OJ L 141/1.
[150] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 (hereinafter 'Regulation 1/2003').
[151] On the obligation of national central banks to report suspicions of crime to national public prosecutors, see Italian report, section 3.1, and Luxembourg report, section 3. For further remarks on the ECB and the links between its proceedings and national proceedings, see Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 5.
[152] See also Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 5.3: 'The admissibility of ECB transmitted information as evidence in national proceedings is thus not regulated at the EU level, but is left to national law'.

specific rules concerning the admissibility and use of ECB-collected evidence in said proceedings, with the consequence that the general rules will apply.[153]

The analysis of ESMA-collected evidence and its admissibility in national punitive administrative proceedings yielded similar results. Article 64(8) EMIR reads as follows: 'ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under [EMIR], it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences …'.[154] Again, 'relevant national authorities' to which ESMA shall refer matters for criminal prosecution are most likely criminal law authorities. Hence, admissibility of ESMA-collected evidence in national punitive *administrative* proceedings falls beyond the scope of Article 64(8) EMIR. National reports contain very limited information on the matter, and they all mention that no specific rules concerning the admissibility and use of ESMA-collected evidence in said proceedings exist. Likewise, there is reportedly no case law on the (in)admissibility of ESMA-collected evidence in punitive administrative proceedings.

Therefore, when it comes to the issue of the OLAF reports' admissibility in national punitive administrative proceedings, it is difficult to draw lessons from the experience of the ECB and ESMA. What can be noted is that the two EU bodies have a clear obligation to make national competent authorities immediately aware of facts that may be considered as having a criminal nature. This should help domestic prosecutors both to detect criminal conduct that may be otherwise difficult to discover and to launch swift investigations into the matter. As section 5.1 notes, a similar obligation does not exist for OLAF – at least formally – and this could create problems in the coordination between the Office and national authorities.

DG COMP

There is also limited information on the admissibility in national punitive administrative proceedings of evidence collected by DG COMP, and national reports do not mention case law on the inadmissibility of such evidence. Germany and Hungary have however specific rules on the matter, while the general principles will apply in the other Member States. In Hungary, the admissibility of DG COMP-collected evidence is not straightforward. Article 80/C of the Act on the prohibition of unfair market conduct and restriction of competition clarifies that the national competition council 'shall substantiate in its reasoning to the resolution the admissibility of [evidence originating from DG

[153] See sections 1.3 and 1.4 above. It follows that, for instance, the admissibility of ECB-collected evidence in Dutch punitive administrative proceedings is subject to the manifest improper criterion (Dutch report, section 3.1), while in Hungary that evidence will typically qualify as documentary evidence and will be admissible even when national standards of procedural safeguards are higher than EU standards, with the usual exception of cases where evidence has been gathered (by the ECB, in this case) illegally (Hungarian report, section 3). In France, the admissibility of ECB-collected evidence is likely to depend upon the respect of the principles of lawfulness and fairness (French report, section 3.1). In Germany, as the punitive proceedings in the field of banking supervision follow the legal framework for regulatory offences, the rules that apply to those proceedings will mostly be drawn from the CCP (German report, section 3.1).

[154] The second part of Art 64(8) EMIR includes a rule on *ne bis in idem* that is not relevant for this study.

COMP or a national competition authority of another Member State], by demonstrating that the conditions set out in Council Regulation (EC) No 1/2003 have been met'.[155]

In Germany, § 81 of the Act against Restraints of Competition, which is the legal basis for sanctions following from infringements of competition law, refers to the Act on Regulatory Offences. Hence, the rules of criminal procedure will in principle apply to competition proceedings. The Act against Restraints of Competition however includes a rule on DG COMP-collected evidence, § 50a, which is very similar to Article 12 of Regulation 1/2003.[156] The latter is the key provision as for the admissibility of DG COMP-collected evidence in national proceedings and differs from the above-mentioned rules of the SSM Framework Regulation and EMIR, as it does not provide for any reference to criminal law authorities and deals more extensively with the use of evidence collected by the Commission.

In more detail, Article 12(1) provides that the Commission and the national competition authorities (NCAs) shall have the power to exchange and use as evidence 'any matter of fact or of law, including confidential information',[157] and § 50a(1) of the Act against Restraints of Competition provides for a similar rule.[158] The German rapporteurs clarify that there is however no obligation for national courts to use the collected information as evidence. National courts assessing DG COMP-collected evidence could for instance exclude it if a substantial violation of fundamental rights has occurred in its gathering. At first sight, they argue, this comes close to a 'double control', since evidence will be evaluated through the lenses both of EU and national standards.[159]

Such an approach could therefore be controversial, as the rationale behind Article 12 of Regulation 1/2003 seems precisely ensuring free circulation of evidence despite different national standards, at least vis-à-vis legal persons.[160] This can be gleaned from recital 16 of the Regulation, which states that exchange of pieces of information and their use shall be ensured '[n]otwithstanding any national provision to the contrary'.[161] Article 12 of Regulation 1/2003 thus introduces 'a "hard and fast rule" of mutual admissibility of *evidence*, regardless of the differences between the legal systems … [and] "breaks open" any national evidentiary system; "foreign" materials need to be accepted, under the conditions provided for in the article'.[162] Upon closer inspection, however, it appears that this set of rules and principles does not sit entirely at odds with the mentioned 'double control' that German courts can exercise on DG COMP-collected evidence, since the EU

[155] See Hungarian report, section 3.
[156] German report, section 3.3. For some remarks on Art 12 of Regulation 1/2003 see also Michiel Luchtman, Michele Simonato and John Vervaele, 'Comparative Analysis' in Michele Simonato, Michiel Luchtman and John Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities (ECN/ESMA/ECB)* (Utrecht University 2018) 182–183.
[157] Art 12(1) of Regulation 1/2003.
[158] German report, section 3.3.
[159] ibid.
[160] ibid. As for natural persons, see infra below.
[161] Recital 16 of Regulation 1/2003. See Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 4.3.
[162] Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.2.

rule on mutual admissibility of evidence does not cover cases of unlawfully obtained or transferred evidence.[163] Besides, also the CJEU's case law seems to allow national courts to apply national procedural safeguards in enforcing EU competition law.[164]

Article 12(2) of Regulation 1/2003 is also worth mentioning, as it introduces a clear *purpose limitation* clause:[165] information exchanged 'shall only be used in evidence for the purpose of applying Articles [101 and 102 TFEU] and in respect of the subject-matter for which it was collected by the transmitting authority'.[166] § 50a(2) of the Act against Restraints of Competition is largely based on this provision. Finally, Article 12 of Regulation 1/2003 also considers the possibility of using evidence gathered by DG COMP to impose sanctions on *natural* persons but attaches conditions. The reason behind the difference between the 'unfettered' use of evidence vis-à-vis legal persons and its much more limited use regarding natural persons is strictly related to the procedural safeguards enjoyed by individuals and companies at the national level. The Preamble of Regulation 1/2003 seems indeed to justify the more permissive regime for legal persons on the basis of the *claimed equivalence* between the rights of defence enjoyed by undertakings in the various systems, while natural persons may be subject to 'substantially different types of sanctions across the various systems'.[167] Hence, information exchanged in accordance with Article 12(1) of Regulation 1/2003 can be used to impose sanctions on *natural* persons only if:

a) the law of the transmitting authority provides for sanctions of a similar nature with respect to violation of Articles 101 or 102 TFEU;[168] this rule is copy-pasted in § 50a(3) of the Act against Restraints of Competition (first sentence), which however adds that such an exclusionary rule does not exclude the use of evidence against legal persons (third sentence);[169]

b) in the absence of such similar sanctions, 'the information has been collected in a way which respects the *same level of protection of the rights of defence of natural persons* as provided for under the national rules of the receiving authority'.[170] This is to be found in § 50a(3) of the Act against Restraints of

[163] Furthermore, evidence would be excluded only in exceptional cases, ie when *substantial* violations of fundamental rights have occurred (German report, section 3.3).
[164] Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 4.3.1, where the authors refer to Case C-60/92 *Otto BV v Postbank NV*, EU:C:1993:876.
[165] See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 4.3.2, which traces back the origins of this principle to Case 85/87 *Dow Benelux NV v Commission*, EU:C:1989:379. See also German report, section 3.3; Argyro Karagianni, Mira Scholten and Michele Simonato, 'EU "Vertical" Report. The Exchange of Information Between National and EU Authorities' in Simonato, Luchtman and Vervaele (eds) (n 156) 17.
[166] Art 12(2) of Regulation 1/2003. The second part of this provision also adds that 'where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under [Art 12] may also be used for the application of national competition law'. For a comparison between this wording and that of the second part of § 50a(2) of the Act against Restraints of Competition, see German report, section 3.3.
[167] Recital 16 of Regulation 1/2003.
[168] Art 12(3), first indent of Regulation 1/2003.
[169] German report, section 3.3.
[170] Art 12(3), second indent of Regulation 1/2003 (emphasis added). See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 4.3.3.

> Competition as well (second sentence). However, on the one hand, the German Act does not restate the final clause of Article 12(3) of Regulation 1/2003 according to which national courts cannot use this information to impose custodial sanctions. German law does not indeed provide for custodial sentences for regulatory offences.[171] On the other hand, the Act against Restraints of Competition expressly prohibits using evidence collected by other NCAs in case of violation of constitutional rights.[172]

The provisions above would be difficult to imagine in the context of OLAF and the proceedings following its investigations. As noted in the previous Hercule III studies, DG COMP and OLAF certainly bear some similarities, yet they are different entities.[173] Hence, when it comes to OLAF, 'The transfer of information from the national competent authorities *is not a closed system* in which national competent authorities exchange information, knowing that the information provided by them is to be kept secret and is not to be used for other purposes'.[174] OLAF and national administrative, not to mention criminal, authorities are not part of a single, closed system as is the case of the European Competition Network: 'Unlike the other authorities, which all have clearly appointed national partners to provide assistance in their tasks, there is no real delineation of such an inner-circle for OLAF. The competent national authorities and their relationships with OLAF are not delineated by the EU level'.[175]

The French report also addresses the admissibility of evidence in competition proceedings. In this country as well there are no specific rules. The ordinary principles of freedom, lawfulness, and fairness of evidence thus apply. In fact, the rules that the national competition authority should follow have been referred to as a 'cocktail of rules'.[176] In principle, the rules of the Code of Civil Procedure and of the Commercial Code should apply, together with some of those of criminal and administrative procedures. French courts recently addressed the issue of whether clandestine recordings made by an individual should be admissible before the Competition Council.[177] The Paris Court of Appeal replied in the affirmative, by noting that the procedures before the competition authority should be subject to rules of criminal litigation because, inter alia, they have a repressive nature. Hence, as criminal case law allows the admissibility of such evidence, the Paris Court of Appeal reached the same conclusion for competition proceedings in the light of their proximity to the criminal proceedings. However, the

[171] German report, section 3.3.
[172] ibid.
[173] See also Covolo (n 148) 321–323.
[174] Luchtman, Simonato and Vervaele (n 156) 168 (emphasis added).
[175] ibid 206. See also Vervaele, transversal report, section 6.
[176] French report, section 3.3, which in turn refers to Laurence Idot, 'Application par les Autorités Nationales et Autonomie Procédurale' (2011) *Europe* 71.
[177] A similar issue arose in EU competition proceedings. In Case T-54/14 *Goldfish BV and Others v Commission*, EU:T:2016:455, the General Court concluded that, in accordance with the *Schenk* requirements (*Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988)), the Commission did not commit any illegality in using secret recordings in competition proceedings. On this case, see more in Vervaele, transversal report, section 5.2.

Commercial Chamber and the Plenary Assembly of the Court of Cassation did not endorse this approach and argued that, unless the Commercial Code expressly provides for the opposite, the rules of the Code of Civil Procedure apply. It follows that 'the recording of a telephone communication made without the author's knowledge constitutes an unfair means by which its production as proof is not admissible'.[178]

The French report also touches upon the issue of the LPP, as does the Dutch. After all, as noted above, the case law of the CJEU concerning the non-applicability of the LPP to in-house lawyers originated precisely in the field of competition law.[179] The French and Dutch reports highlight that the national LPP is broader than the EU's. In France, emails exchanged between lawyers and clients are secret as long as such emails reflect the lawyer's defence strategy,[180] while in the Netherlands the LPP applies to all lawyers who are members of the Dutch Bar Association, including in those cases where the Dutch competition authority itself investigates a violation of (EU or national) competition law.[181] In accordance with the *AKZO & Akcros* judgment,[182] however, a broader LPP does not come into consideration when the Dutch competition authority supports a Commission investigation concerning an infringement of European competition law. At any rate, it is uncertain whether evidence collected by DG COMP can be declared inadmissible if it was gathered in violation of the Dutch LPP, as the 'manifest improper criterion' sets a rather high threshold and there is no relevant case law for the time being.[183] Such a declaration of inadmissibility could also violate Article 12 of Regulation 1/2003 and the principle of equivalent standards on which it is founded,[184] at least when Dutch law is not applicable.

Finally, the recently adopted Directive (EU) 2019/1 confirms that issues connected to evidence are relevant in competition proceedings.[185] The Directive aims to ensure that NCAs have sufficient resources, independence, and powers to apply Articles 101 and 102 TFEU effectively.[186] Therefore, it lays down some provisions that should lead to the harmonisation of NCAs' procedures and status. Without prejudice to Article 12 of Regulation 1/2003,[187] Article 32 of Directive 2019/1 concerns the 'Admissibility of evidence before national competition authorities' and obliges Member States to ensure

[178] French report, section 3.3, where the author however adds that 'there are signs that a shift [in the case law] may occur' (ibid).
[179] See more in Scholten and Simonato (n 129), especially 38 and 51.
[180] French report, section 3.3.
[181] Dutch report, section 3.3.
[182] Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:T:2007:297, as confirmed by the CJEU in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:C:2010:512.
[183] Dutch report, section 3.3.
[184] 'The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent' (Recital 16 of Regulation 1/2003).
[185] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.
[186] Recital 3 of Directive (EU) 2019/1.
[187] Recital 15 of Directive (EU) 2019/1 reads as follows: 'The exchange of information between NCAs, and the use of such information in evidence for the application of Article 101 or Article 102 TFEU, should be carried out pursuant to Article 12 of Regulation (EC) No 1/2003'.

that 'the types of proof that are admissible as evidence before a national competition authority include documents, oral statements, electronic messages, recordings and all other objects containing information, irrespective of the form it takes and the medium on which information is stored'.[188] The reference to 'recordings' is further specified in the Preamble, where the EU legislator adds – in essence 'codifying' the application of the *Goldfish* principles to proceedings before NCAs[189] – that 'NCAs should be able to consider … *covert recordings* made by *natural or legal persons* which are not public authorities, provided those recordings are not the sole source of evidence'.[190]

The provision on admissibility of evidence was included in the Commission's proposal for this Directive and did not undergo significant changes throughout the negotiations, nor did the documents of the negotiations show that it was a controversial issue.[191] As we can read in the explanatory memorandum to the Commission's proposal, in fact, the aim of the above-mentioned provision is mostly to ensure that evidence collected by NCAs is admissible independently of the medium in which it is stored.[192] The rule at hand is therefore different from the current rule on admissibility of OLAF reports. The Preamble of Directive 2019/1 gives nonetheless a clarification on the notion of 'admissibility' as such. According to Recital 73 of the Directive, when a given type of proof is 'admissible', national authorities 'should be able to consider'[193] it in taking their decision. This confirms that, as already mentioned above,[194] 'admissibility' does not mean nor imply 'use' of the evidence, even when it comes from an EU entity, but can be considered equivalent to 'availability'. In other words, the given piece of evidence should be available to national authorities, which would however not be prevented from considering it unconvincing and, therefore, search for further evidence.

4. Admissibility and use of evidence collected by (EU or national) administrative authorities in criminal proceedings: Focus on OLAF

While the previous section focused on national punitive administrative proceedings, the present one will deal with criminal procedures, in which the admissibility of OLAF reports becomes crucial. After all, one of the reasons that justifies the EPPO's establishment is precisely the allegedly ineffective follow-up to OLAF investigations,

[188] Art 32 of Directive (EU) 2019/1. See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 4.3.1.
[189] Case T-54/14 *Goldfish BV v European Commission*, EU:T:2016:455. For some commentary, see Vervaele, transversal report, section 5.2.
[190] Recital 73 of Directive (EU) 2019/1 (emphasis added).
[191] See Art 30 of Commission, 'Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' COM(2017) 142 final, 22 March 2017. The issue of admissibility of evidence is barely touched upon in the Commission's Staff Working Documents accompanying this proposal. Likewise, Art 30 of the Commission's Proposal does not appear among the ones discussed during the trilogues (see, eg, Council docs 8307/18 and 8879/18).
[192] COM(2017) 142 final (previous n) 19.
[193] Recital 73 of Directive (EU) 2019/1.
[194] Section 3.1 above.

which is due, among other causes, to issues connected with the admissibility of evidence gathered by this body. The following section introduces the general rules concerning the admissibility in criminal proceedings of evidence collected by national administrative authorities, while section 4.2 zooms in on the admissibility of evidence gathered by EU bodies, especially OLAF.

4.1 Admissibility of evidence collected by national administrative authorities in criminal proceedings

All legal systems under analysis accept that evidence gathered by national administrative authorities is admissible in criminal proceedings, and this in principle includes the hypotheses where EU administrative bodies share evidence with domestic authorities. In countries such as France, Luxembourg, and the UK, such admissibility follows from the principle of freedom of proof and in any case requires compliance with the rules on evidence set out in national criminal procedural laws. Therefore, in the UK, the admission of evidence collected by administrative authorities shall neither adversely affect the fairness of the proceedings,[195] nor follow a gross violation of national rules and principles that would require the staying of the proceedings.[196] In Luxembourg, the admissibility of that evidence shall respect the above-mentioned criteria of loyalty and usefulness, and shall be subject to the adversarial principle (*contradictoire*).[197] In this country, moreover, the VAT Administration is obliged by law to transmit to judicial authorities upon request relevant pieces of information that may be used within a criminal procedure.[198]

Similarly, in France,[199] administrative authorities shall transmit to the judicial authorities – especially public prosecutors – the elements in their possession that are likely to justify criminal proceedings, and more broadly any other useful element to criminal courts. Evidence gathered in administrative proceedings can be included in the criminal file but, in principle, it does not qualify as an act or document of the procedure; hence it cannot be annulled by the criminal court.[200] There are however some exceptions, such as in the case of administrative tax audit procedure, the regularity of which can be examined by the criminal court when such a procedure triggered prosecution. At any rate, even if the evidence collected by administrative authorities cannot be annulled, the fairness in gathering it can be challenged and may lead to the exclusion of that evidence.[201]

By the same token, information lawfully gathered in administrative proceedings is admissible in Hungarian criminal procedures, although it will have a weaker probative value than evidence collected in accordance with criminal law rules.[202] Usually,

[195] Police and Criminal Evidence Act 1984, s 78. See UK report, section 4.1.
[196] UK report, section 4.1.
[197] Luxembourg report, sections 1.4 and 4.1.
[198] ibid, section 4.1.
[199] As the general rules on evidence apply, evidence collected by administrative authorities can be admitted at trial if its gathering did not violate the principles of lawfulness and fairness (French report, section 4.1).
[200] ibid. See also above, section 2.5.1.
[201] French report, section 4.1.
[202] Hungarian report, section 4, where the rapporteur also notes that 'as to whether the defendant has committed a criminal offence, the courts, the prosecution and the investigating authorities are not bound by decisions made or by facts established in administrative proceedings' (ibid).

investigative measures will be repeated (eg witnesses will be heard again) and the administrative official who carried out the investigative act can be examined as a witness. Hungarian law also includes a specific figure to support investigations, namely that of the 'adviser', who – unlike experts – does not provide analysis but advises the investigating and prosecuting authority on how to 'find, obtain, collect or record evidence'[203] or clarifies technical issues. Therefore, advisers' opinions do not constitute evidence as such.

In Germany, which builds on the principle of controlled proof (*numerus clausus* of types of evidence), information gathered by administrative authorities can be used as evidence in criminal proceedings, in accordance with the general admissibility rules.[204] Hence, objects may be inspected and, as noted also in the Hungarian report, the official who carried out the investigative act can be examined as a witness. With few exceptions,[205] the reading out of administrative documents cannot replace the hearing of witnesses, especially in case of tax investigators or auditors who must present the findings of their investigations. Likewise, if a report includes questioning of witnesses or suspects, it will be necessary to hear them again before the court. In this respect, criminal procedural law is more restrictive than the rules of court proceedings in tax and customs matters, which allow for the use of reports and other documents without formal requirements such as reading them out in a public hearing.[206] In addition, the strict rules on the – in principle – impossibility of replacing a witness by reading out their previous statements also apply to experts, who may have been involved in administrative proceedings and who need to be examined by the criminal court. However, experts' opinions do not aim to prove the facts of the case but explain the current state of scientific knowledge in a given area.[207]

Hearing the administrative official who carried out the investigative measure as a witness in a criminal trial is also common in Italy. The Italian rapporteurs note that information gathered by national administrative authorities usually takes the form of a report, which can therefore be admitted as documentary evidence. The admissibility of such evidence is straightforward and also extends to digital documents and data stored abroad (if the owner gives his or her consent), although it is forbidden when documents concern anonymous information or information about the morality of the parties to the proceedings.[208] It is currently debated whether documents containing administrative authorities' evaluations are admissible. Furthermore, Italian law provides that if a suspicion of crime comes to light during the activities carried out by administrative authorities (eg supervision), these authorities shall perform their subsequent investigative acts in accordance with the more protective rules of the CCP.[209]

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[203] ibid.
[204] German report, section 4.1. While the principle is indeed the one mentioned in the text, there may be some differences according to the type of administrative proceedings (punitive or not) in which evidence was gathered. In France, the nature of the administrative proceedings is irrelevant for the admissibility of evidence collected therein in criminal proceedings (French report, section 4.2).
[205] See more in German report, section 4.1.
[206] ibid.
[207] ibid.
[208] Italian report, section 4.1.
[209] ibid.

Like in Italy, in the Netherlands evidence gathered by administrative authorities usually qualifies as written material, on the admissibility of which in criminal proceedings there is no doubt. This comes however with two riders. First, during the monitoring phase of an administrative procedure, ie before the sanctioning phase, the individual is obliged to cooperate with the administrative authority and the *nemo tenetur* principle does not apply.[210] In line with the *Saunders* case of the ECtHR, self-incriminating statements rendered before a reasonable suspicion of a crime has arisen cannot be admitted in Dutch criminal trials.[211] Although this is not entirely clear for the time being, it seems that they can nonetheless be used to start a criminal investigation. In addition, the *nemo tenetur* principle does not cover evidence existing independently of the will of the suspect, eg that deriving from the professional administration or computer data.[212]

Second, it is unclear what would happen if Dutch administrative authorities, during the monitoring or investigatory phase, act unlawfully. According to the Dutch CCP, it seems that only irregularities that occurred in *criminal* pre-trial investigations may prevent the admissibility of evidence in criminal proceedings, while irregularities committed by administrative authorities would not affect the admissibility of evidence they collected.[213] A 2013 decision of the Dutch Supreme Court nonetheless acknowledges that evidence can also be excluded in further exceptional circumstances, namely when there has been a serious violation of an important rule or principle of procedural criminal law. While there is no case law concerning violations that occurred during administrative proceedings, the literature argues that evidence unlawfully gathered during administrative activities is in principle admissible in criminal proceedings, *unless* it was

> seized in a way that runs so counter a proper government action that any use is intolerable (the 'manifest improper criterion'), or when the use of the evidence would violate the fair trial requirement, or when the proper conduct of procedure has been (severely) violated, or when fundamental rights have been infringed in an excessive way.[214]

In essence, all national reports make it clear that lawful (and sometimes even potentially unlawful) evidence collected by administrative authorities can be used in criminal proceedings,[215] with several nuances that this section has tried to illuminate. The next section aims to analyse how these principles play out in the context of criminal proceedings following OLAF investigations.

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[210] Dutch report, section 4.1.

[211] *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996). See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 2.1. Similar rules apply in the UK: see, eg, Financial Services and Markets Act 2000, s 174(2); Competition Act 1998, s 30A.

[212] Dutch report, section 4.1. This also follows from Art 7(3) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1. See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, sections 2.2 and 3.5.

[213] Dutch report, section 4.1.

[214] ibid.

[215] See also Commission, 'Report to the Council and the European Parliament. Protection of the European Union's Financial Interests. Fight against Fraud. Annual Report 2009' COM(2010) 382 final, 14 July 2010, 23–24.

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

None of the seven Member States provides for special rules on admissibility of evidence collected by OLAF, ESMA, the ECB, and DG COMP in criminal proceedings. Since the rules mentioned in section 4.1 thus apply, OLAF-collected evidence is admissible in these proceedings as long as it complies with the requirements discussed above.[216]

For instance, in Germany, any evidence contained in a document must be in principle read aloud,[217] and in Italy and in the Netherlands OLAF reports fall within the remit of the CCP's provision on documentary evidence.[218] In Hungary, OLAF reports, like those drafted by Hungarian administrative authorities, will be admissible as documentary evidence but will have weaker probative value than evidence collected according to the criminal procedural rules. OLAF investigative acts will usually be repeated in accordance with Hungarian criminal law.[219] Some Hungarian experts suggest that OLAF officials may in the future be involved in Hungarian criminal proceedings as 'advisers', ie in essence they could be informed of an ongoing investigation by competent national authorities, who would then ask for OLAF's advice on what evidence should be collected and in what way.[220] The advisers' legal position is different from that of experts in Hungarian criminal procedure, although both are regulated by the criminal procedure code. As noted above, advisers do not provide evidence.[221]

The French report deals extensively with the admissibility of OLAF-collected evidence and shines a light on an issue that is relevant for all Member States, namely whether and to what extent national authorities can scrutinise OLAF acts. In particular, such scrutiny may be due to *differences in procedural safeguards* between administrative (OLAF) proceedings and national criminal proceedings. Since the 1980s, the Court of Justice has ruled that national authorities cannot declare a Union act invalid.[222] In *Sigma Orionis*, the Court of Justice dealt with a case where a French court posited that some documents used by national authorities in French criminal proceedings, including OLAF reports, were invalid due to the fact that French judicial police did not assist OLAF investigators.[223] The Court of Justice was rather clear in restating its traditional stance: '[T]he EU courts alone have jurisdiction to determine that an act of the European Union is invalid … Therefore, irrespective of the findings made by the Indictment Division in

[216] According to the interviewees contacted by the Hungarian rapporteur, as long as no violation of the criminal procedure code has occurred, OLAF-collected evidence would in principle be admissible in criminal proceedings – because of the freedom of proof principle – even if it was collected in violation of its own rules of procedure (Hungarian report, section 4.5).
[217] German report, section 4.2.
[218] See, respectively, Italian report, section 4.2, and Dutch report, section 4.2.
[219] See section 4.3.2 below.
[220] According to Art 25.1(e) of the 'Guidelines on Investigation Procedures for OLAF Staff' (October 2013) <https://ec.europa.eu/anti-fraud/sites/antifraud/files/gip_en.pdf> accessed 30 May 2019, the OLAF investigation unit expert shall provide 'expert advice where requested by the Member States'.
[221] Hungarian report, section 4.2.
[222] See section 3.3 above. See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.4.
[223] Vervaele, transversal report, section 6.

its judgment, OLAF's report *continues to be lawful in the EU legal order* in so far as it has not been invalidated by the EU judicature'.[224] The Court thus makes a distinction between the *validity* of the OLAF reports in the EU legal order and the *use* that national courts may make of them in national procedures:

> OLAF's report continues to be *lawful* in the EU legal order in so far as it has not been invalidated by the EU judicature, without prejudice to any decisions that might be taken by the national authorities or courts concerning the *use* that can be made of such a report in proceedings under national law. It follows from … Article 11(2) of Regulation No 883/2013, that reports drawn up by OLAF may be used in national proceedings to the extent that they were drawn up in accordance with the rules and procedures laid down by national law. If national law was infringed … the result is that it will not be possible to use the report drawn up by OLAF in national proceedings, but that does not affect the possibility for the Commission to base its decisions on that document.[225]

The French Court of Cassation seems to endorse this distinction as well. In a case decided in December 2015, the French Court noted that the lower court (Indictment Chamber of the Court of Appeal of Colmar) was wrong in declaring itself incompetent to decide on the regularity of OLAF investigative acts that were included ('*versé*') in French criminal proceedings, since those acts *can be annulled to ensure effective judicial review* if they have been carried out in violation of fundamental rights.[226]

The Court of Appeal had also noted that, in carrying out interviews, 'OLAF investigators … complied with procedural guarantees and proceeded to notifications of rights, which are not contrary to the invoked provisions of the Convention [ie Articles 6, 8 and 13 ECHR], and are in conformity with the Community texts governing that body and compatible with the provisions of domestic criminal procedure'.[227] This conclusion may thus lead one to think that it is unlikely that issues of inadmissibility of OLAF-collected evidence can be related to the insufficient guarantees ensured by OLAF, as long as the Office's investigative activities comply with Article 9 of Regulation 883/2013.

In this respect, the Italian rapporteurs first note that, if evidence collected by OLAF is documentary in nature, no issues concerning its admissibility arise. But when a different kind of evidence is at stake, the lower safeguards surrounding its gathering may in principle impair its admissibility in criminal proceedings. However, they highlight that no problem has ever come to the fore as to the admissibility of OLAF-collected evidence, possibly because OLAF Regulation provides for very high procedural standards (especially with regard to the privilege against self-incrimination enshrined in Article 9(2) of Regulation 883/2013).[228] Likewise, the German report notes that so far there is no case law on the inadmissibility of OLAF-collected evidence in national criminal proceedings. It adds that evidence could be in principle excluded if it has been gathered in a way that

[224] Case T-48/16 *Sigma Orionis v Commission*, para 62–63 (emphasis added).
[225] ibid, paras 76–77 (emphasis added).
[226] Court of Cassation, Criminal Division, 9 December 2015, no 15-82300, which is commented in the French report, section 4.2 and in Vervaele, transversal report, section 6.
[227] Court of Cassation, 9 December 2015 (previous n).
[228] Italian report, section 4.2.

is incompatible with the standards of German criminal procedural law (eg, protection of professional privacy or *nemo tenetur*).[229] Nonetheless, in a way confirming that OLAF standards are rather high and thus unlikely to lead to the inadmissibility of OLAF reports because of differences with criminal law standards, the German report specifies that 'national standards will only be relevant where EU law does not provide for a corresponding protection, [eg] by a right to remain silent and to consult with counsel (Article 9(2)(2) and (6) of Regulation No 883/2013)…'.[230]

Going back to French case law, it is worth noting that the French Court of Cassation had already dealt with OLAF reports in another judgment issued in 2013.[231] In that case, French investigators required OLAF's assistance in, among other matters, identifying links between persons and companies involved in the investigations and using computer data seized during searches. The defendants then challenged the validity of OLAF reports, yet the Indictment Chamber of the Court of Appeal of Paris rejected their claim, clarifying that the requests for assistance sent by national prosecutors to OLAF should be considered an exchange of information in accordance with Article 10 of Regulation 1073/1999[232] (now Article 12 of the OLAF Regulation) and Article 7 of the Second Protocol to the PIF Convention[233] (now Article 15 of Directive 2017/1371). They do not represent, as the defendants were claiming, a delegation to OLAF of investigation powers that only police authorities are authorised to exercise.

Nonetheless, in that case, the information transmitted by OLAF was eventually annulled because national investigators had sent the requests to OLAF without prior authorisation from the national public prosecutor's office. As this is a violation of French criminal procedure, OLAF reports were annulled and had thus to be removed from the file.[234] However, the police records signed by OLAF and the searches carried out were not annulled, although the presence of OLAF officials had not been duly authorised. As it was devoid of any effect, OLAF's presence could not represent a ground for annulment of the search and police records.

In the frame of the same case, the Court of Cassation rendered another judgment in November 2016, where it added that the procedure that led to the OLAF reports (subsequently annulled) infringed on the requirement for a fair trial, which is provided for by the preliminary Article of the French CCP and Article 6 ECHR, as it 'creates a real

[229] German report, section 4.2. By the same token, in Hungary, OLAF-collected evidence would in principle be admissible in criminal proceedings even if gathered in violation of OLAF rules, while its admissibility would be forbidden if collected in violation of the Hungarian CCP (Hungarian report, section 4).
[230] German report, section 4.2.
[231] Court of Cassation, Criminal Division, 16 January 2013, no 12-84.221. See the extensive analysis in the French report, section 4.2. See also Luchtman and Vervaele, 'Comparison of the Legal Frameworks' in Luchtman and Vervaele (eds) (n 26) 275.
[232] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [1999] OJ L 136/1, which has been repealed by Regulation 883/2013.
[233] Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [1997] OJ C221/11, which has been replaced by the so-called 'PIF Directive' (Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29).
[234] French report, section 4.2; Vervaele, transversal report, section 6.

disadvantage to the detriment of the applicants'.[235] Furthermore, keeping the OLAF report in the case file would represent a violation of Article 174 of the French CCP, which prohibits obtaining information against the parties from annulled documents or acts.

This case also had a transnational component.[236] Elements of OLAF reports were used in parallel procedures against the same persons in Belgium, where there is a provision on the use of evidence gathered abroad that forbids such use when this would violate the defendant's right to a fair trial.[237] The Belgian court regarded the French decisions as having force of *res judicata* with respect to the admissibility of OLAF evidence and therefore excluded it from the Belgian procedure, as the admission of this evidence would undermine the essence of the fairness of the proceedings in Belgium.[238]

In sum, in the French case law there is a 'clear distinction between the nullity of the OLAF reports *as such* – not a matter of criminal jurisdiction – and the nullity of the OLAF evidence *when used in criminal proceedings*'.[239] In other words, the OLAF report, when the procedure that leads to its adoption violates French law,

> is obviously not annulled as such, but insofar as it constitutes an act of the (French) criminal procedure, which implies its exclusion from the file. It cannot be used as a basis for decisions by judges or national (investigative or prosecutorial) authorities. The annulment also has the effect of depriving all subsequent acts of any merit.[240]

As noted above, this seems to chime with the Court of Justice's stance as recently restated in *Sigma Orionis*.

Unlike in France, but like in Italy and Germany, the admissibility of evidence collected by OLAF has never been denied by Dutch criminal courts. In a case decided in 2013, a Dutch Criminal Court of First Instance adopted the cautious approach espoused by the Customs Chamber of the Court of Appeal of Amsterdam in the above-mentioned decision of 2012,[241] by stating that OLAF-collected evidence should be set aside only in exceptional circumstances.[242] In that case, the Fiscal Intelligence and Investigation Service (FIOD), ie the specialised judicial tax enforcement authority, used reports of an OLAF inspection mission as evidence, which the legal person accused challenged because, among others, it was not informed of their existence. However, as anticipated,

> The Dutch Court of First Instance emphasised that the Dutch Public Prosecutor's office is '*dominus litis*' and that the sanction of the inadmissibility of the prosecution under Dutch criminal procedure can only be used in the case of *very serious infringements* of the essence of the procedure or other fundamental rights which result in the right of the

[235] Court of Cassation, Criminal Division, 9 November 2016, no 16-83.602, as translated by Juliette Tricot (French report, section 4.2).
[236] Vervaele, transversal report, section 6.
[237] ibid.
[238] ibid.
[239] ibid (emphasis added).
[240] French report, section 4.2.
[241] See section 3.1 above.
[242] Court of Noord-Holland (*Rechtbank Noord-Holland*), 23 July 2013, case no 15/993018-06, as reported Vervaele, transversal report, section 6.

> accused to a fair trial being violated, either intentionally or as a result of serious negligence. This was not the case as far as the court was concerned.[243]

Hence, as the Dutch rapporteurs argue, should the issue of inadmissibility be brought up because of the alleged violation of Dutch procedural rules in the Netherlands, the principles discussed above would apply. In other words, OLAF-collected evidence would be excluded only in exceptional cases where the breach makes the procedure as a whole unfair.[244] If evidence has been collected abroad by OLAF and is to be admitted in Dutch criminal trials, the principles laid down in the case law of the Dutch Supreme Court on evidence collected abroad should come to the fore. Because of the mutual trust among States Parties to the ECHR and of the presumption that violations of fundamental rights can be challenged in the other Member State in accordance with Article 13 ECHR (right to an effective remedy), Dutch courts should only assess whether the use of evidence gathered abroad violates Article 6 ECHR. No further rights of suspects and accused persons, such as those enshrined in Article 8 ECHR, are taken into account.[245] A breach of Article 6 ECHR may for instance occur if the *nemo tenetur* principle is violated, while it is likely that Dutch criminal courts will accept evidence coming from a country where the LPP principle is less protected than in the Netherlands.[246]

5. Admissibility of OLAF-collected evidence in national criminal proceedings: Problems and practices

The last section of the questionnaire circulated among the national rapporteurs concerned practices, as well as problems encountered, in dealing with OLAF reports in national criminal proceedings. Bearing in mind that both Article 11(2) of Regulation 883/2013 (OLAF reports) and Article 8(3) of Regulation 2185/96 (on-the-spot checks or inspections reports) require OLAF to take account of the national law of the Member State concerned,[247] it has been first queried whether the Office and national competent authorities discuss the requirements for OLAF-collected evidence to be admitted in national criminal trials before carrying out joint on-the-spot checks or inspections (section 5.1). Second, national rapporteurs have discussed whether national authorities repeat OLAF investigative acts, and the reasons for such a duplication when it occurs (section 5.2). Section 5.3 evaluates whether the proposed amendments to the OLAF Regulation

[243] Vervaele, transversal report, section 6 (emphasis added).
[244] Dutch report, section 4.2.
[245] See also Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.3.
[246] Dutch report, section 4.2. Besides, in the Netherlands, like in Germany, the control on the admissibility of evidence is carried out ex officio by the criminal courts (ibid; see also German report, section 4.2.)
[247] Art 11(2) of Regulation 883/2013: 'In drawing up … reports and recommendations, account shall be taken of the national law of the Member State concerned …', to be read together with Recital 28 of the same Regulation ('[OLAF] reports should be drawn up in a manner compatible with the rules governing administrative reports in the Member States'); Art 8(3) of Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 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 L 292/2: 'Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned …'.

tabled by the Commission and the European Parliament can repair some of the current shortcomings. Finally, section 5.4 makes some remarks on future EPPO-OLAF relationships and their impact on evidentiary issues.

5.1 Exchange of views between OLAF and national criminal law authorities on the requirements for admissible evidence

OLAF Supervisory Committee's Opinion No 2/17 touches upon, among other matters, the exchange of views between OLAF and national authorities concerning the admissibility of evidence and the requirements thereof: 'Early involvement of national authorities in earlier stages of an investigation would ensure admissibility of evidence in subsequent proceedings and in trials before national courts. The national judicial authorities would then not be required to repeat investigative steps already taken by OLAF during its investigation'.[248] The national rapporteurs, also on the basis of interviews with practitioners, have given different answers to the question of whether such an exchange of views takes place within their system. OLAF and national competent authorities are reported to usually not exchange views on the requirements concerning admissibility of evidence in some Member States (Italy, Luxembourg, Germany), while they do so in others (Hungary, the Netherlands, and France).

As for Germany, there is reportedly no need for OLAF and domestic authorities to exchange views on the requirements for admissible evidence as the findings of OLAF reports would have to be in principle introduced in court by examining the report's author as a witness.[249] This is however without prejudice to the assistance that the national authorities give OLAF in preparing and carrying out on-the-spot inspections (eg by transmitting relevant documents). German officials can be present during the inspection but usually do not initiate an administrative investigation under German law; they wait for OLAF reports in order to take further action on the basis of OLAF's findings.[250]

The Italian report mentions that discussions on the conditions to be fulfilled to ensure OLAF reports' admissibility in criminal proceedings usually take place within OLAF itself, by double-checking such conditions with Italian judicial or law enforcement personnel working at OLAF, or at the most by liaising with Eurojust. Hence, OLAF officials are usually informed in advance, if not already aware themselves, of the rules and procedures to be followed in gathering evidence in Italy. In the past, the Judicial and Legal Advice Unit, which was previously known as the 'OLAF Magistrates Unit', as it was composed of national magistrates, used to give advice on similar matters until it was

[248] OLAF Supervisory Committee, 'Opinion 2/2017' (n 130), para 48.
[249] Art 12(4) of Regulation 883/2013 states that 'the Office may provide evidence in proceedings before national courts and tribunals in conformity with national law and the Staff Regulations'. See also Art 25.1(c) of the 'Guidelines on Investigation Procedures' (n 220). On the possibility for OLAF officials to be heard as witnesses see also Simone White, 'Operational Activities and Due Process' in Constantin Stefanou, Simone White and Helen Xanthaki, *OLAF at the Crossroads. Action against EU Fraud* (Hart 2011) 81; Covolo (n 148) 313 and 372–375.
[250] German report, section 5.1. Art 4 of Regulation 2185/86 and Art 14(2) of the 'Guidelines on Investigation Procedures' (n 220) expressly provide that national officials *may* participate in OLAF inspections and on-the-spot checks. See also Inghelram, *Legal and Institutional Aspects* (n 145) 80.

dismantled in 2012.[251] The support of this Unit was highly valued.[252] The Italian report also mentions that, in most of the cases, OLAF does not carry out on-the-spot checks or inspections together with national authorities, so that there seems to be no cases of previous discussion between OLAF and national authorities. The Office is indeed reported to conduct its own investigations and transmit the investigation reports in accordance with Article 11 of Regulation 883/2013.[253]

Similarly, it is reported that no previous discussions on admissibility of evidence take place in Luxembourg, although for an almost opposite reason. Luxembourgish interviewees mentioned that OLAF investigators pay considerable attention to defence rights, in part to avoid any risk of inadmissibility of evidence. They reported however that the Office usually gets in touch with national authorities (judicial police and public prosecutors) in the early phase of its investigations and sometimes transmits the file to them, who then continue the investigation. This takeover of investigations by national authorities seems to be a way to enhance the evidence's admissibility and credibility.[254] Reports by Luxembourgish judicial police officers are indeed presumed true unless it is proven that the officer falsified the report. Reports by other agents (such as OLAF agents) are also admissible, yet their content may be denied simply by proving that facts stated therein are not true.[255]

The Hungarian interviewees would support a takeover of investigations by national authorities as well, as this would raise the probative value of gathered evidence and avoid the replication of OLAF activities.[256] They also report that during OLAF meetings, which take place three to four times a year at the Office of the Prosecutor General of Hungary,[257] Hungarian authorities usually discuss with OLAF officers the necessary requirements for evidence to be admissible in Hungarian criminal proceedings.[258] Such exchanges of views, as anticipated, also occur in France[259] and in

[251] Italian report, section 5.1. See also Helen Xanthaki, 'The Regulatory Framework: The Status Quo and Recent Proposals for Reform' in Stefanou, White and Xanthaki (n 249) 39; Covolo (n 148) 243 and 313.
[252] This has been confirmed by an OLAF investigator interviewed within the frame of this project. Back in 2005, the European Court of Auditors suggested the early involvement of the Magistrates Unit in OLAF investigations: 'The unit's action has often been late … and this has affected the quality of some investigation reports. In the field of direct expenditure, magistrates have been involved from the start with the investigators' work on investigations … If this practice were extended to all the areas in which the Office is involved, it would be easier to determine whether the evidence available is adequate or what additional evidence is needed to allow an investigation to be concluded by the transfer of the file to the appropriate disciplinary or judicial authorities with good prospects of success' (European Court of Auditors, 'Special Report No 1/2005 Concerning the Management of the European Anti-Fraud Office (OLAF), together with the Commission's replies' (2005), para 58).
[253] Italian report, section 5.1.
[254] Luxembourg report, section 5.1.
[255] ibid.
[256] Hungarian report, section 5.
[257] These meetings aim to discuss both general and case-related issues (ibid). '[R]egular high-level meetings' between the Prosecution Service of Hungary and OLAF, as well as 'regular consultations', are also mentioned in OLAF Press Release No 03/2017 (2017) <https://ec.europa.eu/anti-fraud/media-corner/news/09-02-2017/hungarian-prosecutor-general-meets-olaf-director-general-reinforce_en> accessed 22 June 2019.
[258] Hungarian report, section 5.
[259] French report, section 5.1.

the Netherlands. As for the latter, the rapporteurs explain that the Dutch Customs Manual requires a Dutch Customs official to be present during OLAF on-the-spot checks. The exchange of views between national authorities and the Office usually takes place at the end of (rather than during) the joint inspection and the parties mainly discuss how the established facts should be formulated in the report. This should help in ensuring the admissibility of OLAF-collected evidence in Dutch punitive administrative and criminal proceedings. The data and materials that are collected during the investigation must then be included in an annex, in order to substantiate the findings of the report.[260]

Furthermore, the Dutch rapporteurs stress that OLAF is not competent to conduct criminal investigations. Hence, if the Dutch official who is present during OLAF activities believes that criminal conduct is at stake, the OLAF inspection is halted and a specialised customs official is informed (the 'penalty fraud coordinator/contact official'). He or she evaluates whether there is a reasonable suspicion of crime in accordance with Dutch law and, if this is the case, the OLAF investigation is normally brought to an end and the case is transferred to the Fiscal Intelligence and Investigation Service (FIOD).[261] The Italian report makes similar remarks: Italian law enforcement authorities cannot assist OLAF when a suspicion of crime has arisen, as in these cases the continuation of the investigation is bestowed upon national criminal law authorities acting in accordance with the rules of the Italian CCP.[262] Theoretically, there may also be cases where OLAF investigations and national criminal investigations continue in parallel. In this case, national competent authorities could be aware of OLAF's notification and thus join the Office in its activities (if they take place in Italy).[263] There is however no reported exchange of information while OLAF conducts its investigations, as the information is collected by OLAF and not jointly by OLAF and Italian authorities, although both are present while the act is performed.[264]

The issue of whether OLAF should inform national prosecutors of potential *notitiae criminis* is thus slightly different from that of whether OLAF and domestic authorities discuss the requirements for the admissibility of OLAF-collected evidence before (or while) the Office undertakes its investigations, yet it is not less important. The European Court of Auditors (ECA) has recently raised some doubts on the effectiveness of the coordination between OLAF and national authorities precisely in this respect:

> During our interviews in four Member States, national prosecutors indicated that, in most cases, they have no contact with OLAF before receiving the Final Report. They also indicated that they would prefer to be informed of any suspected criminal offence much earlier than at the end of the OLAF investigation, and that if they were, they would assist

[260] Dutch report, section 5.1.
[261] ibid, where the rapporteurs also mention that OLAF is informed in advance of this modus operandi.
[262] Italian report, section 5.1.
[263] According to Art 4 of Regulation 2185/86, national authorities shall be notified 'in good time' of the object, legal basis and purpose of OLAF checks and inspections, to be able to provide all the required help.
[264] Italian report, section 5.1. If OLAF joins an act performed by national authorities (and not the opposite, as in the example mentioned in the text), there are no issues of admissibility of evidence, as the act would be carried out by national authorities following the rules of the Italian CCP in the presence of OLAF (ibid).

> OLAF and, where appropriate, start their own criminal investigation in order to avoid cases becoming time-barred.[265]

An early contact between national authorities and OLAF – especially when suspicions of crimes arise – would realistically benefit OLAF investigations and their follow-up at the national level,[266] yet this does not always take place.[267] The current OLAF legal framework provides in fact for some rules on information exchange, yet almost none of them lays down an *obligation* for OLAF to inform national authorities.[268] For instance, Article 3(6) of Regulation 883/2013 provides that OLAF, even *before* it has decided to open an external investigation, *may* liaise with the competent authorities of the Member States concerned and share with them 'information which suggests that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union'.[269] Then, if the OLAF Director-General decides not to open an external investigation, he or she '*may* without delay send any relevant information to the competent authorities of the Member State concerned for action to be taken where appropriate'.[270] In addition to the possibilities for OLAF to ask for the assistance of national authorities during its investigations (eg for taking precautionary measures or adopting coercive measures), Article 12 of Regulation 883/2013 also provides that OLAF '*may* transmit to the competent authorities of the Member States concerned information obtained in the course of external investigations in due time to enable them to take appropriate action in accordance with their national law'.[271] An exception is to be found in Regulation 2185/96, according to which OLAF '*shall* report as soon as possible to the competent authority of the State within whose territory an on-the-spot check or inspection has been performed any fact or suspicion relating to an irregularity which has come to its

[265] European Court of Auditors (ECA), 'Fighting Fraud in EU Spending: Action Needed' Special Report No 1 (2019) 40–41.

[266] See also Giulia Lasagni, 'Cooperazione Amministrativa e Circolazione Probatoria nelle Frodi Doganali e Fiscali. Il Ruolo dell'Ufficio Europeo per la Lotta Antifrode (OLAF) alla Luce della Direttiva OEI e del Progetto EPPO' [2015] *Diritto Penale Contemporaneo* 1, 5–6 <https://www.penalecontemporaneo.it/upload/1442824408LASAGNI_2015a.pdf> accessed 30 June 2019, who underlines that early involvement of national authorities may allow them to conduct, and in a prompt way, investigative measures that OLAF could not carry out (eg interception of telecommunications).

[267] For further remarks on the cooperation between OLAF and national authorities see Covolo (n 148) 271–273.

[268] The second HERCULE III study dealt with the exchange of information (Simonato, Luchtman and Vervaele (eds) (n 156)). The ADCRIM study group acknowledged that the distinction between 'information' and 'evidence' (on which this study focuses) is sometimes blurred, especially because 'information' collected during OLAF investigations can then become 'evidence' in national proceedings.

[269] Art 3(6) of Regulation 883/2013. Art 4(8) of Regulation 883/2013 provides for a similar rule with regard to internal investigations: before deciding on the opening of such an investigation, OLAF 'may' provide the institution, body, office or agency concerned with information that suggests that there has been fraud, corruption or any other illegal activity affecting the Union budget; in this case, OLAF 'shall' also inform, 'where necessary', the competent authorities of the Member State concerned (ibid).

[270] Art 5(6) of Regulation 883/2013 (emphasis added).

[271] Art 12(1) of Regulation 883/2013 (emphasis added). When information has been obtained in the course of internal investigations, OLAF *shall* inform national authorities (Art 12(2) of Regulation). See also, with respect to the previous OLAF Regulation (Regulation (EC) No 1073/1999) that provided for almost identical rules in that respect, Groussot and Popov (n 145) 606–607; Inghelram, *Legal and Institutional Aspects* (n 145) 108.

notice in the course of the on-the-spot check or inspection'.[272] As the previous Hercule III studies demonstrated, the fragmentation of OLAF's legal framework does not reinforce – but can rather hamper – OLAF's efficient and coherent action.

As noted in section 3.4, the rules for the ECB and ESMA are different. The SSM Framework Regulation and the EMIR provide that when these EU entities become aware of conduct that may have a criminal nature, they shall promptly inform competent national authorities. OLAF does not have such an obligation, not least because its investigations are of an administrative nature and it may not be clear from the outset whether they will end up discovering or dealing with criminal offences. Nonetheless, one may wonder whether – along the lines of what has been described, for instance, in the Dutch report – the early contacts between OLAF and national authorities should also include an OLAF duty to report any potential *notitia criminis* to national competent authorities, in order to agree with them on how to proceed with the case.

After all, the EPPO Regulation now requires any EU body to report without delay to the EPPO any criminal conduct in respect of which the EPPO could exercise its competence.[273] Since this applies also to OLAF, the Commission suggested introducing a new Article in the OLAF Regulation dealing with OLAF's reporting obligations to the EPPO.[274] The rationale of this rule seems to be that the EPPO, which will be competent to investigate and prosecute PIF crimes, should be able to promptly decide whether it should embark upon the investigation of a given case. The same rationale could therefore apply with respect to the relationships between OLAF and national authorities, which, until the EPPO's establishment, are competent to investigate and prosecute PIF crimes.[275]

Granted, there is a remarkable difference between the two scenarios (reporting to the EPPO/reporting to national authorities), for the establishment of the EPPO follows precisely from the national prosecutors' perceived inactivity vis-à-vis PIF crimes. One could object that OLAF's reporting obligation towards domestic authorities would not be conducive to the same positive results that one expects from the duty to promptly inform the EPPO, as there could be a risk that national authorities will give little priority to investigate and prosecute the offences that OLAF believes have been committed.

Nonetheless, late contacts between OLAF and domestic authorities turned out to yield poor results, on the one hand; on the other, if a substantive amount of OLAF recommendations do not have any follow-up because of insufficient evidence, it is worth exploring whether the status quo can improve by creating synergies and collaboration between OLAF and national authorities at an earlier stage of the investigations.

[272] Art 8(2) of Regulation 2185/96 (emphasis added).
[273] Art 24(1) of the EPPO Regulation.
[274] Commission, 'Proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' COM(2018) 338 final, 23 May 2018, Art 12c.
[275] The situation will not change even after the EPPO will be up and running, for those Member States that do not participate in the EPPO. In all the others, early contacts between OLAF and national authorities may instead be still necessary with respect to those criminal cases escaping the EPPO's competence.

5.2 Duplication of OLAF activities

In its recent report, the ECA mentions data in an OLAF study that analysed Member States' follow-up to OLAF's judicial recommendations issued between January 2008 and December 2015.[276] Out of 317 recommendations, 169 were dismissed, 94 of which on grounds of 'insufficient evidence'.[277] The Commission replied that 'limitations of [OLAF] investigative powers' and 'uncertainty of the applicable legislation'[278] can at times hamper a full collection of evidence. While these are systemic and intrinsic weaknesses going beyond the way in which both OLAF officials handle investigations and national authorities ensure the follow-up to them, the Commission also mentions, among other potential reasons that can lead to the dismissal of cases: the margin left to Member States in choosing how to deal with OLAF reports; the political sensitivity of some cases; and the fact that OLAF can detect fraud several years after its commission.[279]

The Commission also briefly mentions the issue of duplication of OLAF investigative acts. In this respect, and building on the above-mentioned OLAF analysis, the Commission highlights the shortcomings of Article 11(2) of Regulation 883/2013, which 'is not *per se* a sufficient legal basis to allow all Member States' judicial authorities to use OLAF reports as evidence in trial. Therefore, in some Member States, after receiving the OLAF final report, prosecutors *start investigation activities once again* in order to acquire admissible evidence'.[280] This stance of national authorities is contentious, as Article 11(2) of Regulation 883/2013 *can* in fact be a sufficient legal basis for the use of OLAF reports as evidence in criminal trials. In principle, indictments and convictions can be based only on OLAF report findings.[281]

As discussed above, however, this provision is not (as it cannot be) the legal basis of an *obligation* for Member States' authorities and courts to use OLAF-collected evidence and to convict the defendants in the light of such evidence.[282] They can indeed assess the facts of a case in a different way than OLAF does. The analysis of the follow-up to OLAF recommendations in the Member States revealed that there might be

> *differences of appreciation* between OLAF and the national authorities of some Member States, as regards evidence. For example when OLAF investigators identified evidence

[276] OLAF, 'Analysis on Member States Follow-Up to OLAF's Judicial Recommendations Issued between 1 January 2008 and 31 December 2015', Ref Ares(2017)461597 – 27/01/2017 (2017).
[277] ibid 1. These data are also reported in ECA, 'Fighting Fraud in EU Spending' (n 265) 39.
[278] Commission, 'Replies to the Special Report of the European Court of Auditors "Fighting Fraud in EU Spending: Action Needed"' in ECA, 'Fighting Fraud in EU Spending' (n 265), para 96 (see also para 100). This echoes the OLAF analysis on the follow-up to its recommendations, where we read that 'limitations to [OLAF] investigation powers and to what is practically feasible do not allow the collection of clear evidence of a criminal offence' (OLAF, 'Analysis on Member States Follow-Up' (n 276) 2).
[279] Commission, 'Replies to the Special Report' (previous n), paras 96, 97 and 100. See more in OLAF, 'Analysis on Member States Follow-Up' (n 276) 2–4.
[280] Commission, 'Replies to the Special Report' (n 278), para 100 (emphasis added). For such a conclusion, see OLAF, 'Analysis on Member States Follow-Up' (n 276) 2, where OLAF adds a remark on the alleged attitude of some prosecutors: 'sometimes prosecutors expect the OLAF report to be a ready-to-use product, which does not require any further investigation activity or, when prosecutors cannot use evidence collected by OLAF, just requires repeating investigation activities already carried out by OLAF investigators' (ibid).
[281] See, eg, Italian report, section 5.2; UK report, section 5; Vervaele, transversal report, section 6.
[282] See also, for example, Inghelram, *Legal and Institutional Aspects* (n 145) 67.

> of the use of false invoices, prosecutors considered this to be unpaid invoices; when investigators found evidence that EU funds had been misappropriated, the prosecutors argued that staff had been unpaid due to lack of cash. Another area where differences of appreciation appear between OLAF and prosecutors of some Member States is the evidence of *mens rea*.[283]

These differences in appreciation may follow from OLAF activities' flaws or national authorities' mistakes, but could also be justified by different legitimate views on the same facts.

When OLAF activities are replicated for evidence to be admitted and used at trial, however, this can arguably be a failure for the European Union, national authorities, and individuals. As Ligeti notes, such a duplication runs against the principle of procedural economy and, at the same time, obliges the persons who are subject to OLAF investigations to bear further investigations – on the same facts – by national authorities. In addition, the repetition of investigative acts could not be effective or even possible in some circumstances, eg because the suspected person destroyed the relevant evidence. This may in turn deter national authorities from providing any judicial follow-up to OLAF investigations.[284] Further problems are linked with the occasional long duration of OLAF investigations; at the end of these investigations, the crimes that are uncovered by the Office and that national authorities could (or should) prosecute are sometimes (either already or on the brink of being) statute-barred,[285] so that a duplication of investigative measures would only worsen this state of affairs.

Among the seven Member States under analysis, it seems that only in Hungary, according to the Hungarian experts interviewed in the framework of ADCRIM, are OLAF activities repeated for the purposes of criminal proceedings. The Hungarian report is clear in this respect: '[T]he interviewees stressed that in practice investigative activities of both OLAF and that of national authorities are repeated in accordance with the CCP'.[286] This repetition is justified on two grounds. First, acts carried out by national criminal law authorities have higher probative value than evidence collected by other (non-criminal) authorities, and this applies both to EU and national administrative authorities.

Second, according to Hungarian interviewees, OLAF reports are often tainted by mistakes or report facts that are based on rumours.[287] As an example, they mention the case concerning the construction of the Budapest M4 Metro Line. The Hungarian government published the OLAF report on its website.[288] The figures therein were quite alarming, as the impact on the EU Cohesion Fund was estimated to be more than €225

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[283] OLAF, 'Analysis on Member States Follow-Up' (n 276) 3 (emphasis added). See also ibid 5.
[284] Ligeti (n 23) 28.
[285] OLAF, 'Analysis on Member States Follow-Up' (n 276) 6; OLAF Supervisory Committee, 'Opinion 2/2017' (n 130), paras 29–31. The OLAF Supervisory Committee extensively analysed the issue of the OLAF investigations' duration in 'Opinion No 4/2014. Control of the duration of investigations conducted by the European Anti-fraud Office' (2015).
[286] Hungarian report, section 5.
[287] ibid.
[288] OLAF, 'Final Report – OF/2012/0118/B40' <www.kormany.hu/download/8/54/f0000/final_report.pdf> accessed 30 June 2019.

million.[289] According to the Hungarian interviewees, OLAF made various mistakes in investigating the case. While experts and practitioners sometimes touch upon the issue of the OLAF reports' quality,[290] the other rapporteurs of this project did not mention it.[291] In addition, some Hungarian criminal law rules make the admissibility of OLAF-collected evidence more difficult. When it comes to the authenticity of documents, for instance, handwriting experts can only work with original documents, while OLAF usually provides copies of the documents received from the persons under investigation.[292]

While Hungary is the only country where there seems to be an established practice of repeating OLAF activities, Italy and the United Kingdom have witnessed such duplication as well.[293] The Italian report mentions two practical reasons for this, while highlighting that this repetition is not at all required by law.[294] First, national criminal law authorities could be, regrettably, unaware of the probative value of OLAF reports.[295]

Second, criminal courts and public prosecutors can be interested in delving further into elements and circumstances that OLAF could have neglected, and vice versa, since OLAF investigations are different in nature and scope from criminal investigations. Likewise, in the assessment of the OLAF Regulation carried out by the independent consultancy ICF, we read that one of the interviewees explained that issues related to the inadmissibility of evidence are connected with 'the relevance of the evidence given the *different aims of the investigations* – OLAF's aim is to recover funds, while the national competent authority's aim is to establish the criminal [liability] of an individual'.[296] Hence, when OLAF has interviewed a person who then becomes subject to criminal investigations, Italian criminal law authorities examine him or her again.[297] When it comes to witnesses, public prosecutors decide on a case-by-case basis whether there is a

[289] ibid.
[290] See, for instance, ECA, 'Special Report No 1/2005' (n 252), para 29.
[291] The ICF's evaluation reported an interview with a national judicial authority that 'noted that the quality and reliability of OLAF's recommendations and reports are *not* really an issue in the stakeholder's national proceedings' (ICF (n 136) 126; emphasis added). The European Parliament suggested amending the OLAF Regulation in order to include Art 11(2)(1a), which would require OLAF to 'take proper internal measures to ensure the consistent quality of final reports and recommendations' (European Parliament, 'Legislative resolution of 16 April 2019 on the 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)0338 – C8-0214/2018 – 2018/0170(COD))', amendment 84).
[292] Hungarian report, section 5. Covolo notes that, if national law requires the originals for the purpose of national procedures while OLAF can only provide copies of documents, this may further impair the admissibility of OLAF-collected evidence and require national authorities to repeat OLAF activities (Covolo (n 148) 311).
[293] As Vervaele points out by referring to Cases T-492/93 and T-492/93 R *Nutral SpA v Commission*, EU:T:1993:85, it seems that repetition of OLAF (at the time UCLAF) used to occur in Italy already in the early 1990s.
[294] Italian report, section 5.2.
[295] In a somehow similar vein, OLAF noted, 'There are also cases where dismissals appear to be motivated by limited knowledge of the rules governing EU funding' (OLAF, 'Analysis on Member States Follow-Up' (n 276) 3; see also Commission, 'Replies to the Special Report' (n 278), para 100).
[296] ICF (n 136) 126 (emphasis added).
[297] Italian report, section 5.2.

need to replicate the interview. For all the other types of evidence, usually OLAF investigators who have drafted the report are summoned as witnesses at trial.[298]

The UK system takes a similar stance vis-à-vis OLAF reports, as duplication is not necessary and, if OLAF-collected evidence is unchallenged, no further evidence would be needed to convict the concerned person. The UK rapporteur notes, 'Typically, the more "scientific" the statement (eg forensic document analysis showing the age or provenance of a piece of paper), the more likely that it would pass unchallenged, or challenged only on "scientific" ground. The more evaluative, the less likely that it would pass unchallenged'.[299] He also stresses that the problem of the admissibility of OLAF-collected evidence does not really come up with respect to OLAF reports as such but rather with regard to the specific items of evidence that are attached to them (witness statements, forensic accountancy, etc).[300] These items are in principle admissible, but there may be exceptions. For instance, if reports contain hearsay evidence, it would be necessary to secure the admissibility of that evidence by requiring OLAF officials to testify in court. Interviews with suspects would generally be repeated by the domestic police before criminal proceedings are brought, since the conditions under which these interviews are conducted is regulated by the Police and Criminal Evidence Act 1984.[301]

The French, Dutch, German, and Luxembourgish reports do not mention cases of repetition of investigative acts. The German rapporteurs note that the OLAF investigative act (inspection, on-the-spot check, etc) is not repeated as such, rather its findings are presented in a different manner. The OLAF report's author is usually called as a witness before the court, as also mentioned by UK and Italian rapporteurs. A specific hypothesis of duplication may concern cases where evidence has been obtained by an investigative measure that breaches the law and/or the defendant's fundamental rights. In such cases, trial courts will exclude evidence if the information could have been obtained lawfully and they can thus repeat the investigative act to obtain that evidence lawfully. This would for instance be the case of a suspect who was not properly informed of the right to remain silent and to consult with defence counsel. The court could notify the accused of such rights and of the inadmissibility of the previous statements as evidence, and then examine him or her again to obtain a statement that can be used at trial.[302]

As for Luxembourg, the issue of duplication was even brought to the attention of national courts. In a case decided in 2015 by the Court of Appeal, the defendant complained that the investigative judge limited himself to including the OLAF report in the case file without carrying out his own investigations. The Luxembourgish CCP requires the investigative judge to conduct investigations by gathering inculpatory ('*à*

[298] ibid.
[299] UK report, section 5.
[300] The fact that the annexes to OLAF reports are rather important with a view to the criminal proceedings, since it is indeed in the annexes that OLAF mostly includes (or should include) copies of the documents it consulted, recordings of the interviews, etc, has been confirmed by an OLAF investigator interviewed within the frame of this project.
[301] UK report, section 5.
[302] German report, section 5.2. However, no cases of duplication due to violations of law or fundamental rights have been so far reported to the German AFCOS (Anti-fraud coordination service) (ibid).

charge') and exculpatory ('*à décharge*') evidence, while OLAF allegedly only carried out investigations *à charge*. The pre-trial chamber of the Court of Appeal rejected the defendant's argument by acknowledging that investigative judges can base their decisions on OLAF-collected evidence without any need to repeat activities already performed by OLAF. In addition, it noticed that OLAF had carried out its investigations *à charge* and *à décharge*, so that no violation of the right to a fair trial occurred.[303]

Luxembourgish interviewees added that, bearing in mind that Luxembourg is a monist system, the need not to repeat OLAF investigations also follows from the principle of *effet utile* of EU law. OLAF-collected evidence's admissibility in criminal proceedings does not imply, however, that such evidence is always sufficient to indict or convict the suspect.[304] National authorities may need further elements to prove the suspect's criminal liability. The Dutch rapporteurs make a similar point: while stating that Dutch law does not require the repetition of OLAF activities, they highlight that additional investigative activities may be sometimes necessary to reach a decision on the case.[305]

A specific example of duplication of investigative activities is when national law enforcement authorities involved in OLAF investigations draw a *parallel national report*. The UK, Luxembourgish, Hungarian, and French reports do not mention any example in this respect. In Italy, if national authorities participate in OLAF investigative activities, they are obliged by law to compile a report. However, this report in principle does not contain evidence, as it simply describes the national authorities' involvement in OLAF investigations. At the most, they can require the Office to transmit to them relevant information.[306] Therefore, this does not qualify as a 'parallel national report' in the sense that Italian authorities replicate OLAF activities.

The same goes for Germany and the Netherlands. In the former, a parallel national report on inspections under administrative law could serve as a backup but has no additional probative value.[307] In the Netherlands, national inspectors also draft a report of the investigations conducted when they are involved in OLAF cases. Like in Italy, this report cannot however be considered a replication of the OLAF report, as it is not an autonomous basis for imposing fines.[308] This national report includes an overview of the investigation and, in the annex, a shadow dossier of the data that OLAF copied. If Dutch authorities do not agree with OLAF's findings, however, they also include their own findings in their report. In case of disagreement between Dutch authorities and OLAF, the former would not sign the report of the latter, although this has so far never happened

[303] Pretrial Chamber of the District Court of Appeal, 6 January 2015, decision No 09/15, as reported in the Luxembourg report, section 5.2. According to Art 9(1) of Regulation 883/2013, OLAF 'shall seek evidence for and against the person concerned'.
[304] Luxembourg report, section 5.2.
[305] Dutch report, section 5.2.
[306] Italian report, section 5.1.
[307] German report, section 5.1. Since 2012, however, the German AFCOS has not been notified of any case where the competent authority drafted a parallel national report (ibid).
[308] Dutch case law concerning decisions based on OLAF reports never mentions national reports (Dutch report, section 5.1).

in the Netherlands.[309] At a later time, OLAF would then draft a 'synthesis report',[310] taking into account the findings mentioned by Dutch officers. In this case, the synthesis report is the OLAF report for the purpose of Article 11 of Regulation 883/2013.[311]

5.3 New rules on OLAF-collected evidence: A solution to the issue of duplication?

The duplication of OLAF activities is therefore far from being a theoretical problem. A distinction can however be drawn between a 'pathological' and a 'physiological' duplication, so to speak. When OLAF activities are repeated because national authorities have inadequate knowledge of EU rules, this is certainly a 'pathological' duplication, which can arguably be repaired only by increasing national authorities' awareness of EU instruments and bodies (eg by means of more training at the national level).

Likewise, duplication can be considered 'pathological' when national authorities repeat in practice (almost) *all* OLAF activities by default. In such a case, one struggles to grasp the added value of OLAF, as its investigative activities would at the most qualify as elements justifying the opening of national investigations. Among the countries under analysis in this study, it seems that only in Hungary is it standard practice that national authorities repeat OLAF activities in accordance with the criminal procedure code. This is intended to raise the reports' probative value, as is the case with the reports by Hungarian administrative authorities.[312] This seems thus an example of the problems that can flow from the assimilation principle.

The suppression of the assimilation clause of Article 11(2) of Regulation 883/2013 could then increase OLAF activities' effectiveness. As discussed in both transversal reports,[313] the Commission tabled a Proposal for the amendment of the OLAF Regulation in May 2018, suggesting deletion of the assimilation clause for the admissibility of OLAF reports in national *administrative* proceedings, including punitive

[309] ibid. Art 8(3) of Regulation 2185/96 and Art 14(6) of the 'Guidelines on Investigation Procedures' (n 220) request the counter-signature by national officials, yet the Dutch rapporteurs note – correctly, in the author's view – that such a signature would not be a precondition for the admissibility of OLAF reports in national criminal proceedings. For an opposite stance, see however COM(2010) 382 final (n 215) 23.

[310] The Dutch customs manual uses this expression, which refers to the 'OLAF report which has been complemented on the basis of the national report. However, this is not a legal term under Regulation 883/2013' (Dutch report, section 5.1). If national authorities agree with OLAF investigators, they sign the preliminary report drafted by OLAF and handed over to them in the joint evaluation meeting that takes place after each inspection. In this case, such a report is usually the final OLAF report within the meaning of Art 11 of Regulation 883/2013 (ibid).

[311] ibid.

[312] There are no elements to link this practice reported in Hungary with the current deficiencies concerning the rule of law in this country. The link between the more general rule of law concerns and the protection of the Union's financial interests, however, has recently been brought to the fore by the 2018 Commission proposal for a Regulation providing for mechanisms (eg suspending payments or even EU-funded programmes altogether) to sanction Member States where there are generalised deficiencies regarding the rule of law (COM(2018) 324 final, 2 May 2018). Such deficiencies may affect, for example, the 'proper functioning of investigation and public prosecution services in relation to the prosecution' of PIF offences and 'the effective and timely cooperation with the European Anti-fraud Office and with the European Public Prosecutor's Office in their investigations or prosecutions pursuant to their respective legal acts and to the principle of loyal cooperation' (Arts 3(1)(b) and 3(1)(f) of the Proposal).

[313] Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.5; Vervaele, transversal report, section 7.

ones. The new text suggested by the Commission would read as follows: 'Upon simple verification of their authenticity, [OLAF] reports … shall constitute admissible evidence in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings in the Member States'.[314] According to the Commission's text, the assimilation rule would continue to apply to national criminal proceedings.

The European Parliament has instead proposed to subject both administrative and criminal proceedings to the same new regime and suggested the following amendment:

> Upon simple verification of their authenticity, reports drawn up on that basis including all evidence supporting and annexed to these reports shall constitute admissible evidence in judicial proceedings before national courts and in administrative proceedings in the Member States. The power of the national courts to freely assess the evidence shall not be affected by this Regulation.[315]

At the time of writing, negotiations are ongoing. One may however wonder whether the suppression of the assimilation rule can truly change the status quo. National law will continue to regulate national criminal proceedings and, if national courts find that OLAF violated national procedural safeguards when gathering evidence, the amendment of the admissibility rule would not impair the national courts' decision not to admit or use OLAF reports. Likewise, if national judges need further or more reliable evidence to convict the defendant, the amendment of Article 11(2) of the OLAF Regulation will not bring about ground-breaking improvements. In fact, some 'physiological' duplication seems inescapable as long as OLAF remains an administrative authority carrying out activities with effects that extend to criminal proceedings. As most national reports mention, while in principle OLAF-collected evidence would be sufficient to justify the adoption of a conviction decision, this does not seem likely to happen if further evidence is not collected (or collected again) by national authorities. This 'physiological' duplication is due, inter alia, to the different aims and standards between OLAF investigations and national criminal investigations. The example of national courts re-examining witnesses or suspects is a case in point. After all, the Commission itself is adamant in stating that 'Member States' judiciaries are and should be independent from OLAF. The national authorities may therefore reach different conclusions than the ones drawn by OLAF'.[316]

While the suppression of the assimilation clause is likely not to change this 'physiological' duplication, it could however help in reducing 'pathological' duplication by clarifying that, in principle, OLAF-collected evidence can be used by national courts for their decisions. In national systems where the inadmissibility of OLAF reports, or the repetition of OLAF activities, is justified by the restrictive rules applying to the admissibility of evidence gathered by administrative authorities (and therefore to OLAF in accordance with the assimilation principle), a rule like that envisaged by the European Parliament may represent a step forward.

[314] COM(2018) 338 final (n 274) 24.
[315] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 85.
[316] Commission, 'Replies to the Special Report' (n 278), para 97.

Against this backdrop, the further question to address is whether it is appropriate and legally feasible to remove the assimilation rule also with respect to national *criminal* proceedings. The transversal reports seem to reply in the affirmative.[317] However, accepting that OLAF reports can be admissible in national criminal proceedings upon simple verification of their authenticity calls for clarifications with respect to: a) the legal basis of the amended OLAF Regulation; and b) the position of individuals vis-à-vis this 'enhanced' admissibility of OLAF-collected evidence in criminal proceedings.

Legal basis

The ADCRIM project examined whether Article 325 TFEU would be a sufficient and adequate legal basis for a provision like that suggested by the European Parliament, which would encroach upon national criminal justice systems. Despite some opposition, this does seem to be preferred. Article 325 TFEU bears an important difference when compared to its 'predecessor', namely Article 280 of the Treaty of the European Community (TEC). Article 280(4) TEC empowered the Council to adopt measures aimed at ensuring a homogenous and effective protection of the common budget, yet at the same time clarified that 'these measures shall *not* concern the application of national criminal law or the national administration of justice'.[318] The new wording of Article 325(4) TFEU, which requires the European Parliament and the Council to take the necessary measures to prevent and curb fraud against the Union's financial interests, has removed this limitation from EU primary law.

The difference between the two texts sparked debate in the literature, especially in the field of substantive criminal law. Some authors even argue that the EU is now empowered to adopt, in the PIF sector, regulations laying down the definition of criminal offences and sanctions thereof.[319] In their view, the new wording of Article 325 TFEU and the specificity of EU financial interests would allow the Union to adopt directly applicable criminal law instruments. The Commission itself, however, when deciding to amend the 1995 Convention on the protection of the European Communities' financial interests,[320] tabled a proposal for a directive – rather than a regulation – on fighting fraud against the Union's financial interests by means of criminal law (the so-called 'PIF Directive'), pursuant to Article 325(4) TFEU.[321] The fate of the PIF Directive's legal basis is known, as the Council and European Parliament shifted it to Article 83(2) TFEU and the Commission decided not to bring the matter before the CJEU, despite its initially hinting it might do so.[322]

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[317] Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.5; Vervaele, transversal report, section 7.
[318] Art 280(4) TEC (emphasis added).
[319] See, eg, John Vervaele, 'The Material Scope of Competence of the European Public Prosecutor's Office: *Lex Uncerta* and *Unpraevia*?' (2014) 15 *ERA Forum* 92.
[320] [1995] OJ C 316/49.
[321] Commission, 'Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law' COM(2012) 363 final, 11 July 2012.
[322] For further remarks on the PIF Directive's legal basis and further references, see Fabio Giuffrida, 'The Protection of the Union's Financial Interests after Lisbon' in Rosaria Sicurella et al (eds), *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners* (Giuffrè

Be that as it may, Article 325 TFEU would justify the adoption of a recast OLAF Regulation providing for the admissibility of OLAF reports also in national *criminal* proceedings, as suggested by the European Parliament. First, while the PIF Directive's legal basis called into question the sensitive relationship between Article 325 TFEU and Article 83 TFEU, with the Council and the European Parliament in essence claiming that the latter is *lex specialis* to the former when it comes to the harmonisation of substantive criminal law, the same issue would not arise vis-à-vis OLAF. Regulation 883/2013 is already based upon Article 325 TFEU and its amended version could not rely on any other legal basis. There is no further *lex specialis* to take into account to enhance the OLAF legal framework in general and, in particular, to ensure the admissibility of OLAF reports in national criminal proceedings. Article 325 TFEU would suffice.[323] Article 82(2)(a) TFEU, which also concerns evidence in criminal matters, refers to the mutual, 'horizontal', so to speak, admissibility of evidence among Member States, while OLAF-collected evidence is evidence collected by an EU body that, in a 'vertical' way, should be admissible in national proceedings.

Second, a rule like that envisaged by the European Parliament would not fall beyond the scope of Article 325 TFEU. Since the previous limitation of Article 280(4) TEC has been removed, providing for the admissibility of OLAF reports in national criminal proceedings could qualify as a 'necessary [measure] in the fields of the … fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States'.[324] The necessity of this rule to strengthen the effective protection of the EU budget arguably flows from the assessment of the OLAF Regulation. The Commission acknowledges that 'the *most important factor* affecting the follow-up to OLAF recommendations identified by the evaluation relates to the rules on the admissibility of OLAF-collected evidence in national judicial proceedings … [I]n some Member States this rule does not sufficiently ensure the effectiveness of OLAF's activities'.[325] Furthermore, the rule suggested by the European Parliament would ensure an equivalent treatment of OLAF reports throughout the EU, overcoming the differences currently flowing from the principle of assimilation. Besides, recent case law of the CJEU seems to confirm that criminal procedure – and especially evidentiary-related matters – do not escape the field of application of Article 325 TFEU, rather the contrary. In *Kolev* and *Dzivev*, when examining Article 325 TFEU and its implications, the Court acknowledges that the 'Member States must … ensure that the rules of criminal procedure permit effective investigation and prosecution of [PIF] offences'.[326]

Third, it is true that these two recent judgments highlight that it is mostly for national legislators, rather than the EU, to deal with criminal procedural rules to ensure

2017) 249–252. See also Rosaria Sicurella, 'A Blunt Weapon for the EPPO? Taking the Edge Off the Proposed PIF Directive' in Willem Geelhoed, Leendert H Erkelens and Arjen WH Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer – Asser Press 2018) 106–108.

[323] See more in Vervaele, transversal report, section 3.

[324] Art 325(4) TFEU.

[325] COM(2018) 338 final (n 274) 5 (emphasis added).

[326] Case C-612/15 *Kolev and Others*, EU:C:2018:392, para 55. For a very similar statement, see Case C‑310/16 *Dzivev*, para 29. See more in Vervaele, transversal report, section 3.

effective protection of the EU budget,[327] yet one should not forget that Article 325 TFEU obliges both Member States *and* the Union to counter fraud and any other illegal activities affecting the Union's financial interests.[328] In the light of such shared obligation, a rule like that suggested by the European Parliament could well be covered by Article 325 TFEU especially as it would not unhinge the whole national criminal justice system. On the contrary, it would concern the limited PIF domain, which is a distinctive field within EU law as it relates to the protection of inherently European legal interests pertaining to the EU as such (rather than to its Member States).[329] It is in this domain that, with the establishment of the EPPO, the EU has for the first time been allowed to partake in the exercise of traditional national sovereign prerogatives such as those of investigating and prosecuting (PIF) crimes. In such a specific and special field, and bearing in mind that OLAF is an EU body that is entrusted with the mission of enhancing the protection of the Union budget, it should be possible to require Member States to consider admissible the findings of its investigations, all the more so since the new Regulation would not (and could not) oblige Member States' courts to base their decision on such evidence. As the European Parliament's text suggests, 'The power of the national courts to freely assess the evidence shall not be affected by this Regulation'.[330] This expression is almost a copy-paste of Article 37(2) of the EPPO Regulation.[331]

The rule that the European Parliament puts forward, in fact, does not foresee a very different regime compared to that envisaged by the EPPO Regulation. Article 37(1) of the latter states, 'Evidence presented by the prosecutors of the EPPO or the defendant to a court 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'. The aim of Article 37 of the EPPO Regulation is to ensure the 'horizontal' admissibility of EPPO-collected evidence: if the European Delegated Prosecutor (EDP) carries out the investigations in Member State A but the trial takes place eventually in Member State B, the courts of Member State B should not deny admission of evidence collected by EDPs in Member State A *only because* this evidence has been gathered abroad. The OLAF Regulation, however, aims to bridge the gap in the 'vertical' relationship between an EU investigative body and national tribunals, in principle within the same Member State. While the EPPO Regulation lays down a rule of, so to speak, 'non-inadmissibility' (evidence collected abroad *cannot* be denied admission only because of its foreign origin), the recast OLAF Regulation would provide for a bolder admissibility rule (OLAF reports *shall* be admissible). In both cases, however, the EU texts leave untouched the powers of national courts to assess EPPO- or OLAF-collected evidence. As a consequence, they remain free to consider this evidence unreliable or insufficient to lead to a conviction, and could thus need to adopt further measures or require further investigations. In addition, especially in systems building on the principle of discretionary prosecution, the

[327] Case C-612/15 *Kolev*, para 65; Case C‑310/16 *Dzivev*, para 31.
[328] Art 325(1) TFEU.
[329] For further remarks and references, see Giuffrida, 'The Protection' (n 322) 245ff.
[330] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 85.
[331] See more in Vervaele, transversal report, section 3.

admissibility of OLAF-collected evidence may not be convincing enough for national authorities to justify further investigations and prosecutions.

The new suggested wording of Article 11(2) of Regulation 883/2013 – in the European Parliament's version – would have the merit of clarifying that OLAF-collected evidence will have to be admitted in criminal proceedings, even if national rules on admissibility of evidence gathered by national administrative authorities are scarce or altogether non-existent.[332] The suggested provision appropriately specifies that it is not only the reports as such, but also all evidence supporting, and attached to, them that should be admissible. The UK report has for instance mentioned that national authorities usually assess the admissibility of the various elements supporting OLAF reports rather than that of the reports as such.[333]

In other words, the new rule would at least ensure that OLAF-collected evidence will be 'available' to national criminal courts (ie admissible in criminal proceedings). As discussed above, the Preamble of Directive 2019/1 on the powers of national competition authorities clarifies that, when a given type of proof is 'admissible', this means that national authorities 'should be able to consider'[334] it in view of their decisions. The same goes for OLAF-collected evidence in accordance with the new rule on admissibility as couched by the European Parliament: national courts will be in a position to *consider* this evidence when taking a decision, but would *not* be automatically bound by it.

Position of individuals vis-à-vis the new suggested rules on OLAF-collected evidence

Once it is established that the new suggested rule on the admissibility of OLAF reports in criminal proceedings would fall within the remit of Article 325 TFEU,[335] it is to be questioned whether higher procedural safeguards should underlie the enhanced admissibility of these reports. One of the objections to the European Parliament's proposal for an amended OLAF Regulation is indeed that, by ensuring the *de iure* admissibility of OLAF-collected evidence in criminal proceedings, there is a serious risk that even evidence collected unlawfully or in violation of fundamental rights should be permitted entry into the case file. Therefore, procedural safeguards should be strengthened as well.[336] The safeguards listed in Regulation 883/2013 are overall rather robust when compared with the usual ones surrounding administrative investigations in

[332] The European Parliament would also require the national courts to notify to OLAF 'any rejection of evidence in accordance with [Art 11(2) of the amended OLAF Regulation]. The notification shall include the legal basis and a detailed justification for the rejection. The Director-General shall, in his or her annual reports pursuant to Article 17(4), evaluate the admissibility of evidence in the Member States' (European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 88).
[333] See section 5.2 above.
[334] Recital 73 of Directive (EU) 2019/1.
[335] It goes without saying that it is an open question whether there will be sufficient political will in the Council on the amendment of Art 11(2) of the OLAF Regulation as suggested by the European Parliament. Bearing in mind that the Council did not accept basing the PIF Directive on Art 325 TFEU, one may expect that the Council will be even less inclined to accept that such a provision could be the legal basis of a recast OLAF Regulation providing for a bold admissibility rule concerning criminal proceedings.
[336] See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.5; Vervaele, transversal report, section 7.

the Member States, yet there are still some shortcomings from a criminal law perspective.[337]

In the light of settled CJEU case law, individuals can only challenge the validity (or, more specifically, the usability) of OLAF reports before *national* courts.[338] The European Parliament suggested bridging this gap by introducing an ad hoc provision in the OLAF Regulation. Article 11a of the amended OLAF Regulation would provide the following:

> Any person concerned may bring an action against the Commission for annulment of the investigation report transmitted to the national authorities or to the institutions under Article 11(3) on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties, including violation of the Charter, or misuse of powers.[339]

This rule would strengthen the position of individuals vis-à-vis OLAF-collected evidence. The control by the CJEU would ensure the validity of OLAF reports and that fundamental rights as enshrined in the Charter have not been violated during OLAF investigations. Assuming this rule is approved and that, in a given case, the CJEU will confirm that OLAF reports are valid, it is however unclear whether national courts would still be able to assess OLAF-collected evidence. On the one hand, the CJEU's jurisdiction over OLAF activities could be considered exclusive. On the other, national courts could still examine OLAF reports in the light of the relevant rules of national law and especially potentially higher national standards.[340] This may not sit well with the *Melloni* principles, notably if the CJEU will have found that OLAF has not violated any right of the Charter.

If OLAF reports, albeit 'validated' by the CJEU, will lack reliability or credibility in the eyes of a national judge, he or she would still be free to search for further evidence, as one can glean from the last sentence of the provision suggested by the European

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[337] See, for instance, Ligeti (n 23); Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.4.

[338] As noted in the French report of the first Hercule III study, with remarks that seem valid for all Member States, 'it is the exhibition, the production of these documents which can be annulled and not the original documents which by their very nature cannot be invalidated by [national] courts' (Juliette Tricot, 'France' in Luchtman and Vervaele (eds) (n 26) 216). See more in section 3.3 above. For some remarks on this gap in judicial protection see, for instance, Valsamis Mitsilegas, *EU Criminal Law* (Hart 2009) 215–218; Xanthaki (n 249) 55–57; Covolo (n 148) 556ff.

[339] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 94. See more in Vervaele, transversal report, section 7.

[340] This seems the case when it comes to EPPO-collected evidence, as can be inferred from the recital of the Regulation concerning evidentiary matters: '[The EPPO] Regulation respects the fundamental rights and observes the principles recognised by Article 6 TEU and in the Charter … and by Member States' constitutions in their respective fields of application. In line with those principles, and in respecting the different legal systems and traditions of the Member States as provided for in Article 67(1) TFEU, nothing in [the EPPO] Regulation may be interpreted as prohibiting the courts from applying the fundamental principles of national law on fairness of the procedure that they apply in their national systems, including in common law systems' (recital 80 of the EPPO Regulation). However, this applies in a 'vertical' setting (EPPO-collected evidence to be admitted in a different Member State than that in which it was collected), while provisions on OLAF-collected evidence mostly aims to regulate 'horizontal' issues (OLAF reports to be admitted in national proceedings of the same Member State where the Office carried out its investigations); hence, transposing the provisions concerning EPPO-collected evidence in the OLAF setting may not be straightforward.

Parliament: '[T]he power of the national courts to freely assess the evidence shall not be affected'.[341] Again, as the *de iure* admissibility of OLAF reports would not entail their automatic use in national proceedings, the positive outcome of a possible judicial review by the CJEU would not imply that national courts are deprived of their power to assess OLAF-collected evidence. The difference with the current scenario would however be that individuals affected by OLAF activities could challenge the reports before the CJEU and trigger an early control on the OLAF's respect of EU law, including fundamental rights as enshrined in the Charter. Should the Court find that OLAF reports are invalid, they will be declared null and void in the EU legal order and could neither be used in any Member State nor justify any further measure based on them.

Further enhancement of procedural safeguards may also follow from the creation of the so-called 'Controller of procedural guarantees', which the European Parliament has suggested establishing. The Controller should be competent to decide on complaints concerning alleged OLAF violations of procedural safeguards.[342] The idea of setting up this body dates back to 2013, when the OLAF Supervisory Committee called for the setting up of a 'transparent and stable internal procedure for dealing with individual complaints'.[343] In 2014, the Commission suggested establishing a 'Controller of procedural guarantees',[344] but the Member States opposed this idea.[345] The Controller could strengthen the protection of the rights of individuals involved in OLAF investigations, yet it is debatable whether it would deliver positive results in practice. It ought indeed to be noted that, in the literature, the added value of such a body is disputed, as it would represent 'an additional layer of non-binding control'.[346] The OLAF Supervisory Committee itself seems to be critical of the Controller in a more recent opinion, which calls for 'finding ways to exercise the right to effective judicial control by placing [the task of monitoring OLAF's compliance with procedural guarantees and duration of investigations] under the jurisdiction of a *truly judicial body*, either at national or EU level'.[347] Should the negotiators agree on the Court's jurisdiction over OLAF reports, the establishment of the Controller could be sidelined, as the judicial review by the CJEU would suffice to ensure an adequate control of OLAF's respect for procedural safeguards. This would be all the more true if another of the European Parliament's proposals is agreed upon, namely that of reinforcing the internal legality check that OLAF carries out on its reports before transmitting them to national authorities. With a view to strengthening the protection of individual rights – and somehow 'recreating' the previous Magistrates Unit – the European Parliament requires such a legality check to be entrusted

[341] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 85.
[342] ibid, amendments 76–77. See more in Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.5.
[343] OLAF Supervisory Committee, 'Opinion No 2/13 on Establishing an Internal OLAF Procedure for Complaints' (2013) 2.
[344] Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees' COM(2014) 340 final, 11 June 2014. See also Covolo (n 148) 547–549; Ligeti and Robinson (n 144) 243–244.
[345] See Council doc 14075/14, 27 October 2014.
[346] Ligeti (n 23) 24.
[347] OLAF Supervisory Committee, 'Opinion 2/2017' (n 130) 27 (emphasis added).

to 'experts in law and investigative procedures who are qualified to hold judicial office in a Member State'.[348]

Finally, the European Parliament suggests introducing a further key procedural safeguard that is currently missing in the OLAF framework, namely the right of access to the file.[349] Article 9(5a), in the European Parliament's version, would read as follows:

> For cases where the Office recommends a judicial follow-up, and without prejudice to the confidentiality rights of whistle-blowers and informants, the person concerned shall have access to the report drawn up by the Office under Article 11 following its investigation, and to any relevant documents, to the extent that they relate to that person and if, where applicable, neither the EPPO nor the national judicial authorities object within a period of six months. An authorisation by the competent judicial authority may also be granted before this period has expired.[350]

If agreed, this provision could strengthen the procedural safeguards of individuals subject to OLAF investigations, and consequently reduce the issues (potentially) concerning the admissibility of OLAF-collected evidence.

Therefore, the European Parliament's proposal tries to enhance both aspects of OLAF activities. As for the law enforcement aspect, it suggests putting admissibility in administrative proceedings on a par with that in criminal proceedings.[351] This would not be prohibited under Article 325 TFEU but should go hand in hand with the enhancement of procedural safeguards. Hence, the European Parliament calls for the strengthening of the individuals' position vis-à-vis OLAF activities, and the heed it pays to the defence aspect is also reflected in its amendments concerning the EPPO-OLAF future relationships, as discussed in the section below.[352]

5.4 A few remarks on the future OLAF-EPPO relationships and their impact on evidence gathering

The principle guiding the future EPPO-OLAF relationship is that OLAF shall not conduct investigations when the EPPO is already dealing with the same facts.[353] According to Article 101(3)(c) of the EPPO Regulation, however, the EPPO may 'request OLAF, in

[348] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 135, which also requires the opinion of these experts to be attached to the final investigation report.
[349] Ligeti (n 23) 16–18. See also Inghelram, *Legal and Institutional Aspects* (n 145) 129ff; Covolo (n 148) 461ff.
[350] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 75.
[351] Vervaele notes that, while the European Parliament's efforts to strengthen the individual's position are remarkable, the text put forward still 'does not regulate the standards for unlawful evidence, nullity or the exclusion of evidence and seems to leave this to the Court' (Vervaele, transversal report, section 7). For similar remarks, see Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 6.5.
[352] For a broader analysis of this future relationship see, eg, Andrea Venegoni, 'The New Frontier of PFI Investigations. The EPPO and Its Relationship with OLAF' (2017) *eucrim* 193; Anne Weyembergh and Chloé Brière, 'The Future Cooperation Between OLAF and the European Public Prosecutor's Office', Study for the European Parliament (2017).
[353] Recital 103 and Art 101(2) of the EPPO Regulation.

accordance with OLAF's mandate, to *support* or *complement* the EPPO's activity'[354] by, among other actions, 'conducting administrative investigations'.[355] Bearing in mind that they may be requested 'in the course of an investigation by the EPPO',[356] it is not entirely clear what would be the nature of these OLAF investigations, especially those 'in support' of EPPO investigations. As Weyembergh and Brière note, the Regulation 'entertains some sort of "constructive ambiguity" around the notion of OLAF's supporting and complementing the work of the EPPO'.[357] The way the above-mentioned provision is couched seems to imply that OLAF may become – at least on an ad hoc basis and for the Member States participating in the EPPO – a sort of *police judiciaire* of the EPPO,[358] although the negotiators had clearly ruled out such transformation of OLAF.[359]

The risk looming large in this scenario is that the EPPO may delegate tasks to OLAF with the 'aim of circumventing'[360] the EPPO Regulation rules on procedural safeguards. As noted above, safeguards provided for by the OLAF Regulation are high but not entirely aligned with the more protective ones to be found in national criminal legislation (or even in national constitutions). The EPPO may therefore be tempted to 'outsource' some of its investigative activities to OLAF, which will conduct administrative investigations – with lower safeguards – to gather evidence that the EPPO itself can use at a later stage. As Kuhl notes,

> A great challenge for EPPO efficiency … results from the criminal investigation and enforcement function of OLAF (at the request and at the service of the EPPO) … This function … should … be subject to specific instructions and legal control by the EPPO, and in accordance with a specific set of rules that require compliance with *criminal judicial standards and guarantees*.[361]

It is thus to be welcomed that the European Parliament has taken stock of the issue by requiring that, where OLAF performs supporting or complementary measures at the EPPO's request, 'the EPPO may instruct the Office to apply *higher standards* of fundamental rights, procedural guarantees and data protection than provided for in [the

[354] Art 101(3) of the EPPO Regulation (emphasis added).
[355] Art 101(3)(c) of the EPPO Regulation.
[356] Art 101(3) of the EPPO Regulation.
[357] Weyembergh and Brière (n 352) 20.
[358] In the view of negotiators and OLAF staff, OLAF can be in an ideal position to offer its support to the EPPO in three scenarios, thanks to its expertise: cross-border cases, cases involving third countries, and cases involving EU officials.
[359] The Regulation does not endorse the vision of OLAF as the EPPO's *police judiciaire*, as it prefers the vision according to which 'the EPPO's main support would come from the national authorities; and the relation between the EPPO and OLAF is envisaged as a relation between two autonomous bodies. In this context, OLAF is still supporting the EPPO's work, but in a more "subsidiary manner", and OLAF keeps its own margin of manoeuvre' (Weyembergh and Brière (n 352) 21).
[360] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 110.
[361] Lothar Kuhl, 'The European Public Prosecutor's Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?' (2017) *eucrim* 135, 141 (emphasis added). For similar views, see Petr Klement, 'OLAF at the Gates of Criminal Law' (2017) *eucrim* 196, 198–199; Jan Inghelram, 'EPPO, OLAF and CJEU – A Brief Look at Their Interplay' [2019] 2 *ECA Journal* (*Fraud and Corruption. Ethics and Integrity*) 70, who notes that the 'purely operational link' enshrined in Art 101 of the EPPO Regulation 'hides a more fundamental discussion on adequate control of OLAF' (ibid 71).

OLAF] Regulation'.[362] In the absence of such instructions, the provisions of the EPPO Regulation on procedural safeguards and data protection 'shall apply mutatis mutandis to measures'[363] performed by OLAF. As we can read in the European Parliament's 2019 resolution, this provision aims to 'protect the admissibility of evidence as well as fundamental rights and procedural guarantees'.[364]

This provision confirms the praiseworthy attention that the European Parliament pays to the procedural safeguards of individuals involved in OLAF investigations. At the same time, it seems to build upon the view of OLAF as the EPPO's *police judiciaire*: when the EPPO requests OLAF to conduct investigations, such investigations should be in the criminal law domain. While this may be appropriate if OLAF investigations aim to 'support' the EPPO's investigations, it may be more contentious when OLAF conducts administrative investigations to 'complement' the EPPO's activity. One could perhaps think of situations where the EPPO is aware of some aspects of the case escaping its own remit (eg disciplinary consequences) and that OLAF could better carry out during EPPO investigations to promptly tackle the non-criminal aspect of the conduct under investigation.

A further connected question concerns the status of the evidence gathered by OLAF while conducting administrative investigations upon the EPPO's request. It ought indeed to be remembered that OLAF- and EPPO-collected evidence have different status. When cases have a *purely national dimension*, EPPO-collected evidence will be admitted in national proceedings according to the ordinary rules of criminal procedure, ie the same rules apply to national non-PIF criminal investigations.[365] After all, the European Delegated Prosecutors – who will form the linchpin of EPPO investigations – are national prosecutors carrying out their activities on the basis (mostly) of national law, under the direction of the EPPO's Central Office (Permanent Chamber and Supervising European Prosecutor). As for OLAF, the rule on the admissibility of its reports is mostly thought to apply in national cases. As per the text of current Article 11(2) of Regulation 883/2013, OLAF conducts administrative investigations in a given Member State, taking into account its national law, and the Office's reports shall be considered equivalent to those of assimilable national administrative authorities.

When the case has a *cross-border dimension*, the above-mentioned 'prohibition of non-inadmissibility' regulates the status of EPPO-collected evidence in the Member State where evidence needs to be used.[366] As for OLAF, it is not entirely clear whether Article 11(2) of Regulation 883/2013 also applies when OLAF reports are to be used in Member States other than the one(s) where OLAF conducted its investigations. If OLAF

[362] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 110 (emphasis added).
[363] ibid.
[364] ibid.
[365] In the EPPO Regulation, there is no rule on the admissibility of evidence collected by the EPPO in cases that do not involve a cross-border element. Therefore, in accordance with Art 5(3) of the EPPO Regulation ('… National law shall apply to the extent that a matter is not regulated by this Regulation …'), the ordinary rules of national criminal procedure apply.
[366] Art 37 of the EPPO Regulation.

carries out its activities in Member State A, taking into account the legislation of this country, it is unclear whether the assimilation principle also applies when authorities from Member State B wish to rely on that OLAF report.[367] It might be said to apply according to Article 11(2) of Regulation 883/2013, which states that OLAF reports 'shall constitute admissible evidence in administrative or judicial proceedings of the *Member State in which their use proves necessary*',[368] which could therefore be a different Member State from the one where OLAF conducted its investigations.

In the light of the above, therefore, it remains to be seen to which of the two sets of rules OLAF reports will be subject when OLAF conducts investigations upon the EPPO's request. On the one hand, one may think that OLAF reports could not be considered, or equated to, EPPO-collected evidence. The EPPO can require OLAF to support or complement ongoing investigations by conducting *administrative* investigations 'in accordance with OLAF's mandate'[369] but cannot 'delegate' to OLAF responsibilities that should be carried out (usually by national police) in accordance with the code of criminal procedure. On the other hand, as noted, the ambiguous provisions on the EPPO-OLAF relationships may lead one to think that OLAF may become – on an ad hoc basis – a sort of *police judiciaire* of the EPPO. In the latter scenario, if OLAF-collected evidence will eventually be subject to the rules on EPPO-collected evidence, the respect of criminal procedural safeguards by OLAF will be all the more necessary.

6. Conclusion

The analysis of rules, case law, and practices of seven Member States has confirmed what could be called a postulate of EU integration, namely that criminal justice systems are (still) rather different throughout the EU. However, this study brought to light not only their differences but also their similarities. Especially in the wake of the establishment of the EPPO, an increasingly more 'European' approach to criminal law matters is required.

The ADCRIM project has focused on a very specific yet critical aspect of national systems, namely the admissibility of evidence, including that gathered by OLAF, in national procedures. The study addressed both punitive administrative and criminal proceedings, focusing on the latter.[370] All the differences notwithstanding, it emerged that OLAF-collected evidence – and more precisely its reports and the annexes to them – are in principle *admissible* in each of the Member States under analysis, both in punitive administrative and criminal proceedings.

It has been queried whether the other EU bodies with which the previous Hercule III studies compared OLAF (the ECB, ESMA, DG COMP) could provide useful guidance

[367] Art 11(2) of Regulation 883/2013 focuses mostly on the rules of the Member State concerned by OLAF activities: 'In drawing up such reports and recommendations, account shall be taken of the *national law of the Member State concerned*. Reports drawn up on *that basis* shall constitute admissible evidence in administrative or judicial proceedings…' (emphasis added).
[368] ibid (emphasis added).
[369] Art 101(3) of the EPPO Regulation.
[370] The following concluding remarks thus concern the admissibility of OLAF reports in national *criminal* proceedings, unless otherwise specified.

to examine the admissibility of OLAF-collected evidence. The answer turned out to be overall negative, as national legislation and case law concerning these entities have not revealed relevant practices or lessons from which OLAF could learn. The reason for this seems to be found in the different natures of these bodies and their different relationships with the national criminal justice systems. ESMA and ECB legal frameworks, for instance, do not provide for any rule concerning the admissibility of evidence gathered by them in national proceedings. Regulation 1/2003 on competition law provides instead for some rules concerning the 'migration' of evidence from the EU to the national level. However, the applicability of such rules to OLAF would be contentious. DG COMP and its partners (NCAs or national courts) are part of a 'closed system', which is regulated almost entirely by EU law. OLAF's 'partners' are instead national prosecuting authorities and, most important, national criminal courts – all of them acting in accordance with national criminal law rather than with the EU rules.

Comparison with other EU bodies, however, provides food for thought from three different perspectives. First, as the transversal report on 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' notes, EU admissibility rules – such as Article 12 of Regulation 1/2003 or Article 11(2) of Regulation 883/2013 – have the merit of 'breaking open'[371] national laws: "'foreign' materials need to be accepted',[372] under the conditions provided for in EU law. Furthermore, these provisions help to 'do away with the issue of diverging standards' and 'ensure that evidentiary laws come within the scope of the Charter and the jurisdiction of the CJEU'.[373] Whatever these rules provide for, the Charter should be the pole star of EU and national activities and the Court of Justice's case law may help in ensuring coherence and consistency in the EU legal order.[374]

Second, the ECB and ESMA legal frameworks require the two bodies, when they become aware of potentially criminal conduct, to promptly inform competent national (criminal law) authorities, either directly (ESMA) or indirectly (the ECB informs central banks, which should pass the information on to public prosecutors). The study of the OLAF legal framework and some national reports show that this obligation does not apply to OLAF, at least not always. The issue at hand has been discussed within the framework of the analysis concerning contacts between OLAF and national authorities during the Office's investigations. It emerged that OLAF does not always contact national authorities before conducting investigative measures in the Member States, although such contact would help to ensure that OLAF complies with national procedural requirements with a view to the admissibility of evidence in criminal proceedings. Thus sometimes national authorities are only informed of OLAF investigations the moment they receive OLAF reports. Yet late contacts have turned out to be detrimental to the effectiveness of national investigations that follow OLAF's: if national authorities only become aware of the facts OLAF investigated when the Office brings its investigations to an end and

[371] Luchtman, Karagianni and Bovend'Eerdt, transversal report, section 3.2.
[372] ibid.
[373] ibid.
[374] ibid, section 7.

transmits the report, domestic prosecutors may need to repeat acts carried out by OLAF to ensure respect for procedural requirements and standards for admissible evidence. Furthermore, PIF crimes could be almost or already time-barred. A timelier communication between OLAF and national authorities seems therefore desirable.

Third, Directive 2019/1 concerning the powers of national competition authorities deals expressly with the issue of admissibility of evidence gathered by NCAs and transmitted to other NCAs. Although these provisions concern the 'horizontal' relationship between NCAs, while the OLAF Regulation addresses the 'vertical' admissibility in national proceedings of evidence collected by an EU body, they confirm that when EU law touches upon admissibility it refers to the 'ability to consider'[375] evidence. In other words, admissibility does not and could not mean (mandatory) use of evidence, as the national reports confirm. Where national judges find that OLAF activities have violated fundamental safeguards, they are reluctant to rely on OLAF reports. Likewise, it could also happen that national authorities find OLAF reports of insufficient quality or do not share OLAF's views, and therefore search for further evidence to adopt their decisions. Some national reports note that OLAF investigations have different aims than do national criminal investigations, so the repetition of some OLAF activities may be 'physiological'. National authorities, for instance, may be interested in asking witnesses or suspects different questions than those that OLAF posed during its investigations. Risks of 'physiological' duplication are inherently related to the nature of OLAF as an administrative authority carrying out activities with effects that extend to criminal proceedings. Furthermore, in several Member States, national courts can and do use OLAF findings after the OLAF official who drafted the report is heard as a witness, since this is usually how the outcomes of administrative inquiries are channelled in criminal proceedings. However, this would not even be a case of true repetition of the investigative act previously carried out by OLAF; rather its findings would simply be presented in a different manner.[376] Duplication of OLAF activities can nonetheless be also 'pathological', eg because national authorities ignore the probative value attached to OLAF reports by Article 11(2) of Regulation 883/2013 or because almost all OLAF activities are repeated by default.

Against this background, the amendment of the OLAF Regulation would not change the status quo in a radical way with respect to the hypotheses of 'physiological' duplication of OLAF's activities. It could however represent an opportunity to repair at least some of the existing shortcomings. In particular, the proposal of the European Parliament to ensure admissibility of OLAF-collected evidence in all national punitive proceedings (OLAF reports 'shall constitute admissible evidence in judicial proceedings before national courts')[377] could create a level playing field among Member States, leaving behind the fragmentation created by the assimilation rule. There seems to be no tenable objection to Article 325(4) TFEU justifying a measure like the one suggested by the European Parliament. In all Member States, OLAF reports could then be available to

[375] Recital 73 of Directive 2019/1.
[376] German report, section 5.2.
[377] European Parliament, 'Legislative resolution of 16 April 2019' (n 291), amendment 85.

national courts, upon simple verification of their authenticity and without any further complexity following from the assimilation principle.

Strengthening the admissibility of OLAF-collected evidence in criminal proceedings should go hand in hand with the enhancement of safeguards and guarantees for individuals concerned by OLAF investigations. In this respect, the European Parliament's proposal tackles some of the issues that Regulation 883/2013 and the CJEU's case law leave open, such as the right of access to the OLAF file and judicial review of OLAF reports by the CJEU. The European Parliament also resuscitates the idea of a 'controller of procedural safeguards' within OLAF, although the establishment of this body may be redundant if the CJEU will eventually be entrusted with control over the validity of OLAF reports.

Deciding on the safeguards that OLAF shall respect in the course of its investigations is a crucial, albeit not the only,[378] factor that influences the admissibility of OLAF-collected evidence in national criminal proceedings. This and other studies have confirmed that the procedural safeguards listed in Article 9 of Regulation 883/2013 are overall rather robust when compared with the usual safeguards for administrative investigations in the Member States, yet there are still some shortcomings from a criminal law perspective. A previous study by Ligeti, for instance, stressed the importance of the right of access to the case file and argued that 'several aspects of the rights contained in Art. 9 should … be further detailed such as the threshold to invoke the privilege against self-incrimination, the minimum information to be provided to the interviewee and the regime for carrying out digital forensic operations'.[379]

Such a position is often met with some resistance by practitioners at the national and EU level, who consider subjecting OLAF investigations to criminal law standards disproportionate, since the Office does not have criminal law powers. However, as OLAF's added value comes to light when the results of its investigations can be (and are) used in criminal proceedings, it may be worth considering whether the safeguards currently provided for by the OLAF Regulation should be further strengthened. In principle, the higher the standards OLAF is called on to respect during its investigations, the fewer the obstacles to OLAF-collected evidence being admitted and used in national criminal procedures.

EU law already contemplates some harmonisation of the procedural safeguards of persons involved in criminal proceedings. The Directives on procedural safeguards that the EU legislator has adopted in the aftermath of the Lisbon Treaty do not apply to OLAF investigations, which do not qualify as criminal investigations, yet there is some overlap. For instance, Article 7 of Directive 2016/343 lays down the *nemo tenetur* principle, which is also enshrined, albeit in a more limited way, in Article 9(2) of Regulation 883/2013.[380] As these Directives crystallise the minimum protection that should be ensured to persons involved in criminal proceedings throughout the EU, they could represent a benchmark

[378] Ligeti (n 23) 7.
[379] ibid.
[380] See Luchtman, Karagianni and Bovend'Eerdt, transversal report, sections 2.2 and 3.5. See also Ligeti (n 23) 12–13.

for the evaluation of the admissibility of OLAF reports by national authorities. In other words, one way to enhance such admissibility and to ensure consistency throughout the EU would be to require national courts to assess whether OLAF respected the minimum safeguards laid down in those Directives. Should this be the case, OLAF reports should be admissible in national criminal proceedings, and national courts should not refuse to take them into account on the basis of potentially higher national standards. This would represent a sort of 'codification' of the *Melloni* principles and would arguably strengthen the effectiveness of OLAF's activities. As the Directives provide only for minimum standards that are worded in a rather general way, the intervention of the CJEU may be at times necessary to help national courts clarify the scope of the Directives' provisions and thus whether OLAF violated the rights provided therein.

The link between admissibility of evidence and procedural safeguards is of the essence also for future EPPO-OLAF relationships, which in any case require clarification. On the one hand, OLAF is to be independent from the EPPO and there should be no duplication of investigations. On the other hand, however, Article 101(3)(c) of the EPPO Regulation seems to hint at a situation where the EPPO could somehow end up delegating to OLAF investigative activities aimed at collecting evidence that the EPPO intends to use in national proceedings. If this is the right understanding of the provision at hand, the full respect of criminal law rules and guarantees by OLAF is imperative, as the European Parliament rightly suggests: it would be untenable to allow OLAF to be – in essence – the *police judiciaire* of the EPPO and to comply at the same time with rules affording individuals less protection than those provided for by criminal procedural law. This would however require, in the long run, further thought regarding OLAF's future nature and identity, which will arguably exceed the administrative law domain.

12. POLICY RECOMMENDATIONS

K. Ligeti and F. Giuffrida

INTRODUCTION

ADCRIM is the third of a cycle of Hercule III research projects examining potential improvements of OLAF's legal framework. The project draws insights by making a comparison with three other EU entities involved in the enforcement of EU law, namely the European Central Bank (ECB), the European Securities and Markets Authority (ESMA), and the European Commission's Directorate General for Competition (DG COMP). Coordinated by Utrecht University, the first two studies dealt with, respectively, investigatory powers and procedural safeguards,[1] and exchange of information between the above EU bodies and national enforcement authorities.[2] ADCRIM was coordinated by the University of Luxembourg and tackled the admissibility of evidence collected by OLAF in national punitive administrative and criminal proceedings, with a stronger focus on the criminal law setting.

OLAF's mission is to 'step up the fight against fraud, corruption and any other illegal activity'[3] affecting the Union budget. Despite its nature as an administrative body, OLAF is very close to the criminal law domain. In particular, legal and/or practical issues arise when evidence collected by OLAF according to the rules and standards of administrative procedure 'migrates' to criminal proceedings. The starting point of our analysis is, therefore, Article 11(2) of Regulation 883/2013, according to which:

> In drawing up such reports and recommendations [ie reports and recommendations adopted upon completion of an OLAF investigation],[4] account shall be taken of the

[1] Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017).

[2] Michele Simonato, Michiel Luchtman and John Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities* (*ECN/ESMA/ECB)* (Utrecht University 2018).

[3] Art 1 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) [2013] OJ L 248/1.

[4] Art 11(1) of Regulation 883/2013 states:

> On completion of an investigation by the Office, a report shall be drawn up, under the authority of the Director-General. That report shall give an account of the legal basis for the investigation, the procedural steps followed, the facts established and their preliminary classification in law, the estimated financial impact of the facts established, the respect of the procedural guarantees in accordance with Article 9 and the conclusions of the investigation.
>
> The report shall be accompanied by recommendations of the Director-General on whether or not action should be taken. Those recommendations shall, where appropriate, indicate any disciplinary,

> national law of the Member State concerned. Reports drawn up on that basis shall 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. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.

This provision, which replaces the analogous rule of Regulation 1073/1999 (repealed by Regulation 883/2013) and which is worded in a very similar fashion as Article 8(3) of Regulation 2185/96 on OLAF on-the-spot checks and inspections, has three key components. First, it requires OLAF to draft its reports by taking into account national law. Second, it provides for an assimilation rule, ie OLAF reports shall be considered – for the purposes of admissibility in national proceedings and assessing their evidentiary value – as if they were reports drawn up by national administrative inspectors. Third, such reports can be used in national 'administrative or judicial proceedings', which include administrative proceedings, criminal proceedings, and the in-between category of punitive administrative proceedings. The latter refers to proceedings aiming to issue administrative sanctions that would qualify as having a criminal nature according to the *Engel* criteria set out by the European Court of Human Rights (ECtHR),[5] which the Court of Justice of the European Union (CJEU) recently endorsed.[6]

The application of Article 11(2) of Regulation 883/2013, and of its predecessors, turned out to be unsatisfactory. The Commission itself, when tabling a Proposal for the amendment of the OLAF Regulation, acknowledged that

> the most important factor affecting the follow-up to OLAF recommendations … relates to the rules on the admissibility of OLAF-collected evidence in national judicial proceedings. … in some Member States [the assimilation rule] does not sufficiently ensure the effectiveness of OLAF's activities.[7]

According to OLAF's own analysis of the follow-up to OLAF recommendations between 2008 and 2015, about half of these recommendations (169 out of 317) did not lead to any proceedings at the national level, and the most common reason for the dismissal of cases was 'insufficient evidence'[8] (94 out of 169 dismissals). The same analysis revealed that

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administrative, financial and/or judicial action by the institutions, bodies, offices and agencies and by the competent authorities of the Member States concerned, and shall specify in particular the estimated amounts to be recovered, as well as the preliminary classification in law of the facts established.

[5] *Engel and Others v The Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).

[6] See, for instance, Case C-489/10 *Bonda*, EU:C:2012:319; Case C-524/15 *Menci*, EU:C:2018:197.

[7] Commission, 'Proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' COM(2018) 338 final, 23 May 2018, 5.

[8] OLAF, 'Analysis on Member States Follow-Up to OLAF's Judicial Recommendations Issued between 1 January 2008 and 31 December 2015', Ref Ares(2017)461597 – 27/01/2017 (2017) 1.

> Member States' authorities repeatedly take the view that art. 11§2 of Regulation 883/20132 is not always a sufficient legal basis to allow Member States' judicial authorities to use OLAF reports as evidence in trial. Therefore, in numerous Member States, after receiving the OLAF final report, prosecutors perform investigation activities again in order to acquire admissible evidence.[9]

Such duplication is detrimental both to individuals, who are subject to multiple investigations (by OLAF and by national authorities) based on the same facts, and to the EU, as the (often complex and long) OLAF investigations are in essence considered to merely justify the opening of national investigations into the same facts.[10] Furthermore, repetition of investigative acts could at times not be possible or effective (eg because the suspected person destroyed the relevant evidence) and prolongs the time elapsed since the commission of potential crimes, increasing the risks of their becoming statute-barred before any final decision can be taken.

Against this backdrop, the ADCRIM project studied how the rule enshrined in Article 11(2) of Regulation 883/2013 plays out in seven national systems (France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom),[11] and whether and to what extent duplication occurs. The outcomes of this study have been summarised in the comparative report, which has also examined whether the suggested amendments to the OLAF Regulation, proposed by the Commission in May 2018 and by the European Parliament in April 2019,[12] could repair some existing shortcomings. On this basis, we have come up with policy recommendations to strengthen the admissibility of OLAF final reports in criminal proceedings. These recommendations are grouped into recommendations that do not require a legislative change (best practice recommendations) and proposals for legislative amendments.

I. PROPOSED BEST PRACTICES

RECOMMENDATION NO 1: Ensure there is enough expertise within OLAF itself, or if need be by liaising with national authorities, Eurojust and/or the EPPO, to take adequately into account national law when drafting OLAF reports

Article 11(2) of Regulation 883/2013 and Article 8(3) of Regulation 2185/96 require OLAF to take account of the national law of the Member State concerned when drafting the final OLAF report or the on-the-spot checks and inspections report. This obligation

[9] ibid 2.
[10] Katalin Ligeti, 'The Protection of the Procedural Rights of Persons Concerned by OLAF Administrative Investigations and the Admissibility of OLAF Final Reports as Criminal Evidence' (Study for the European Parliament's Committee on Budgetary Control 2017) 27–28.
[11] Any reference to the UK should be understood as referring to the English and Welsh legal system.
[12] European Parliament, 'Legislative resolution of 16 April 2019 on the 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)0338 – C8-0214/2018 – 2018/0170(COD))'.

remains unchanged in the text of the Commission's Proposal for an amended OLAF Regulation and in the European Parliament's resolution of April 2019.[13] Especially in a context where the principle of assimilation applies, it is crucial that OLAF pays adequate attention to national rules. Even if and when the principle will be set aside,[14] OLAF cannot shy away from considering national law when drafting its reports, which are to be eventually used by national courts acting in accordance with national law.

Within OLAF, the Judicial and Legal Advice Unit, which was also known as the 'Magistrates Unit' since it was composed of national magistrates, gave advice to OLAF officials on national law concerning evidentiary issues until it was dismantled in 2012. As its support was highly valued, it would be appropriate to give further thought to whether such a unit should be reintroduced, as the European Parliament seems to suggest when it requires the internal OLAF legality check to be entrusted to 'experts in law and investigative procedures who are qualified to hold judicial office in a Member State'.[15] Having the necessary 'in-house' expertise for each of the 28 Member States would indeed represent an added value for OLAF activities, as it could help to increase the quality of its reports and their compliance with national requirements, thus reducing the risks of duplication of investigative activities. As an alternative, OLAF should explore the possibility to consult, when needed, with national Desks at Eurojust, or, in the future, with the competent European Delegated Prosecutor or European Prosecutor of the Member State where it carries out its investigations. OLAF could also get in touch with competent national authorities, as further explained below.

RECOMMENDATION NO 2: Ensure that the investigative measures carried out by the Office (interviews, inspections, forensic analysis, etc) are adequately documented in OLAF final reports and especially in their annexes

Some national reports noted that, in practice, admissibility issues in national criminal proceedings do not arise vis-à-vis OLAF reports as such but rather with respect to the annexes to these reports. It is indeed in the annexes that OLAF mostly includes (or should include) copies of the documents it consulted, interview recordings, findings of forensic analysis or inspections, etc. Therefore, to increase the probative value of OLAF-collected evidence, adequate attention should also be paid to these annexes and their quality, as they are of the essence for national investigations and prosecutions.

[13] cf COM(2018) 338 final, Art 1(10)(b), which however adds to the current text that account should be taken also of the relevant provisions of Union law. There are no amendments to this provision in the European Parliament's resolution of April 2019.
[14] See section 5.3 of the comparative report.
[15] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendment 135.

RECOMMENDATION NO 3: More training at the national level on EU rules and procedures to fight PIF crimes is needed

A certain degree of what could be called 'physiological' duplication seems inherent to how OLAF works and its nature as an administrative body whose actions have criminal law ramifications. However, the comparative report also brought to light cases of, so to say, 'pathological' duplication of OLAF investigative activities. A glaring example is when national authorities repeat OLAF activities because they are unaware of EU legal instruments and principles regulating the matter, as some interviewees contacted in the framework of this study reported. In this respect, increasing national authorities' knowledge of, and familiarity with, EU rules, bodies, and instruments for fighting PIF crimes, eg by more specific training on these matters, could repair the current situation.

II. PROPOSED LEGISLATIVE AMENDMENTS

RECOMMENDATION NO 4: Enhance contacts between OLAF and national competent authorities at the beginning of OLAF investigations, by considering the introduction of an obligation for OLAF to promptly inform these authorities before the Office carries out investigative measures at the national level and/or when it becomes aware of cases having potential criminal law implications

The national reports have demonstrated that sometimes OLAF and national authorities do not have any contact until the moment OLAF transmits its final reports and recommendations in accordance with Article 11(2) of Regulation 883/2013.[16] The OLAF Supervisory Committee's Opinion No 2/17 touches upon the issue as well, calling for an '[e]arly involvement of national authorities in earlier stages of an investigation'.[17] We share this view, because early contacts would allow both OLAF and competent domestic authorities to plan their activities accordingly.

Especially if OLAF promptly informs national authorities before carrying out investigative measures at the national level, they not only could advise OLAF on rules for ensuring admissibility of evidence, as noted above, but also embark on intrusive investigative measures that OLAF could not undertake, if specific pieces of evidence must be secured. The early involvement of national authorities could also help to solve some time-related problems plaguing OLAF investigations and their follow-up. Fraud and other activities affecting the EU budget are often difficult to discover in the first place, and complex to investigate in the second. Hence, when OLAF completes its investigations and transmits its reports in accordance with Article 11(2) of Regulation 883/2013, the crimes at hand are sometimes already, or on the brink of being, statute-barred.[18] Early

[16] See comparative report, section 5.1.
[17] OLAF Supervisory Committee, 'Opinion 2/2017 Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19)' (2017), para 48.
[18] OLAF, 'Analysis on Member States Follow-Up' (n 8) 6.

contacts between OLAF and national authorities could therefore allow them to coordinate their activities in a better way.

The introduction of an OLAF obligation to promptly report to national authorities cases having (potential) criminal law implications could also be considered. The current OLAF legal framework provides for some rules on information exchange, yet almost none of them lays down an obligation for OLAF to inform domestic authorities of cases where a criminal offence seems to have been discovered.[19] The ECB and ESMA legal frameworks require instead that these two bodies, when they become aware of potentially criminal conduct, promptly inform competent domestic (criminal law) authorities, either directly (ESMA) or indirectly (the ECB informs central banks, which should then pass the information on to public prosecutors). For the above-mentioned reasons, and despite the clear differences in mission and powers between these two bodies and OLAF, it would not be inconceivable to apply similar rules to the latter as well.

Furthermore, the EPPO Regulation now requires that OLAF – as well any other EU institution, body, office and agency – report without undue delay to the EPPO any potential case falling within the competence of the European prosecution authority.[20] Since the EPPO will be competent to investigate and prosecute PIF crimes, it should be able to promptly decide whether to embark upon the investigation of a given case as soon as there is a suspicion that a PIF offence has been committed. The same rationale could therefore apply with respect to the relationships between OLAF and national authorities, which are currently competent to investigate and prosecute PIF crimes as well. After all, late contacts between OLAF and national authorities have turned out to yield poor results and it would be thus worth exploring whether the status quo may improve by creating synergies and collaboration between OLAF and national authorities at an earlier stage. Even when the EPPO will have started its activities, such early contacts would be needed, at least in the Member States that do not participate in the EPPO; in all others, they are also likely to be needed with respect to criminal cases beyond the EPPO's competence.

RECOMMENDATION NO 5: Replace the assimilation clause with a rule providing for the admissibility of OLAF reports as such, clarifying that national courts will still have the power to freely assess OLAF-collected evidence; at the same time, higher procedural safeguards should be ensured or, alternatively, the option of subjecting the admissibility of OLAF reports to the respect of the minimum standards laid down in the Directives on procedural safeguards can be explored

The Commission and the European Parliament intend to remove the assimilation principle from the OLAF Regulation, which is convenient, since the ADCRIM project confirmed

[19] See more in comparative report, section 5.1.

[20] Art 24(1) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] OJ L 28/1.

that the principle can lead to unsatisfactory results. The Commission would however keep it for national criminal proceedings, while the European Parliament would not make any distinction between criminal and administrative procedures. The European Parliament suggests replacing Article 11(2) of Regulation 883/2013 with the following provision:

> Upon simple verification of their authenticity, reports drawn up on that basis including all evidence supporting and annexed to these reports shall constitute admissible evidence in judicial proceedings before national courts and in administrative proceedings in the Member States. The power of the national courts to freely assess the evidence shall not be affected by this Regulation.[21]

This proposed wording of Article 11(2) of Regulation 883/2013 would have the merit of clarifying that OLAF reports and the annexes thereto will have to be admitted as such in national criminal proceedings, even if national provisions on admissibility of evidence gathered by national administrative authorities are unclear or altogether non-existent. It goes without saying that the question remains as to whether such a new provision will be truly able to improve the current situation, as it will have to apply in a context where there is no harmonisation of national rules on criminal proceedings. If each national court continues to follow its own code of criminal procedure and to exercise the powers bestowed upon it by non-harmonised national legislation, the possibility that even an amended OLAF Regulation will not solve most of the problems related to OLAF-collected evidence looms large. Yet the fact that the admissibility of OLAF-collected evidence will no longer depend on the rules applying to comparable national administrative authorities, but only on the reports' authenticity that domestic competent authorities will have to verify, would arguably represent a step forward.

While the Commission and the European Parliament agree on the removal of the assimilation rule for administrative proceedings, the issue becomes less straightforward when it comes to encroaching upon criminal justice systems. In section 5.3 of the comparative report, it has been argued that Article 325(4) TFEU would not be an obstacle to the adoption of a text as that suggested by the European Parliament. However, while this change in the OLAF legal framework would not be contentious as far as its legal basis is concerned, it should go hand in hand with two further amendments.

a) First, it is to be welcomed that the European Parliament suggests specifying that – along the lines of Article 37 of the EPPO Regulation – national courts remain free to assess OLAF-collected evidence. The study of the seven national systems demonstrated that some of the issues connected with OLAF reports do not concern the *admissibility* as such, but rather the *use* that national prosecutors and courts make (or do not make) of these reports. In other words, even when OLAF reports are admissible, which in national criminal proceedings they usually are, domestic authorities could still need to search for further evidence or even to repeat some of the investigative activities previously carried out by the Office.[22] As some national reports noted, OLAF investigations have indeed different aims and standards than national criminal

[21] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendment 85.
[22] See more in section 5 of the comparative report.

investigations, so that in some cases there is no real alternative to carrying out further, or even repeating, investigative activities (eg reinterrogating the suspects and asking them new questions that OLAF did not pose). These risks of, so to speak, 'physiological' duplication are inherently related to the nature of OLAF as an administrative authority carrying out investigations with effects that extend to criminal proceedings, and there seems to be little room to entirely avoid them in the future if the nature itself of OLAF will not change.

The European Parliament's proposal could however improve the status quo, as it would create, on the one hand, a level playing field among Member States, leaving behind the complexities and fragmentation following from the assimilation rule. On the other hand, by specifying that national courts would remain free to assess OLAF-collected evidence along the lines of the similar EPPO Regulation provision, it would clarify that 'admissibility' of OLAF reports means that a national court will have the 'ability to consider'[23] them when taking its decisions. It will be eventually for this court to decide on the reliability and usefulness of the reports, taking into account the principles of *effet utile* of EU law and of sincere cooperation (Article 4(3) TEU), the obligation to protect the Union budget (Article 325 TFEU), and, last but not least, fundamental principles and standards of national criminal procedure.

b) The 'upgrade' of OLAF reports' admissibility calls indeed for the enhancement of procedural safeguards. Those listed in Article 9 of Regulation 883/2013 are overall rather robust when compared to the usual ones applying to administrative investigations, yet there are still some shortcomings when one looks at them through the lens of criminal law. It is therefore to be welcomed that the European Parliament, while providing for a stronger admissibility rule in criminal proceedings, suggests bridging some existing gaps in the OLAF legal framework regarding the position of individuals concerned by the Office's investigations. The European Parliament would introduce a provision on the *right of access* to the case file and another on the *jurisdiction of the Court of Justice* to review OLAF reports.[24] As argued in a previous study, the right of access to the file is of the essence, especially with a view to criminal proceedings, as only timely access to the file allows the effective exercise of defence rights and ensures equality of arms.[25] Likewise, the rule on judicial review would be beneficial to persons concerned by OLAF activities, as it would allow the CJEU to control the validity of OLAF reports and OLAF's compliance with EU fundamental rights during investigations. The European Parliament also suggests introducing a body that the Commission proposed a few years ago, the 'Controller of procedural guarantees'. If the provision on the Court of Justice is agreed upon, however, the creation of this further body may be redundant, as respecting procedural guarantees may be arguably better controlled by the combination of OLAF internal and CJEU external review.

[23] Recital 73 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.
[24] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendments 75 and 94.
[25] See more in Ligeti (n 10) 16–18.

Another option to consider to ensure the admissibility of OLAF reports and avoid that national courts refuse to use them because of alleged differences with national safeguards would be to establish a link between OLAF activities and the Directives on procedural safeguards in criminal proceedings. Since these Directives crystallise the minimum protection that should be ensured to persons involved in criminal proceedings throughout the EU, they could represent a benchmark for the evaluation of the admissibility of OLAF reports by national authorities. In other words, OLAF's legal framework could be amended in a way that requires national courts to assess whether OLAF investigations respected the minimum safeguards laid down in the Directives. Should this be the case, OLAF reports should be admissible in national criminal proceedings, and national courts could not refuse to take them into account on the basis of potentially higher national standards. This would represent a sort of 'codification' of the *Melloni* principles and would arguably strengthen the effectiveness of OLAF's activities.

RECOMMENDATION NO 6: Clarify the relationships between OLAF and the EPPO, especially with respect to the 'complementary' and 'supplementary' role of OLAF envisaged by Article 101(3) of the EPPO Regulation; ensure that, in any case, EPPO does not 'outsource' its investigations to OLAF to the detriment of the individuals' safeguards

When the EPPO is dealing with a case, in principle OLAF should not open any parallel administrative investigations into the same facts. When the EPPO decides instead not to take on board a given case, it could refer the case to OLAF if there is still room for administrative follow-up or recovery.[26] What can be gleaned from these provisions is that OLAF and the EPPO will be distinct bodies with different mandates which should coordinate their activities to avoid duplication.[27] Nothing however suggests that – as things stand now – OLAF will become the *police judiciaire* of the EPPO. While there was some discussion about this hypothesis before the creation of the EPPO, the negotiators have clearly ruled out such a transformation of OLAF.

Nonetheless, according to Article 101(3)(c) of the EPPO Regulation, the EPPO, in the course of its investigations, may request OLAF to support or complement its activity by conducting administrative investigations.[28] The scope of this provision is not entirely clear. If the EPPO can request OLAF to conduct administrative investigations in 'support' of its own, one would be inclined to think that the outcome of OLAF's activities will eventually be used by the EPPO in the framework of criminal investigations, as if OLAF were, on an *ad hoc* basis, the EPPO's police arm. The risk looming large in this scenario is that the EPPO may delegate tasks to OLAF with the 'aim of circumventing'[29] the EPPO Regulation rules on procedural safeguards. If this is the right understanding of

[26] Recitals 103 and 105, and Art 101(2) of the EPPO Regulation.
[27] See Recital 103.
[28] Art 101(3)(c) of the EPPO Regulation.
[29] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendment 110.

the provision at hand, the full respect of criminal law rules and guarantees by OLAF is imperative, as the European Parliament rightly suggests: it would be untenable to allow OLAF to be – in essence – the *police judiciaire* of the EPPO and to comply at the same time with rules affording individuals less protection than those provided for by criminal procedural law.

ANNEX I

QUESTIONNAIRE FOR NATIONAL RAPPORTEURS

1. GENERAL FRAMEWORK

1.1 What is the function of admissibility rules in your national administrative law?

1.2 What is the function of admissibility rules in your national criminal procedural law?

1.3 Can the decision on admissibility be subject to review? And what is the scope of this review?

1.4 Is your system of proof free or controlled?[1]

1.5 May evidence declared inadmissible in the context of non-criminal proceedings (administrative proceedings) subsequently be admitted and used in criminal proceedings?

1.6 May evidence declared inadmissible in criminal proceedings subsequently be admitted and used in non-criminal administrative proceedings?

2. ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL PUNITIVE ADMINISTRATIVE PROCEEDINGS

2.1 Do the rules of administrative law and procedure in your national system apply to the admissibility of 'OLAF-collected evidence' in punitive administrative proceedings? Could you specify the general rules? Are there any specific provisions related to OLAF-collected evidence?

2.2 Could you provide an overview of your national case law on the admissibility of OLAF-collected evidence in punitive administrative proceedings?

[1] Controlled systems are intended as systems adopting a *numerus clausus* of means of proof (evidence), therefore excluding 'atypical' means.

2.2.1 Could you provide us with any case(s) in which the OLAF-collected evidence was expressly declared inadmissible? Please state in respect of each cited case the relevant grounds for inadmissibility.

2.2.2 Are you aware of any case(s) in which the admissibility of the OLAF-collected evidence was denied due to the *sui generis* nature of OLAF (i.e. where it was not possible to establish an equivalence between the mandate and functions of OLAF and a national administrative authority)?

2.3 Based on your knowledge of national legislation, jurisprudence and practice do higher national standards in relation to procedural safeguards impact the admissibility of OLAF-collected evidence?

BOX 1

Example: according to the CJEU case law in competition matters, in-house lawyers are not covered by legal professional privilege (LPP). What happens if national law accords such a privilege also to in-house lawyers?

2.4 How can the concerned person in an OLAF investigation challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards?[2] Is there an *ex officio* control at national level in your legal system?

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

3.1: ECB

3.1.1 Do the rules of administrative law and procedure in your national system apply to the admissibility of evidence collected and transmitted by ECB according to Article 136 SSM Framework Regulation in punitive administrative proceedings? Could you specify the general rules? Are there any specific provisions related to evidence collected according to Article 136 SSM Framework Regulation?

3.1.2 Could you provide us with any significant case(s) in which the evidence collected and transmitted according to Article 136 SSM Framework Regulation was expressly declared inadmissible? Please state in respect of each cited case the relevant grounds for inadmissibility.

[2] Please refer to the powers and safeguards identified in the first Hercule III study. **Powers:** production orders, interviews, on-site inspections, access to traffic and telecommunication data. **Safeguards:** legal professional privilege, privilege against self-incrimination, access to a lawyer.

3.1.3 Based on your knowledge of national legislation, jurisprudence and practice do higher national standards in relation to procedural safeguards impact the admissibility of ECB-collected evidence? (see also box under question 2.3)

3.1.4 How can the concerned person challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards?[3] And can there be an *ex officio* control?

3.2 ESMA

3.2.1 Do the rules of administrative law and procedure in your national system apply to the admissibility of evidence collected and transmitted by ESMA according to Article 64(8) EMIR to national punitive administrative proceedings? Could you specify the general rules? Are there any specific provisions related to evidence collected according to Article 64(8) EMIR?

3.2.2 Could you provide us with any significant case(s) in which the ESMA-collected evidence was expressly declared inadmissible in national punitive administrative proceedings? Please state in respect of each cited case the relevant grounds for inadmissibility.

3.2.3 Based on your knowledge of national legislation, jurisprudence and practice do higher national standards in relation to procedural safeguards impact the admissibility of ESMA-collected evidence? (see also box under question 2.3)

3.2.4 How can the concerned person challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards?[4] And can there be an *ex officio* control?

3.3 DG Competition

3.3.1 Do the rules of administrative law and procedure in your national system apply to the admissibility of evidence collected and transmitted by DG COMP according to Article 12 of Regulation 1/2003 to national punitive administrative proceedings? Could you specify the general rules? Are there any specific provisions related to evidence collected and transmitted according to Article 12 of Regulation 1/2003?

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[3] Please, refer to the powers and safeguards identified in the first Hercule III study. **Powers:** production orders, interviews, on-site inspections, access to traffic and telecommunication data. **Safeguards:** legal professional privilege, privilege against self-incrimination, access to a lawyer.

[4] Please, refer to the powers and safeguards identified in the first Hercule III study. **Powers:** production orders, interviews, on-site inspections, access to traffic and telecommunication data. **Safeguards:** legal professional privilege, privilege against self-incrimination, access to a lawyer.

3.3.2 Could you provide us with any significant case(s) in which DG COMP-collected evidence was expressly declared inadmissible in national punitive administrative proceedings? Please state in respect of each cited case the relevant grounds for inadmissibility.

3.3.3 Based on your knowledge of national legislation and jurisprudence do higher national standards in relation to procedural safeguards impact the admissibility of DG COMP-collected evidence? (see also box under question 2.3)

3.3.4 How can the concerned person challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards?[5] And can there be an *ex officio* control?

4. ADMISSIBILITY OF EVIDENCE COLLECTED BY OLAF, ESMA AND DG COMP IN NATIONAL CRIMINAL PROCEEDINGS

4.1 Does your system generally allow for the admissibility of information gathered by national administrative authorities as evidence in criminal proceedings?

4.1.1 If yes, could you please explain under which conditions? If not, please explain the reasons.

4.1.2 Is the admissibility of information gathered by national administrative authorities regulated by a general provision in your code of criminal procedure? Or is the admissibility provided by sectoral rules?

4.1.2.1 In the latter case, does your system lay down special rules on the admissibility in criminal proceedings of information collected by the ECB/ESMA/DG COMP and their respective National Competent Authorities (NCAs) or OLAF?

4.2 Regarding its admissibility in criminal proceedings, is there any distinction between information collected by administrative authorities in the context of their ordinary regulatory or supervisory activities and information gathered by the same authorities in the context of administrative investigations into alleged regulatory breaches?

[5] Please, refer to the powers and safeguards identified in the first Hercule III study. **Powers:** production orders, interviews, on-site inspections, access to traffic and telecommunication data. **Safeguards:** legal professional privilege, privilege against self-incrimination, access to a lawyer.

BOX 2

Example: The ECB constantly supervises the financial institutions falling under the Single Supervisory Mechanism (SSM) regime and information, which may also include evidence of a potential violation, is provided on a day to day basis from the supervised entities to the supervisor. In this context, legal safeguards may operate differently from the cases where the ECB performs an administrative investigation.

4.3 For the purposes of their admissibility in criminal proceedings, is there any distinction between the types of evidence collected by the ECB/ESMA/DG COMP and their respective National Competent Authorities (NCAs) or OLAF (business records, documents, interviews, digital forensic operations)?

4.4 Based on your knowledge of national legislation, jurisprudence and practice, do higher national standards in relation to procedural guarantees impact the admissibility of evidence collected by ECB/ESMA/DG Competition and OLAF in national criminal proceedings? (see also box under question 2.3)

4.5 How can the concerned person challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards?[6] And can there be an *ex officio* control?

5. FOCUS: OLAF-COLLECTED EVIDENCE AND ADMISSIBILITY IN CRIMINAL PROCEEDINGS

5.1 (requires interviews): Are the requirements for the prospective admissibility of the report in criminal proceedings discussed with OLAF before proceeding to a joint on-the-spot check or inspection?

> **5.1.1** When a joint on-the-spot check or inspection with OLAF is conducted, does your national authority proceed to draft a parallel national report on the inspection?

5.2 (requires interviews): Are investigative activities already performed by OLAF repeated according to the relevant national provision in the code of criminal procedure? In the affirmative case, could you provide us with your opinion on the reasons justifying this practice?

[6] Please, refer to the powers and safeguards identified in the first Hercule III study. **Powers:** production orders, interviews, on-site inspections, access to traffic and telecommunication data. **Safeguards:** legal professional privilege, privilege against self-incrimination, access to the lawyer.

5.2.1 Of the investigative activities performed by OLAF (on-the-spot checks, interviews, digital forensics operations), which are more frequently repeated according to national provisions?

ANNEX II

LIST OF THE AUTHORS & OLAF STAFF CONTACTED DURING THE STUDY

AUTHORS

Author	*Position*	*Organisation*	*Role within the project*
Prof. Peter Alldridge	Drapers' Professor of Law	Queen Mary University of London, United Kingdom	Responsible for the UK national report
Prof. Martin Böse	Professor in Criminal Law, Criminal Procedure, International and European Criminal Law	University of Bonn, Germany	Responsible for the German national report (together with Anne Schneider)
Koen Bovend'Eerdt	PhD candidate	Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University, the Netherlands	Responsible for the transversal report 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' (together with Michiel Luchtman and Argyro Karagianni)
Prof. Michele Caianiello	Professor in Criminal Procedure and International and European Criminal Procedure	University of Bologna, Italy	Responsible for the Italian national report (together with Giulia Lasagni)
Dr. András Csúri	Postdoctoral researcher	Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and	Responsible for the Hungarian national report

		Enforcement in Europe (RENFORCE), Utrecht University, the Netherlands	
Aart de Vries	PhD candidate	Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University, the Netherlands	Responsible for the Dutch national report (together with Ton Duijkersloot and Rob Widdershoven)
Prof. Ton Duijkersloot	Associate Professor	Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University, the Netherlands	Responsible for the Dutch national report (together with Aart de Vries and Rob Widdershoven)
Fabio Giuffrida	Research and development specialist	University of Luxembourg, Luxembourg	Coordinator of the project; responsible for the comparative analysis and, together with Katalin Ligeti, of the Luxembourgish national report and of the policy recommendations
Argyro Karagianni	PhD candidate	Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) Utrecht University, the Netherlands	Responsible for the transversal report 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' (together with Michiel Luchtman and Koen Bovend'Eerdt)

Dr. Giulia Lasagni	Postdoctoral researcher in Criminal Procedure; Adjunct Professor in European Criminal Procedure	University of Bologna, Italy	Responsible for the Italian national report (together with Michele Caianiello)
Prof. Katalin Ligeti	Professor of European and International Criminal Law	University of Luxembourg, Luxembourg	Responsible for the Luxembourgish national report and policy recommendations (together with Fabio Giuffrida)
Prof. Michiel Luchtman	Professor of Transnational Law Enforcement and Fundamental Rights	Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) Utrecht University, the Netherlands	Responsible for the transversal report 'EU Administrative Investigations and the Use of Their results as Evidence in National Punitive Proceedings' (together with Argyro Karagianni and Koen Bovend'Eerdt)
Dr. Angelo Marletta (until 31 August 2018)	Postdoctoral researcher (until 31 August 2018)	University of Luxembourg, Luxembourg (until 31 August 2018)	Coordinator of the project; responsible for the comparative analysis and, together with Katalin Ligeti, of the Luxembourgish national report and of the policy recommendations
Prof. Anne Schneider	Professor in Criminal Law, Criminal Procedure and White Collar Crime	University of Mannheim, Germany	Responsible for the German national report (together with Martin Böse)
Prof. Juliette Tricot	Associate Professor in Criminal Law	University Paris Nanterre, Paris, France	Responsible for the French national report
Prof. John Vervaele	Professor in Economic and European Criminal Law	Willem Pompe Institute for Criminal Law and Criminology and the Utrecht Centre for Regulation	Responsible for the transversal report on 'Lawful and Fair use of Evidence from a European Human Rights Perspective'

		and Enforcement in Europe (RENFORCE), Utrecht University, the Netherlands; Professor in European Criminal Law, College of Bruges, Belgium; President of International Association of Criminal Law (AIDP)	
Prof. Rob Widdershoven	Professor of European Administrative Law	Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University, The Netherlands	Responsible for the Dutch national report (together with Aart de Vries and Ton Duijkersloot)

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LIST OF OLAF STAFF CONTACTED DURING THE STUDY[1]

Eduardo Cano Romera	Head of Unit, Investigation Selection & Review
Stephanie Duverger	Investigator
Dr. Oliver Landwehr	Legal and Policy Officer – Senior Legislative Officer
Dr. Romana Panait	Head of Sector within the Investigation, Selection and Review Unit; formerly Legal and Policy Officer
Dr. Dario Proietti	Investigator
Dr. Simone White	(retired) Legal Officer
Dr. Lucia Zoli	Legal Officer

[1] The content of this publication represents the views of the authors only and is their sole responsibility. The listed persons were involved or contacted during the project as interviewees and/or participants in the meetings but they did not participate in the drafting of any part of the study. The coordinator is grateful to all of them for their support.