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Chapter 10 - Pertinent issues of punitive enforcement in a composite legal order

Michiel Luchtman

1. INTRODUCTION

The enforcement reality in which EU enforcement authorities and their national partners operate do not square easily with traditional notions of enforcement sovereignty or cooperation on the basis of international mutual (administrative or judicial) assistance agreements. Yet to a large extent, these authorities have taken the place of these structures. The typical elements of international enforcement cooperation have been removed from their legal frameworks to address the specific needs of the EU and its Member States. These authorities were entrusted with the task to reduce significant enforcement deficits, particularly in transnational cases where individual states cannot always live up to this task. They function in an environment in which transnational citizenship or agency is strongly advocated.[1] The need for effective enforcement, as well as effective legal protection relate directly to the legitimacy of the composite European legal order, ie not only the EU, but also its Member States. Yet both needs may also come into conflict with notions of state sovereignty. National legal orders not only need to open up, but are also in need of a common narrative that guides these processes of enforcement integration.[2]

In this chapter, I aim to bring together the main findings of the previous chapters, in search of what could be the main elements of such a narrative. I have structured my findings around the two distinct, yet related perspectives, i.e. the perspective of the *effective enforcement* of EU laws and policies (section 2), as well as that of *effective legal protection* in this complicated composite setting (section 3). I will conclude with a series of, what I have called, benchmarks for enforcement in a composite legal order (section 4).

A distinctive feature of all EU enforcement authorities is their EU-wide[3] mandate. The notion of territorial borders that is so distinctive for the international law framework, has been removed from the institutional design of the EU authorities, or at the least has been given a different function in it. In some instances, such as in competition law, EU-officials have operational powers that indeed remind of a concept of European territoriality to the extent that these officials may perform their operations *anywhere* on the territories of the participating states, regardless of their own nationality and of national borders. Yet in other areas, such as for the EPPO, national enforcement jurisdiction has been transformed into a European system of territorial competences (*örtliche Zuständigkeit*), connected via informal methods for transnational cooperation.[4]

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[1] J Graat, *The European Arrest Warrant and EU Citizenship. EU citizenship in relation to foreseeability problems in the surrender procedure* (Springer 2022).

[2] See chapter 1, section 3 (Luchtman).

[3] That is to say: covering the territories of the Member States that are participating in the legal arrangements establishing those authorities.

[4] Cf CMJ Ryngaert and JAE Vervaele, 'Core Values Beyond Territories and Borders: The Internal and External Dimension of EU Regulation and Enforcement' in Ton van den Brink, Michiel Luchtman and Miroslava Scholten (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (Intersentia 2015) 299.

In all composite models, it is not the European states that are working together, but their authorities. These authorities do not act in their capacity as national representatives or state agents, but as part of an EU enforcement structure. Cooperation within the framework of EU enforcement authorities is not guided by such concepts as diplomacy, reciprocity or sovereignty, but by commonly defined goals, enforcement policies and strategies. These policies and strategies are, by their very definition, not developed within the confines of a single legal order. They are the product of institutionalised forms of mutual consultation and the coordination of enforcement efforts, within the frameworks of the studied EU authorities. It should be noted, however, that there are significant differences per policy field. Clearly, the influence of the EU is much stronger in the field of competition law, than in the area of the protection of the EU's financial interests, wherein OLAF lacked (and still lacks) powers to coordinate punitive follow up at national level, although this will change, for criminal cases, with the arrival of the EPPO.

At the same time, however, all of the studied regimes in this book point back to the national legal orders on numerous occasions. Composite enforcement frameworks therefore inherently lead to questions on the vertical relationships between the standards of national and EU law, particularly where EU standards are absent, vague or refer back to national law (with respect to investigative powers or safeguards, for instance). Decentralised enforcement structures also entail puzzling questions that relate to their many horizontal or transnational elements. The transnational scope of their investigations – to a certain extent the raison d'être of their existence – inherently means that a number of national laws may be applied during their investigations.

Despite their advantages compared to international cooperation, decentralised enforcement frameworks may thus constitute a risk for effective law enforcement. Unclarity with respect to the applicable legal rules – vertically, but also horizontally – can have a negative effect on law enforcement operations. Uncoordinated action, for instance, not only carries the risk of enforcement competition and ne bis in idem violations, but may also result in efficiency losses. No doubt that these problems get bigger if one also takes account of the relationships between the EU authorities with national criminal justice actors. Indeed, a strict separation of European and national procedures can imply, as is demonstrated in a number of OLAF-cases,[5] that shared materials cannot be used as evidence in criminal proceedings. These issues are not only a problem for the EU legal order, that must think of a strategy to stimulate the admissibility of evidence obtained by EU authorities in criminal proceedings, but also for national legal systems that ought to think of how such materials can indeed be used in national proceedings of an administrative, but occasionally also a criminal nature.

Another concern of fundamental importance is the legal position of individuals that get involved in investigations that are conducted by the EU-authorities and their partners. The European Union is, as was noted before, a polity that not only houses its Member States, but also its citizens.[6] These individuals have been given transnational economic or even citizens' rights of free movement. Where free movement is encouraged, those individuals will establish connections to multiple legal orders and will in fact be stimulated to do so by EU law and policies. Consequently, individuals may become the victim of crime, become charged persons in composite administrative

[5] See chapter 6 (Giuffrida and Theodorakakou) in this book and Giuffrida, 'Comparative Analysis' in F Giuffrida, and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019) 222.

[6] See chapter 1, section 3 (Luchtman).

investigations or be approached as third parties that have relevant information.[7] Yet the scope of their rights and duties vis-à-vis the EU authorities and their national partners will inevitably vary, depending on the applicable set of rules, even though this composite system itself is operated by a single EU authority. The composite enforcement structures and their complicated relationships to criminal justice systems thus raise many pertinent questions of fundamental rights protection, including effective judicial protection.

As said, concerns for the effective enforcement of laws and EU policies on the one hand (section 2) and the protection of the individual vis-à-vis EU enforcement authorities and their national partners on the other (section 3) are interrelated. They are also related to other risks, particularly the undermining of public confidence in state authority (in a composite sense) and in the legitimacy and added value of the EU as such. It will not be enough to remove or reshape the role of national borders within the composite enforcement frameworks. In a composite legal order that is bound by the rule of law, there is also a need for a common narrative and subsequent action, both at the EU and the national levels. As said, benchmarks for it are developed in section 4.

2. EFFECTIVE COMPOSITE ENFORCEMENT OF EU LAWS AND POLICIES

What is needed when it comes to the effective enforcement of EU rules and policies in the setting of EU authorities and their relationships with their national partners? Is the notion of an EU-wide operational competence reconcilable with an often decentralised enforcement framework? What is needed to ensure an enforcement level playing field? Is coordination with national criminal justice also necessary for this? Who is to act in these matters, the EU level and/or the national level? All of these questions have a vertical dimension, but also a horizontal or transnational dimension. In many cases, a strict distinction between the two dimensions may not even be possible. Information that was obtained under the auspices of a national authority may end up in a report of findings, drawn up by an EU authority, and introduced as evidence in a court in yet another jurisdiction.[8]

Our previous studies have demonstrated, as has also been highlighted in the previous chapters, that there are many ways in how the tension between European operational competence and national diversity can be solved. Yet even fully autonomous investigations still need coordination with national law. As we wrote before, 'the examples of ECB, ESMA and also DG Comp show how important a strong national framework is for the EU authorities. The relevant rules and regulations ensure a) that there is a national counterpart for cooperation with the EU authority in each sector, b) that these authorities cooperate with the EU authority by sharing operational information, c) possess a certain set of investigative powers for that purpose (interviews, productions orders, site visits), including – particularly – the assistance of the police or equivalent forces, and d) – in cases of concurrent jurisdiction, such as in competition law with respect to Arts. 101 and 102 TFEU – coordination with ongoing

[7] Cf the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ('Stockholm roadmap') [2009] OJ C295/1, 3.

[8] See also the observations by chapter 2 (De Vries and Widdershoven) in this book.

national cases, as well as e) provisions with respect to admissibility as evidence (including the need for equivalent standards of legal protection).'[9]

2.1. ORGANISATIONAL ISSUES

Even the most autonomous systems of EU-enforcement need to reconnect at some stage to the national legal orders. Composite enforcement is a joint enterprise of the executive, legislative and judicial branches at EU and national levels. In this regard, it is useful to differentiate between problems relating to the tasks and organisation of law enforcement at national level, to the manners in which national legal orders are capable of 'feeding' the EU-authorities with information or assisting during their investigations, as well as to the subsequent use of the results as evidence in punitive procedures at the national level.

Without doubt, organisational problems are most significant in the area of OLAF's competences. This is, first of all, because it has proven very difficult to raise a sufficiently strong level of awareness at the national level that cooperation with OLAF is part and parcel of the mandate of the national partners. The so-called Anti-Fraud Coordination Services (AFCOS) have only to a limited extent been capable to solve this problem. It turns out that, partly because the PIF-area is so wide in scope and covers so many sectoral regulations, it is virtually impossible to establish a clearly defined circle of national partners for OLAF, ie authorities that are aware of their duty to share information with OLAF and are provided with the legal tools to do so by their legal orders.[10] Sometimes, its national partners are not even known to OLAF, and vice versa.[11] While OLAF-regulations refer back to national law on numerous occasions, national laws often remain silent. A legal limbo is the result. Quite strikingly, the EU sectoral PIF-arrangements also lack behind in the creation of such a level playing field; tasks and powers of national partners are often far from harmonised, particularly on the expenditure side of the EU budget. The EPPO may run into the same problem, as its creation has not changed the relevant legal rules.

2.2. THE APPLICABLE LAW: INVESTIGATORY POWERS, SAFEGUARDS AND ADMISSIBILITY OF EVIDENCE

OLAF's institutional design is also most problematic, in terms of effective enforcement, when it comes to the legal design of the stage of the investigation, as well as the possibility to use the acquired materials as evidence in national punitive procedures. In other areas of study, we notice stronger forms of supervisory and enforcement convergence on the side of the executive, ie the EU-authorities and their national partners. Indeed, the development of common policies and strategies is strongly encouraged by the institutional frameworks in banking law, competition law and other

[9] M Luchtman and J Vervaele, 'Summary of Main Findings and Overall Conclusions' in MJJP Luchtman and others, *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) 324.

[10] See chapter 4 (Böse and Schneider) and chapter 5 (Bovend'Eerdt & Karagianni) in this volume.

[11] MJJP Luchtman, M Simonato and JAE Vervaele, 'Comparative Analysis' in M Simonato, M Luchtman and J Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities (ECN/ESMA/ECB)* (Utrecht University 2018) 172.

areas of EU (financial) regulation, like the proposed establishment of the Anti-Money Laundering Authority.[12]

When it comes to the investigative stage of the composite enforcement procedures, four issues may affect the effective enforcement of EU rules and policies. First of all, there are still policy areas, quite astonishingly, where EU authorities lack a clear set of powers. Again, OLAF is the most prominent case in point. Even after its recent revision, the relevant legal instruments do not attribute investigative powers to OLAF, but describe what materials OLAF should be able to retrieve. In cases of non-cooperation, OLAF must rely on its national partners to ensure cooperation. Only its national partners are able to impose sanctions for non-cooperation or to use physical coercion to obtain materials, if necessary.[13]

Powers of enforcement do exist in other domains. DG Comp and ECB, as well as their national partners, have powers of compulsion. They are able to impose financial punitive and non-punitive sanctions for non-cooperation. As a general rule, real powers of coercion are not available for EU administrative authorities. For that, cooperation and coordination with criminal justice bodies, including the EPPO, may be necessary. There are no real indications, however, that this lack of coercive powers (as opposed to powers of compulsion) is perceived as a real problem for the relevant EU-authorities.

A third issue is the surplus of safeguards that appears to be applicable for OLAF-investigations. Though OLAF does not perform criminal investigations and has no powers of compulsion, it nonetheless needs to take account of a series of safeguards that are normally part of criminal procedures. In terms of the effectiveness of its operations, this can be considered as yet another flaw in its institutional design. Arguably, there may be some added value to this, because the inclusion of such safeguards may facilitate the later use as evidence in punitive procedures.[14] However, this added value is limited, because of the restrictions that apply for its use in evidence in criminal procedures sensu stricto.[15]

Finally, our previous reports draw the attention to almost the opposite of the problem just discussed. There is also a clear lack of attention for the safeguards that apply within the context of the administrative investigations by the EU authorities or their partners. Issues with respect to, for instance, legal professional privilege, access to counsel or the privilege against self-incrimination (relevant in punitive administrative proceedings or in cases where a later use in those procedures cannot be excluded) have received little to no attention in the applicable frameworks.[16] Consequently, there are a number of questions that are currently unanswered. First of all, even assuming that the EU courts will apply the well-known EU competition law standards to the actions of other EU-authorities, such as ECB (which is not clear yet), the question is how the competent authorities and courts should deal with the diverging national and EU standards during the gathering of information and the judicial review of investigative acts. EU standards, after all, fall below national standards in some instances. Which of those standards should prevail, then?[17] The same issue may come back once materials are introduced in another legal order (EU or national) as evidence.

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[12] Commission, 'Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010' COM (2021) 421 final.

[13] See chapter 4 (Böse and Schneider) in this volume.

[14] See, in extenso, Bovend'Eerdt in his forthcoming dissertation.

[15] Article 11(2) Regulation 2013/883, as revised by Regulation 2020/2223, and discussed by Giuffrida and Theodorakakou, chapter 6, in this book.

[16] On the specifics of those rights, see chapter 2 (De Vries and Widdershoven) in this volume.

[17] See also the analysis and recommendations by chapter 2 (De Vries and Widdershoven) in this volume.

Do higher national standards for instance preclude the use of such materials as evidence? What laws are to be applied? Clearly, there is a vertical and horizontal dimension to each of these questions, depending on the institutional architecture of the EU relevant authority.

The issue of the diverging standards also needs attention in light of the judicial review of the relevant investigative acts, on which I will also come back in the following section, and with a view to a smooth transfer of the materials from one legal order to another in order to be used as evidence. Otherwise, there is a risk that materials that have been collected under EU law or foreign law may not be used as evidence in punitive procedures. The latter would certainly be a problem in light of the principle of effectiveness of EU law. Yet, quite surprisingly, also highly harmonised areas such as banking law lack provisions on the admissibility of evidence. Moreover, the rules on admissibility of materials as evidence in cases of competition law seem to be limited to evidence that has been obtained *lawfully*.[18]

Admissibility rules of evidence can be said to have two core functions that are related to the principle of mutual trust; they are an expression of the recognition of equivalence, which in turn implies that diverging standards with respect to, for instance, fundamental rights can no longer hamper the admissibility of materials as evidence, save for exceptional circumstances.[19] Arguably, such rules build upon the principle of mutual trust and would then constitute hard-and-fast rules of non-inquiry of the legality of acts that are alien to the legal order of the forum. In principle, those materials cannot and should not be tested by any authority, or measured against any kind of standard of the forum state. The precise scope of such a rule, however, is yet to be determined, particularly for situations in which there are claims of unlawful investigative acts that interfere with the rights of individuals.

2.3. JUDICIAL PROTECTION AND UNLAWFULLY OBTAINED EVIDENCE (I)

Case law on the relationships between the admissibility of evidence, procedural safeguards and defence rights, as well as judicial protection is still scarce and hardly touches upon these relationships in the specific setting of composite procedures.[20] One of the first relevant cases is *Webmindlinces*.[21] The case deals with the conditions under which materials, obtained through the interception of telecommunications and seizure of emails in the context of ongoing parallel criminal procedures, can be used as evidence in tax procedures (VAT). The Court, quite firmly, introduced a responsibility for tax courts to offer redress for possible violations of the right to privacy that occurred in that parallel criminal procedure. It held that tax courts must verify whether the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to the disputed evidence and of being heard concerning it. If a breach of Article 7 CFR were to be established, the court is obliged to disregard that evidence. The same goes if the tax court would not be empowered to check that the evidence was obtained in the context of the criminal procedure in accordance with EU law or would

[18] MJJP Luchtman, AM Karagianni and KHP Bovend'Eerdt, 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' in F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019) 18 and 34.
[19] ibid 52; De Vries and Widdershoven in this volume.
[20] For an overview, see chapter 9 (Vervaele) in this volume.
[21] Case C-419/14 *WebMindLicences* [2015] ECLI:EU:C:2015:832.

not be able to 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.

The judgment is interesting, because it introduces a division of labour between different courts, which may also be relevant for composite procedures. Moreover, it takes a very firm stance on the exclusion of unlawfully obtained evidence. Regarding the latter, the question is whether this judgment still stands. In recent cases on the e-privacy directive, the Grand Chamber of the Court held that in those situations where EU law is silent on the law of evidence, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights that individuals derive from EU law. Therefore, it is up to national law to determine the appropriate reaction to unlawfully obtained or transferred evidence. Those rules must however be no less favourable than the rules governing similar situations subject to domestic law (the principle of equivalence) and may not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness).[22]

Yet despite the leeway that it now offers to the national legal orders, the Court also confirms in *Prokuratuur*, and that is still in line with *Webmindlinces*, the need to remedy breaches of EU-rights of defendants in criminal procedures. Legal orders must have in place, in the words of the Grand Chamber, 'procedural rules for actions intended to safeguard the rights that individuals derive from EU law,' subjected to the conditions of equivalence and effectiveness.[23] The Court continued that 'regard must be had, in particular, to the risk of breach of the adversarial principle and, therefore, of the right to a fair trial entailed by the admissibility of […] information and evidence [obtained in contravention of the requirements of EU law]. If a court takes the view that a party is not in a position to comment effectively on evidence pertaining to a field of which the judges have no knowledge and that is likely to have a preponderant influence on the findings of fact, it must find an infringement of the right to a fair trial and exclude that evidence in order to avoid such an infringement.'[24] Therefore, remedies for violations of EU rights, as required and provided for by Article 47 CFR, should not only be in place for persons with a view to the prevention, reparation or compensation of those breaches,[25] but also, specifically for defendants in punitive procedures, in light of their right to a fair trial. There appears to be no good reason not to require the same in administrative punitive procedures.

It is puzzling, however, what the Court means precisely with the phrase to be able to 'comment effectively on evidence pertaining to a field of which the judges have no knowledge', and how this case law relates, if at all, to composite procedures. *Prokuratuur*, after all, dealt with the covert collection and retention of personal data for national security and law enforcement purposes. I submit that the same line of reasoning can be used, however, when individuals have no opportunity to question the lawfulness of investigations for other reasons. One of those reasons could be that the information has been gathered in another jurisdiction. The case law of the Court suggests that courts in punitive procedures either ascertain that the remedies have already been provided for by another court, or that they offer the possibility to comment on the evidence themselves.[26] Yet to accept such an approach in composite procedures would surely be

[22] Case C-746/18 *Prokuratuur* [2021] ECLI:EU:C:2021:152, para 42, also discussed by De Vries and Widdershoven (chapter 2) and Vervaele (chapter 9) in this volume.
[23] ibid, para 42.
[24] ibid, para 44.
[25] Cf Case C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902, para 33.
[26] Cf Case C-419/14 *WebMindLicences* [2015] ECLI:EU:C:2015:832.

at odds with, for instance, the approach in international criminal law, where the so-called *Trenungsprinzip* organizes legal protection along the lines of the involved legal orders. Under that principle, it is not for the trial state, for instance, to offer a remedy for violations of the right to privacy that took place in another state (unless those violations can affect the right to a fair trial). The consequence of that is that courts do not have to entertain themselves with breaches of privacy, as guaranteed by the Charter or the ECHR, in another jurisdiction, nor with the application of foreign laws.[27]

The *Trennungsprinzip* has even become a hard and fast legal rule under the mutual recognition schemes in the Area of Freedom, Security and Justice. Mutual recognition, too, starts from a strict separation of responsibilities between the involved judicial authorities of different EU Member States. The Court of Justice held in its Opinion 2/13 that '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.'[28]

Recently, however, the Court added in *Gavanozov II* that issuing states must have remedies in place for that purpose under the framework of the European Investigation Order.[29] It held that 'the right of the person concerned to contest the need for, and lawfulness of, [investigative] measures means that that person must have available to him or her a legal remedy against the EIO ordering that they be carried out.'[30] The Court thus not only confirmed that legal remedies should be available for interferences with Charter rights, but it also created, specifically for mutual recognition regimes, a division of responsibilities along the lines of the legal orders involved. A similar development is discernable in surrender law, under the framework of the European Arrest Warrant.[31]

It remains to be seen what the precise scope of the rules, implementing the principle of mutual recognition will be. Sooner or later, questions will for instance come up that relate to the secrecy of investigations, both in relation to proceedings of the issuing authority, as well as to those of the executing authority. Questions relating to effective judicial protection may after all conflict with considerations of operational secrecy and this can affect the legal position of the later accused, but also third parties. Ultimately, it will be the issuing authority, that is best placed to make such assessments. Yet then, it may have to compensate later for a lack of legal protection in the executing state. Difficult issues relating to the access to the case file, the application of foreign law, et cetera, are ahead.

Moreover, the principle of mutual recognition does not (yet) cover the admissibility as evidence of the materials that were gathered. Trial courts may, despite the resulting limitations on the right to effective legal protection, still apply the *Trennungsprinzip* and refuse to hear arguments concerning violations of privacy rights and foreign laws in that respect. Under the present circumstances, it cannot be excluded and it is in fact

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[27] See Böse, Bröcker and Schneider, 'Introduction' in M Böse, M Bröcker and A Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer 2021).

[28] *Opinion of the Court of 18 December 2014 [on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms] pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 192.

[29] Case C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902.

[30] ibid, paras 35 and 41.

[31] Cf Joined Cases C-508/18 and C-82/19 PPU *OG & PI* [2019] ECLI:EU:C:2019:456, para 75; Joined Cases C-566/19 PPU and C-626/19 PPU *JR & YC* [2019] ECLI:EU:C:2019:1077, para 48.

confirmed by legal practice in a number of countries,[32] that limitations to the principle of effective judicial protection will occur. That situation is not in line with the principles established by *Webmindlicences* and, at the least implicitly, *Prokuratuur*. It implies, after all, that we cannot exclude situations wherein the defendant is not in the position to comment effectively – not in the gathering/transferring jurisdiction (eg for reasons of secrecy), nor in the trial jurisdiction (due to the *Trennungsprinzip*) – on matters that allegedly amount to a violation of his (EU) rights. A violation of the right to a fair trial is then imminent, because in my understanding of both cases, the court connected the right to an effective remedy to the right to a fair trial.

Under the rules of international law and, arguably, even the horizontal Area Freedom, Security and Justice, this situation – ie the limitation of the right to legal protection – is often accepted as a given. This is due to the complexities of these forms of cooperation, but also by the fact that transnational cooperation schemes essentially relate to situations where one authority assists another in the performance of the latter's duties. The former is not conducting the procedure itself and can consequently only be responsible for a small portion of it. That substantial grounds cannot be challenged in that legal order is understandable in that light, as it would also require access to the file and knowledge of foreign laws, for instance. The decision that certain acts should best be kept secret is a decision that executing authorities cannot always make either.

At this point in time, it is unclear if the Court of Justice will apply Article 47 CFR to such transnational situations and is willing to accept limitations to Article 47 CFR as a result of it, under the framework of Article 52(1) CFR.[33] But even if it would, the question is whether the same should go for composite procedures. This is, first of all, because composite procedures intend to overcome, rather than emphasize the formal separations between those legal orders and, secondly – most importantly –, because those procedures are legally characterized, despite their reliance on a multitude of legal orders, by their internal coherence.[34] How, then, can one accept limitations to art 47 CFR, similar to those just described, in that context? The arguments that may explain the situation in transnational cooperation have no value within structures that are meant to be composite. Being an intrinsic part of the composite procedure, authorities cannot turn a blind eye to what happened earlier in the same procedure, not even when it happened in another jurisdiction.

All of this does not change because sanctioning authorities or courts in a particular jurisdiction are under no obligation to actually impose a sanction, after being requested or instructed to do so. Even in situations where, for instance, a national supervisory authority imposes a sanction on an undertaking of its own volition, that decision followed upon the investigations and prosecutorial decisions that were made under the supervision and coordination of one and the same composite entity. Courts are, as a rule of thumb, consequently under a responsibility to offer remedies, either by making sure that remedies were de jure and de facto available in the gathering or transferring jurisdiction, or by offering the remedy themselves. If both options are not available, the consequence seems to be that those materials cannot be used as evidence, as that would infringe the right to a fair trial. It is a division of labor on the basis of on the basis of a chain-approach, rather than on the basis of the *Trennungsprinzip*.

More specifically, the foregoing implies four rules of thumb:

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[32] See M Böse, M Bröcker and A Schneider (eds), *Judicial Protection in Transnational Criminal Proceedings* (Springer 2021).
[33] See also chapter 4 (Böse and Schneider) in this volume.
[34] See chapter 2, section 4 (Luchtman) in this volume.

1. Where investigative acts interfere with EU-rights, particularly Charter rights, and the investigating authority is not itself an independent judicial body or the measure was not authorised by such an authority, the principle of effective judicial protection requires that a legal remedy is available to the person that is directly adversely affected by it.

Depending on the policy field, including whether the measures involve third parties or only the later defendants and/or whether the measures affect natural persons or legal persons, this legal order can be the order where the act is executed or the legal order where the measure was 'ordered' or 'requested'.[35] In both situations, there appears to be no solid reason as to why the substantial reasons cannot be challenged before any of those courts in principle, save, of course, for such considerations as operational secrecy in the investigative stage.

2. When there are no concerns raised as to the lawfulness of the ordering or execution of investigative acts or to their transmission, whereas this would have been legally possible to the party affected by the measure, materials obtained in or transferred by one legal order can as a rule be used as evidence in another.[36] In this situation, it is not for the authorities or courts of the sanctioning legal order to offer redress, should arguments be made by those same parties.

3. In situations where remedies were available for the affected parties and used in the transferring legal order, a finding of unlawfulness is not to be discussed again before the court of the sanctioning legal order, as that would be at variance with the principle of mutual trust. However, if the transferring legal order did establish irregularities and has not itself attached further consequences to it, it is up to the forum court to decide on the procedural consequences, in light of the right to a fair trial and taking account of the principles of equivalence and effectiveness. A relevant yardstick could be, in light of the principle of equivalence, to determine what the procedural consequences of that or a similar unlawful act would have been, had they taken place in the legal order of the trial state.[37]

4. Particularly in cases where no remedies were or could be offered by the gathering/transferring legal order to the (later) defendant, yet his EU-rights were at stake, loopholes are known to occur under a strict application of the *Trennungsprinzip*. In composite procedures, the authorities, as well as the courts that are competent to review the sanctioning decision will then need to provide for the opportunity to 'comment effectively on evidence pertaining to a field of which the judges have no knowledge.' Such situations could occur, for instance, because EU law precludes the courts of the gathering legal order to perform such a test.[38] Other examples are cases

[35] The former situation, for instance, will usually do more justice to the situation of third parties that are natural persons and will offer them a one stop shop-solution.
[36] Cf chapter 2 (De Vries and Widdershoven) in this volume, discussing Case C-188/92 *Textilwerke Deggendorf* [1994] ECLI:EU:C:1994:90.
[37] Cf M Luchtman, 'Het Europees Openbaar Ministerie in Nederland: Over Zijn Ondeelbaarheid en Verhouding tot de Nederlandse Strafrechter' [2021] *Delikt en Delinkwent* 63, 819-20.
[38] The latter may occur in situations where EU-law attributes sanctioning powers to the EU level and the 'EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities', Case C-219/17 *Berlusconi* [2018] ECLI:EU:C:2018:1023, para 43. See the discussion by chapter 2 (Widdershoven and De Vries, section 3, in this book.

wherein the law of that legal order offers no specific remedy, contrary to Article 47 CFR, or wherein remedies against the acts of the transferring legal order were not available to the defendant, for instance, because the investigative measures as such did not directly affect his interests or, in cases where his interests were directly affected, for reasons of operational secrecy.

The ways in how these principles are further implemented depends on the specifics of the legal regime that is applicable. Following the observations of De Vries and Widdershoven, as well as Ligeti and Robinson in this book, it may be useful to make a further distinction between situations where the punitive sanction is ultimately imposed by the EU-authority, subjected to the jurisdiction of the EU-judiciary, or by a national authority.[39] In the latter case, a further distinction may be necessary between the use of materials that were obtained and transferred by an EU authority, subjected to the rules of *Foto Frost*, or by the national authority of another jurisdiction, under the auspices of an EU authority.

Obviously, to complete the circle, the foregoing observations will have an impact on the effectiveness of composite procedures. The ultimate consequence of having no remedy available is after all that certain materials – ie those of preponderant importance – cannot be used as evidence in the procedure. To avoid problems, authorities and courts may decide not to use such materials in cases of unlawfulness,[40] yet that will hamper the effective enforcement of EU law and, moreover, may have as a consequence that alleged breaches of EU law remain undiscovered. My conclusion, therefore, is that there is ample reason for the EU and national legislator to overthink their system of legal remedies in light of the effectiveness of composite law enforcement.

2.4. COMPOSITE ENFORCEMENT PROCEDURE AND NATIONAL CRIMINAL JUSTICE (I)

The foregoing observations relate to enforcement procedures that are performed by or under the auspices of the EU authorities themselves. The following relates specifically to their relationships with criminal law enforcement at the national level. These relationships go in two directions. In some cases, they will be triggered 'bottom up', when criminal justice bodies ask for or even order information that is in the hands of EU authorities or their national partners. The top down-mirror covers the many implications that the work of the EU-authorities may have for national criminal justice. As I have already highlighted the problematic relationships in terms of national follow-up to OLAF investigations by criminal justice bodies, I will not deal with this issue here again.

To start with, questions of legal protection arise in situations where materials gathered by EU-authorities are used in criminal procedures, or vice versa,[41] and issues

[39] See also L Arroyo Jiménez, 'Effective Judicial Protection and Mutual Recognition in the European Administrative Space' [2021] *German Law Journal* 22, 344.

[40] As pointed out by RJGM Widdershoven and P Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement' in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017); Giuffrida, 'Comparative Analysis' in F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019) 257-60.

[41] Cf Case C-469/15 P *FSL and Others v Commission* [2017] ECLI:EU:C:2017:308, discussed by MJJP Luchtman, AM Karagianni and KHP Bovend'Eerdt, 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' in F Giuffrida and K Ligeti (eds),

with respect to their lawfulness arise. One of these issues is whether the national and European Courts will define the relationship between criminal justice and composite administrative procedures in the same way as they have defined the relationships between administrative authorities and criminal justice in the national setting of, for instance, *Webmindlicences*. Do the EU Courts wish to uphold their firm position that administrative courts should fully assess the legality and proportionality of the actions of criminal justice bodies, if criminal courts have not done so already and that they should otherwise exclude the materials as evidence in the administrative procedures?[42] There may be reason to mitigate this stance, also in light of *Prokuratuur*.[43] It could be argued that such a test – that is now performed outside the context of composite procedures – is to be limited to a test of fairness and to manifest, grave breaches of EU-rights, such as the right to privacy or property. It is not always clear, after all, why defendants in administrative punitive procedures should be able to comment on violations of their right to privacy that occurred in another (criminal) procedure and therefore should be remedied under that framework. Of course, that may change again in situations where EU authorities and national bodies of criminal justice do start to cooperate more intensively than they do now. The following parts of this section highlight a number scenarios of how this could evolve.

The scope of the investigations that are conducted by EU-authorities can easily overlap with national substantive criminal law. Moreover, we see that in a great deal of cases there may be multiple national criminal law systems competent to take up a case. The overlap, therefore, has vertical (EU-national), as well as horizontal dimensions. Nonetheless, the relationships between composite administrative enforcement at EU level and national criminal justice are often opaque or even deliberately cut off. The latter situation is omnipresent in competition law where, in order to protect the rights of the defence in competition proceedings, the provision of information to criminal justice actors is severely restricted. Exchange of information from competition law authorities to criminal justice bodies is usually limited to providing information as a basis for the start of criminal investigations.[44] Moreover, there is no doubt that provisions, such as Article 12(3) Reg 1/2003 facilitate the enforcement of competition law within the network, but may simultaneously impede the administration of criminal justice. In the situations described in that section, information may not be used by the receiving authority to impose custodial sanctions. This system, which in many aspects is more restrictive than the case law of the ECtHR requires, clearly brings along restrictions for effective criminal law enforcement. It creates a de facto rule of priority for administrative enforcement, which is not always warranted in light of the proper administration of justice.

Also in banking law, the connections between administrative and criminal enforcement are not an intrinsic part of the SSM's design.[45] Both systems of enforcement are regarded as two distinct areas of law. Though there are provisions that deal with exchanging information and though those provisions do not carry the same

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Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings (Luxembourg University 2019) 18-21 and chapter 2 (De Vries & Widdershoven) in this volume.

[42] Case C-419/14 *WebMindLicences* [2015] ECLI:EU:C:2015:832.

[43] Case C-746/18 *Prokuratuur* [2021] ECLI:EU:C:2021:152.

[44] See chapter 8 (Allegrezza *et al*.) and chapter 5 (Bovend'Eerdt and Karagianni) in this volume; see also MJJP Luchtman, AM Karagianni and KHP Bovend'Eerdt, 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' in F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019) 30-5, with further references.

[45] See chapter 8 (Allegrezza *et al*.) in this volume.

restrictions as in competition law, exchanging information and coordination is not perceived as a task for ECB, yet for its national partners (the NCAs) and national criminal justice bodies. In light of the division of competences within the SSM-system, this is not always a logical choice. It blurs the clarity on the applicable legal rules, it raises questions as to the scope of control that ECB can exercise over its national partners, as well as what powers criminal justice actors can exercise, if necessary, to obtain relevant information from within the SSM framework.[46]

The strong information position of EU authorities will usually lead to a situation wherein their procedures are concluded first. A lack of coordination and exchange of information consequently raises questions in light of the ne bis in idem principle. Now that Article 50 CFR is applicable in cases wherein both the EU authority or its national partner and criminal justice bodies are competent for the same set of facts, the question is whether the court of justice will accept a limitation of the scope of the principle under Article 52 CFR. Dual procedures as such are after all not – at least not in the absence of specific EU rules – prohibited, provided they serve complementary aims relating to different aspects of the same unlawful conduct. To ensure that the disadvantages resulting, for the persons concerned, from such a duplication are limited to what is strictly necessary, coordination between the procedures will be required.[47] A violation of Article 50 CFR then appears to be imminent, where such coordination does not take place. If that is true, it is wise for the EU and national legislators to ensure coordination between the procedures on a more structural basis, particularly in those policy areas where dual track procedures are not uncommon.

It is currently not clear to what extent a violation is also imminent in cases where supplementary goals are indeed pursued and coordination did take place. Both criteria are inherently vague and imprecise.[48] Are complementary goals pursued if national provisions of criminal law, such as general fraud offences, serve to implement the relevant EU directives and regulations and the criminal or administrative sanctions can each and of themselves be considered to be effective, dissuasive and proportionate?[49] Moreover, what is meant with a coordination of procedures? Is it the mere possibility of an information exchange or does it involve a division of labor, consultation, et cetera?[50]

These questions are relevant, because according to the Strasbourg case-law (if it were applicable),[51] a coordination would bring along that both types of procedures are de facto considered as part of one and the same procedure, thus preventing a breach.[52] Yet the Luxembourg Court seems to follow a different approach. Dual track procedures are as such not forbidden, but do interfere with Article 50 CFR. To prevent this interference from becoming a breach, the goals in both procedures pursued must be supplementary and not go beyond what is strictly necessary. The more the subject matter comes within the domain of EU law, the more stringent this necessity-test will presumably be. The (open) question is to what extent this necessity is still there, where both types of punitive sanctions each and of themselves can be considered to be

[46] See chapter 8 (Allegrezza *et al.*) in this volume.
[47] Case C-151/20 *Nordzucker* [2022] ECLI:EU:C:2022:203; Case C-524/15 *Luca Menci* [2018] ECLI:EU:C:2018:197; Case C-537/16 *Garlsson Real Estate and others* [2018] ECLI:EU:C:2018:193; Joined Cases C-596/16 and C-597/16 *Di Puma and Zecca* [2018] ECLI:EU:C:2018:192.
[48] Case C-151/20 *Nordzucker and others* [2021] ECLI:EU:C:2021:681, Opinion of AG Bobek.
[49] As was the case in Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.
[50] The Court does seem to require actual coordination, see Case C-117/20 *bpost SA* [2022] ECLI:EU:C:2022:202, para 55.
[51] The territorial scope of Article 4 P7 ECHR is after all limited.
[52] *A and B v Norway* App nos 24130/11 and 29758/11 (ECtHR, 15 November 2016).

effective, dissuasive and proportionate and – also depending on the content of the legal provisions at play – can be said to pursue similar or even the same objectives of EU law. In those situations, dual track procedures and the double prosecutions or sanctioning that follow from it, even if well-coordinated, seem to go beyond what is needed to ensure the effective enforcement of EU law. Those situations could lead to a violation of Article 50 CFR.

The issue of coordination is also relevant for certain defence rights, including, but not limited to situations that the EU and national authorities investigate the same acts conducted by the same (legal) persons or their representatives.[53] Some have expressed concerns as to the adverse consequences that the European Courts' case-law on ne bis in idem – ie the requirement of coordination to prevent a violation in dual track systems – may have on the applicable defence rights in criminal procedures.[54] Will it lead to a circumvention of these rights? The problem may be actually the opposite. For instance, we know that there are instances in which the rights and safeguards of criminal justice, particularly the right to silence, but in its wake also the right to a lawyer, cast foreword their shadow over non-punitive procedures. Where it is reasonably foreseeable that information obtained under compulsion in non-punitive procedures can end up in punitive procedures by other authorities, this can lead to a violation of the right to a fair trial, at the least if compulsion is indeed exercised. The relevant question in these cases is whether these procedures are 'sufficament liées',[55] a criterion that reminds of the criterion of procedures being 'closely connected in substance and in time' in the ne bis in idem-case law.

The impact of this case law on composite enforcement and its relations to criminal justice is unclear. Can national safeguards of criminal justice impact the composite operations of EU authorities? To what extent is it relevant that these safeguards implement EU law?[56] The ECtHR's case-law implies that sufficiently strong connections between non-punitive and punitive procedures cover far more situations than an organisational union of both tasks within one and the same authority. In *Chambaz*, the Court concluded that Article 6 ECHR also applied to the tax procedure, because of the overlapping tasks and the mutual legal information and assistance obligations, which indeed led to a strong overlap in the investigations at hand. Under those circumstance, persons concerned will have to take account of the impact of their declarations, performed under compulsion, beyond the non-punitive procedure in which they were obtained. A duty to obtain the requested information under compulsion in those procedures may consequently violate the privilege against self-incrimination, particularly the right to remain silent.

Now, can we say that the situation is different for administrative composite procedures and their relation to national criminal justice? Usually, the territorial scope of the privilege is limited to a specific national jurisdiction.[57] Yet again, why would that be so, now that the notion of territorial borders has largely been removed from or reshaped by the legal design of the relevant authorities? Do criminal investigations in

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[53] On the relationships between the privilege against self-incrimination of legal persons and their representatives, see S Lamberigts, *The Privilege Against Self-Incrimination of Corporations* (Leuven 2018).

[54] *A and B v Norway* App nos 24130/11 and 29758/11 (ECtHR, 15 November 2016), Dissenting opinion of Judge Pinto de Albuquerque, para 21.

[55] *Chambaz v Switzerland* App no 11663/04 (ECtHR, 5 April 2012).

[56] For instance, 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 OJ L65/1.

[57] S Lamberigts, *The Privilege Against Self-Incrimination of Corporations* (Leuven 2018) 250-252.

the Netherlands have an impact on administrative acts of investigation in Germany, if these are conducted by or under responsibility of the EU authorities?

It may come as no surprise that I am of the opinion that with the reshaping of the role of nation-state borders within the institutional design of these enforcement modalities, there no longer appears to be a good reason to treat these mechanisms differently from comparable national enforcement mechanisms. National borders cannot be, as they would be under international law, a decisive factor, as they no longer serve as formal separations between administrative investigations in one legal order and criminal investigations in another.[58] Consequently, there appears to be no good reason to limit the scope of the relevant EU rules – particularly Directive 2016/343 on the presumption of innocence – and Articles 47 and 48 CFR to a specific national jurisdiction. Where compulsion is used in composite administrative procedures and exchange of information and coordination with criminal procedures is necessary (if only to prevent a violation of the ne bis in idem principle), this may lead to a sufficiently strong connection between the procedures of the EU authorities, their partners and national actors of criminal justice.[59] Consequently, in situations where all are acting within the scope of EU law, to prevent Articles 47 and 48 CFR from being violated and to ensure the effectiveness of the composite non-punitive procedure, which will entail duties of cooperation, provisions are necessary that exclude a later or parallel use of the obtained (will-dependent) materials in punitive procedures. I do not only regard this as a matter of fairness, but also of legal certainty and legality. To determine their legal position, individuals must be able to determine their legal position in this regard ex ante, ie before the requested information is to be provided.

Finally, as much as actors within composite administrative procedures need to become aware of the intrinsic links of their work with criminal justice, the opposite is also true. And again, there are signals that criminal courts perceive the work of EU authorities of an entirely different order than their own everyday work. Again, this is capable of affecting the effective enforcement of EU law. There is an EU-side to this, was well as a national side. At the EU level, the aforementioned lack of clarity on the applicable safeguards plays a role, without doubt. The most pertinent example, however, are the provisions in the OLAF-framework on the admissibility of OLAF reports as evidence in national punitive and non-punitive procedures.[60] Even after the OLAF-reforms of 2020, the rules on the admissibility of evidence are regarded as unduly strict. Yet, as was noted before repeatedly, the smooth transition of its reports and their use as admissible evidence in criminal procedures are vital for the protection of the EU's financial interests.

At the national level, the question is whether national authorities, particularly criminal courts, are sufficiently aware of the European dimension of their tasks and are willing to adapt to it. Though it will surely be a bridge too far to introduce in, for instance, the SSM-framework provisions on the admissibility of evidence in criminal proceedings, the question is also to which extent national courts and legislators themselves need to open up, even on their own motion, to the impact of composite

[58] On transnational types of cooperation between administrative and judicial bodies, see MJJP Luchtman, *European Cooperation Between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities* (Intersentia 2008).

[59] Arguably, but I come back to this in section 3.3, there may be also a horizontal, transnational dimension to this.

[60] Giuffrida en Theodorakakou, chapter 6, in this book and Giuffrida, 'Comparative Analysis', as well as K Ligeti and F Giuffrida, 'Policy Recommendations' in F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019) 293.

administrative proceedings on criminal justice. I disagree, therefore, with authors that say that national laws on evidence are not the EU's business. Even where the EU legislator does not or cannot take adequate account of this, there is also a responsibility for national courts and legislators in this regard.

3. EFFECTIVE LEGAL PROTECTION IN COMPOSITE ENFORCEMENT

In the previous section, the aim was to demonstrate that the institutional design of the authorities that were studied does not always correspond to what is needed for effective enforcement in a composite setting. Further actions are needed, both at EU and national levels, to ensure the effective enforcement of EU law. Now that the administrative enforcement authorities of the EU and the participating states by and large seem to have found each other within the composite enforcement structures of the EU authorities and their partners, this finding relates particularly to the other two branches of state (in a functional sense). The impact of composite enforcement on the responsibilities of the legislative and judicial branches is still far from clear. Clear arrangements for the protection of defence rights and procedural safeguards, as well as judicial protection do not appear to be in place. Even more so than its implications for effective enforcement, the current situation raises concerns in light of the legal protection of individuals. Those are the topic of this section.

Concerns like these are not new. It is well documented in international criminal law doctrine that the opacity of transnational criminal investigations and the great diversity among national legal systems pose problems for individuals, national courts and politicians to keep an eye on law enforcement operations. The concern is that the cooperating authorities – each of them accountable to the actors of their state of origin – are de facto put in a position where they are able to 'rule with law',[61] instead of being governed by it. Those authorities may agree, for instance, to obtain information in a jurisdiction where legal conditions are more lenient and subsequently introduce the materials as evidence in another jurisdiction.[62] Yet in the international law context, this situation is also more or less presented as a given, precisely because the applicable rule of law safeguards are connected to the nation-state and the relevant enforcement procedures are considered as *national* procedures that, at best, coincide with procedures running in parallel in other states and for which other actors are responsible. Under that framework, national authorities are held to account by national courts or political organs in light of national interests and perspectives. Those courts are usually not concerned with the actions of foreign authorities. That implies that the often intensive processes of mutual coordination that take place between the cooperating authorities are not taken

[61] B Bowling and J Sheptycki, 'Global Policing and Transnational Rule with Law' (2015) 6 Transnational legal theory 141, 146 write: 'These agents act in conditions of low visibility, act with considerable discretion and are largely unregulated by any superordinate form of authority.' See also JP Brodeur, *The Policing Web* (OUP 2010); B Loftus, *Police Culture in a Changing World* (OUP 2012); R Reiner, 'Police and Policing' in: M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (OUP 2007).

[62] See for instance, the following remarks by a former lead investigator of the Dutch financial police (the FIOD) in 'De Fraudeur is ons Altijd Drie Stappen Voor' *NRC* (21 May 2016) (translated from Dutch): '"Fraudsters have ever smarter advisers. They are always three steps ahead of us. If the British Virgin Islands has new legislation next year, there is already a tax expert who knows about it, while we just know how it goes in the Cayman Islands." But where criminals look for the most comfortable legislation internationally, so does the FIOD. In an investigation with the Americans, they were able to infiltrate the country most easily, while the Netherlands was more lenient with telephone taps.'

into account by the national accountability forums of other states.[63] Remedies for actions that are carried out by other authorities must consequently be offered in the other legal order. What is more, is that to the extent that such problems are recognized, it is often maintained that fundamental right standards should be lowered under international legal assistance instruments, because of the complexities of international legal assistance and for the sake of the greater good.[64]

There is good reason not to be so lenient in the composite setting of the European Union, where economic actors and citizens have been granted enforceable rights of free movement in a transnational setting. The international law narrative fits poorly with the integrationalist, composite reality of the European Union and enforcement practice by EU authorities. The EU is in need of a narrative that guides the removal of the traditional barriers of international law; a narrative that not only focuses on the need for swift and efficient cooperation, but also on the relevant rule of law standards, particularly the legality of the procedures, their fairness, as well as the legal protection for individuals. This is necessary, not only because a lack of attention will ultimately hamper effective enforcement, as was discussed in the previous section, but mainly because this is what Articles 2 and 3 TEU call for.

3.1. THE APPLICABLE LAW: LEGALITY AND FAIRNESS IN COMPOSITE ENFORCEMENT PROCEDURES

Let us assume that a financial institution is operating under a European license and active in multiple EU Member States on the basis of that license. Such an institution may be subjected to the supervision of an EU supervisory authority, for instance, ECB or a national competent authority. That institution may have stored information on servers or in the cloud that is relevant for supervision and enforcement purposes. Consequently, the information may be accessible from a number of its offices in different Member States. Requests for information may involve methods or contain information that fall within the scope of Article 7 or Article 8 of the Charter. The use of such investigatory powers then constitutes an interference with the right to privacy. Under those circumstances, the applicable law is to define the conditions under which the competent authority is given access to that information. The same goes when personal data are transferred to other authorities. All of that follows directly from said articles, in conjunction with Article 52 CFR.

In the case of an on-site inspection, the legal position of the institution and the powers of the investigative authority are defined by the law that attributes the investigative power to that authority. To that extent, there is no uncertainty about the applicable law.[65] It is that law – be it national or European – that provides the basis for interferences with the right to privacy. It grants those powers, yet also defines their scope and the conditions under which they are considered 'lawful.' It permits what otherwise would have been an illegal act, a breach of the right to privacy. If it is ECB exercising that power, it will be the relevant EU provisions of, for instance, the SSM Regulation that apply to the specific situation. Those who are confronted with these

[63] Cf F Meyer, 'Protection of Fundamental Rights in a Multi-Jurisdictional Setting of the EU' in M Scholten and A Brenninkmeijer, *Controlling EU agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (Cheltenham Edward Elgar 2020) 134.
[64] For discussion, see A Klip, *European Criminal Law: An Integrative Approach* (Intersentia 2021) 562; MJJP Luchtman and AAH van Hoek, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights' (2005) 1 Utrecht Law Review 1.
[65] Cf Case C-550/07 P *Akzo Akcros* [2010] ECLI:EU:C:2010:512, paras 100-108.

measures can assess their legal position with reference to the specific law that is applicable to the case; they are able to determine what their legal position is vis-à-vis the authorities or to assess to what extent the law has correctly been applied by the authorities during review procedures, with reference to the applicable law.

In composite procedures, differences in investigative powers and the corresponding safeguards remain. Even where EU powers are almost fully harmonized, there may be national safeguards to respect or additional powers at the national level to deploy. Such differences continue to exist, even in the banking area. The legal arrangements that determine the applicable law have been discussed in chapter 1, section 4. It was noted that particularly the arrangements that regulate the horizontal dimensions of composite procedures often remain implicit. If the same information is then accessible via the laws of different legal orders and if that information can be obtained either by the EU authority itself or by that authority 'asking', 'requiring' or 'instructing' a national partner to do so, the requirement of a lawful basis inevitably loses parts of its function. Within composite enforcement systems, the applicable law is seldomly precisely defined in such horizontal relations; a number of national laws is often potentially applicable, in the investigative stage and/or in the sanctioning stage. That means that a new type of discretion comes to the fore in these systems; the discretion to determine which set of legal rules is applicable to any given case.[66]

The question is whether this type of discretion must also be subjected to the rule of law. Sometimes, case allocation rules exist, as in banking law with a system of home state control. That system is particularly relevant for prosecutorial decisions and the sanctioning stage within the SSM system.[67] Yet even those rules do not necessarily prevent authorities from *gathering* information in other jurisdictions than the home state.[68] Issues of legality, particularly with regard to the legal basis of the interference and its proportionality, may still arise in light of the right to privacy, for instance. This reality is even an intrinsic part of the composite system of banking supervision, with its joint inspection teams or on-site inspection teams.

It would be naïve to assume that such differences between legal systems are unknown or play no role in enforcement practice. Of course they do. They are a legal reality. The EPPO Regulation for instance stipulates that Member States notify the EPPO when national law limits access to information via investigative powers in their jurisdiction.[69] In another area of law, ESMA guidelines on transnational cooperation between national authorities and/or ESMA urge cooperating authorities in the context of joint investigations to consider, inter alia, 'the identification and assessment of any legal limitations or constraints and any differences in procedures with respect to investigative or enforcement action or any other proceedings, including the rights of any Person subject to investigation (…).'[70] Finally, we can make mention of the Eurojust Guidelines 2016, which also point specifically to the necessity to take account of differences between the legal systems of EU Member States. Those guidelines hold that '[t]he existing legal framework, including obligations and requirements that are imposed in each jurisdiction, should be considered as well as all the possible effects of

[66] See chapter 2, section 3 (Luchtman).
[67] For legality and case allocation in competition law, see S Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart 2009), 212.
[68] As will be put forward in due time in Argyro Karagianni, *The Protection of Fundamental Rights in Composite Banking Supervision Proceedings* (Europa Law Publishing forthcoming).
[69] Article 30(3) Regulation 1939/2017. The wording in itself is interesting: 'limitations', not 'safeguards' or 'conditions for lawful application'.
[70] See Article 6(3-5) of *Guidelines 2014/298 on cooperation arrangements and information exchange between competent authorities and between competent authorities and ESMA*.

a decision to prosecute in one jurisdiction rather than in another and the potential outcome in each jurisdiction.' They also warn, however, that 'judicial authorities should not decide to prosecute in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another.'[71] However, it is totally unclear where the first situation ends and the second begins.

That these discretionary margins exist and that authorities must deal with them does not mean that the status quo is not problematic in the EU-framework. Should such new types of discretion, inherent to all the legal frameworks of this study, be left untouched? Questions with respect to the role of national and EU law in regulating the discretion to apply a specific set of legal rules in composite procedures not only relate to the right to privacy. Depending on the specific framework at hand, the role of the legality principle also comes into play as a safeguard against breaches of other fundamental rights. Those rights concern the right to liberty (in cases where custodial measures are available), property, but also the right to a fair trial and the substantive legality principle. All of these rights are covered by the EU Charter, which as a general rule will be applicable in these procedures. By their very definition, composite procedures fall within the scope of EU law (Article 51(1) CFR).

A distinction between two types of norms may be helpful to identify the relevant areas of attention. On the one hand, 'primary norms' seek to guide the conduct of individuals in their daily affairs and, on the other, 'secondary norms' guide the actions of enforcement authorities, as well as the conduct of individuals in the setting of those enforcement actions (secondary or enforcement norms).[72] Regarding the first category of norms, the substantive legality principle requires that, if violations of those norms are enforced with punitive penalties, these norms, as well as their punitive enforcement are laid down, ex ante, by law in sufficiently clear provisions. The same goes for the applicable penalties. That is provided for by Article 49 CFR.

With regard to the second category, the main purpose of procedural rules is to protect the defendant against any abuse of authority.[73] In that respect, when it comes to guaranteeing the fairness of the procedure, the requirement of procedural legality is closely connected to the principle of equality of arms. In presenting their case, the defendant should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. The law protects 'the defence which is the most likely to suffer from omissions and lack of clarity in such rules', by introducing binding rules for all parties concerned. That is the core of the maxim '*nullum judicium sine lege*.' There appears to be no good reason not to apply this maxim also in punitive (administrative) procedures that have not yet reached the stage of judicial review.[74]

The requirement of procedural legality has a different role than the substantive legality principle. In connection to the right to a fair trial, its primary focus is to enable defendants, on which I will focus in the following, to take or become part in the procedure in due time, to design an effective defense strategy and to present their case. Corresponding rights and duties of defendants – for instance the duty to produce documents or to appear during a hearing – should be sufficiently clear in that regard. Conversely, abuses of authority with these processes are to be prevented by the law.

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[71] *Eurojust 2016 Guidelines for deciding 'Which jurisdiction should prosecute?'* 3-4.

[72] Inaction, incidentally, may also lead to actions by individuals, for instance procedures to force authorities to commence procedures.

[73] *Coëme and others v Belgium* App nos 32492/96, 32547/96 and 32548/96 (ECtHR, 22 June 2000), para 102.

[74] ibid.

This brings along that such rules need not necessarily be foreseeable at the time of the commission of an offence,[75] but they must be so once punitive proceedings have started. In light of the latter, the law should also preclude authorities from any possibility to influence or even manipulate the commencement of such procedures, for instance by postponing any communication thereof to defendants.

The procedural focus of the legality principle is also inherent to another category of secondary norms, during the investigative stage and the regulation of investigatory powers, as well as the applicable procedural safeguards. When it comes to such rights as the protection of privacy, liberty or property, the legality principle, as laid down in said rights and Article 52 CFR, is only to a limited extent capable of guiding the actions of individuals. I would even argue that offering such guidance is not its primary goal. Third parties, for instance, may also be subjected to such investigatory powers, but are in no position whatsoever to anticipate their application. At best, the law allows them to determine their position, including their procedural rights and duties, once they are confronted with these measures. Yet, sometimes, even the latter is not possible. Some interferences with privacy may by their very nature not be known to individuals, in view of the possibility of their absconding or of a collusion of evidence.

Does that mean that the procedural legality principle is of no importance? Far from it. The requirement of lawful interferences seeks to protect such individuals against abuses of authority, by subjecting the executive and the judiciary to the rule of law. The law determines the acceptable degree of discretion that is to be afforded to the authorities. In that regard, the requirement of the legality of the interference and its proportionality coincide.[76] The law, after all, stipulates the criteria by which the proportionality of a measure must be assessed. The more these measures are concealed, the stricter the corresponding safeguards must be. The more intrusive the interference, the stricter the requirements for the application of a certain power. The requirements of foreseeability and accessibility consequently reveal the yardsticks by which the conduct of the authorities is to be assessed, ex ante or ex post, by individuals and by courts or other authorities.

The question for composite procedures is to which extent national laws are still capable of fulfilling these functions in cases where EU law makes way for the application of multiple national laws and provides no further guidance as to the applicable rules. In chapter 1, section 4, I argued that, despite its often fragmented or decentralised character, composite enforcement by EU authorities is characterised by its legal coherence and that that should have consequences for the interpretation of, inter alia, fundamental right standards. Yet what precisely are those consequences? Depending on the specific right at hand and the fundamental right in play, I propose the following three hypotheses:

1. Regarding the substantive legality principle, as protected by Article 49 CFR, said principle brings along that at the time when individuals undertake an action that may constitute a criminal offence,[77] they must be able to assess which criminal law or set of criminal laws will be applicable to their case.

[75] On this, see also M Panzavolta, 'Choice of Forum and the Lawful Judge Concept' in M Luchtman, *Choice of Forum in Cooperation Against EU Financial Crime* (Boom/Eleven 2013).
[76] As was recently also emphasized in Case C-140/20 *G.D.*, [2022] ECLI:EU:C:2022:258, para 53 ff.
[77] The same goes for negligence, of course.

This hypothesis does justice to the concept of transnational agency or citizenship.[78] If the EU aims to promote the free movement of persons, that also means that the potential consequences of such movement under the criminal law must be foreseeable to those individuals (natural or legal persons). The principle of free movement brings along that, where free movement rights have been exercised, the law of the host state constitutes the default position and, hence, the primary point of orientation for individuals, as is reflected, for instance, in banking law and its system of home state control. After all, the host state is the state where the financial institution chose to start its undertakings. Where free movement rights have not been used by individuals, the laws of the home state will apply, as a default.

Of course, that does not mean that the punitive laws of other states may not be applicable either, for instance if part of the business is conducted there or the legal harm of the offence is done there. Yet where punitive sanctioning in other legal orders than the 'default order' remain a possibility, composite enforcement procedures should exclude the possibility for EU authorities and national partners to determine the applicable legal regime or regimes and, hence, the applicable offences and sanctions in a way that could not be anticipated, at the time of action, by the individual or undertaking. Such 'foreseeability gaps' may be closed by secondary rules, for instance rules on forum choices, that in turn must meet the requirements of procedural legality.[79] The foregoing also means, by implication, that the potential application of offences and sanctions from those other jurisdictions (than the default legal order) is as such not impermissible in light of the free movement of persons, but that it needs a clear, foreseeable basis in the law. To that extent, rules on jurisdiction are in my view also influenced by the substantive legality principle of Article 49 CFR.[80] Arguably, one could even raise the standard for Article 49 CFR and point to the fact that diverging offences and sanctions, even if foreseeable, still pose a problem in light of the contradictory signals that are thus sent to persons.

The foregoing brings along that composite systems that lack a 'case allocation system' require our specific attention. OLAF's framework is again a case in point here. The PIF-area lacks a system that designates the competent forum in a manner that is foreseeable to individuals. For OLAF, the question is whether this system should be part of the OLAF framework or of the authorities that are required to provide for (punitive) follow up, including the criminal justice authorities.[81] Case allocation mechanisms are in place in the area of banking law and, in a more informal way, in EU

[78] On the relationships between EU citizenship and criminal law, see, inter alia, S Coutts, *Citizenship, Crime and Community in the European Union* (Hart 2019); K Ligeti and A Marletta, 'EU Criminal Justice Actors: Accountability and Judicial Review Vis-À-Vis the EU Citizen' [2016] 7 NYECL, 175; M Luchtman, 'Choice of Forum and the Prosecution of Cross-Border Crime in the European Union: What Role for the Legality Principle?' in M Luchtman (ed), *Choice of Forum in Cooperation Aainst EU Financial Crime: Freedom, Security and Justice and the Protection of Specific EU-Interests* (Eleven 2013) 3.

[79] Cf, in the national setting, *Camilleri v Malta* App no 42931/10 (ECtHR, 22 January 2013). For an example of how this could be done, see Luchtman, ibid, and K Ligeti, J Vervaele, A Klip and G Robinson (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law* (Hart 2018).

[80] M Luchtman, 'Choice of Forum and the Prosecution of Cross-Border Crime in the European Union: What Role for the Legality Principle?' in M Luchtman (ed), *Choice of Forum in Cooperation Against EU Financial Crime: Freedom, Security and Justice and the Protection of Specific EU-Interests* (Eleven 2013) 3.

[81] As will be explained and further elaborated in due time by Koen Bovend'Eerdt in his dissertation.

competition law.[82] Particularly interesting in this regard is, of course, also the EPPO that has a system of forum choices that closes foreseeability gaps at the secondary level, ie in the determination of the competent forum state.

2. The procedural legality principle that is part of the right to a fair trial (Articles 47 and 48 CFR) implies that individuals, as soon as punitive procedures can reasonably be anticipated, must be able to determine their procedural position and to design an effective defence strategy in light of the punitive finality of the procedure. Abuses of authority are a particular risk where the competent forum remains undetermined after procedures have started or where procedural acts in other legal orders, ordered or executed by or under the auspices of the competent EU authority, adversely affect the rights and duties of the defendant before that forum.

For the procedural part of the legality principle, a key issue is to determine if and when abuses of authority are likely to take place in composite procedures. Composite enforcement procedures may end up in punitive sanctions either at EU or the national level. The principle of legality requires that a) it is not possible for enforcement authorities to postpone the opening of punitive procedures,[83] b) that the competent forum must preferably be known at this stage, too, and c) that procedural acts that are conducted in other legal orders cannot negatively affect or bypass the exercise and scope of defence rights as guaranteed by the forum, nor increase the (scope of) enforcement duties already incumbent on the person concerned by the laws of that forum. Moreover, d) in those cases where non-punitive procedures can have an impact on parallel or consecutive punitive procedures, those consequences should be foreseeable to individuals as well.[84]

Though these propositions are still quite broad, they do offer a frame of reference for assessing procedural legality in a composite setting. These propositions do not in themselves prevent that procedural acts are performed in other jurisdictions than the jurisdiction of the forum (EU or national), not even after punitive procedures have officially commenced. Nor do they entail that it should always be the highest standards of defence rights that apply to a given case (provided the standards of the CFR are at all times respected) or that it should be the defendant that chooses by which applicable legal regime it wishes to proceed.

I do consider it problematic, however, that procedural acts that are relevant for the procedure in the forum jurisdiction may also be conducted under the legal regimes of other legal orders that fall below the level of protection of the forum. Such situations could occur, for instance, where the forum offers more extensive protection with regard to the privilege against self-incrimination. Another case in point is the protection of legal professional privilege that varies in scope among different member states and the EU level.[85] These are situations where risks for abuses are the greatest, even when the

[82] Commission, 'Commission Notice on cooperation within the Network of Competition Authorities' [2004] OJ C101/43, discussed inter alia by S Brammer, *Co-Operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart 2009).

[83] Cf the ECtHR's case-law on the notion of a criminal 'charge', eg, *Deweer v Belgium* App no 6903/75 (ECtHR, 27 February 1980); *Serves v France*, App no 20225/92 (ECtHR, 20 October 1997), para 42; *Marttinen v Finland*, App no 19235/03 (ECtHR, 21 April 2009), para 62.

[84] Cf *Chambaz v Switzerland*, App no 11663/04 (ECtHR, 5 April 2012); *Marttinen v Finland*, App no 19235/03 (ECtHR, 21 April 2009).

[85] See chapter 2 (De Vries and Widdershoven) and chapter 4 (Böse and Schneider) in this volume; R Widdershoven and P Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement' in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities* (Edward Elgar Publishing 2017) 338.

relevant Charter standards are met by those other legal orders. Such changes are problematic, if and when they are made unilaterally by the executive. This is so, first of all, because it affects legal certainty and hampers the development of a defence strategy. Moreover, it affects the principle of equality of arms and, in plain language, fair play, if no law prevents the authority – being a party to the procedure – to apply rules that have an impact on the procedural position of other parties to that same procedure. Such degree of executive discretion must be prevented by the law. Perhaps, we should go even further than that and tackle the possibility of changing the applicable procedural rules in and of itself. It will not always be easy, after all, to determine when a standard falls short of another or to isolate specific procedural acts and corresponding rights and duties from the proceedings as a whole. This aligns with the principle of *forum regit actum* that is for instance (partly) incorporated in Article 32 EPPO Regulation.

Though this finding does not per se lead to a uniform set of procedural rules at EU and national levels, it does require clear rules on the choice of forum. Even the SSM-framework, implementing a system of home state-control, allows for the possibility that procedural preparatory acts are conducted outside the jurisdiction of the forum, for instance by means of instructions.

Moreover, the foregoing stresses the need to make a timely forum decision. This seems particularly relevant to OLAF. As long as it remains unclear where OLAF-reports or materials collected and transferred by it will end up, it is difficult to design an effective defence strategy. Parallel punitive procedures are then not precluded, to the detriment of, mostly, the defendant. Again, the question is whether this is a problem of the OLAF framework itself (which is after all not competent for punitive follow-up) or whether it requires a broader sectoral approach, including the punitive follow-up at national level. At this moment, OLAF does not make forum choices in the proper meaning of the word, nor can it formally commence punitive procedures.

3. Regarding the legality principle that aims to protect against arbitrary interferences with one's privacy, property or even liberty, the EU authority or its national partners should not be in the position, by determining the applicable set of investigatory powers, to exert influence on the applicable standards and procedures for the ex ante proportionality assessment of the required interference, as defined by law, nor on the possibility and scope of an ex post review thereof.

Though there may be good reasons for an authority to collect evidence in one legal order and not in another, concerns remain. Those concerns do not, in general, relate to the specific legal basis for the actual interference with one's privacy, as provided for by the legal order in play. The applicable legal rules of that order will after all be accessible and foreseeable to the parties concerned. In fact, one could even maintain that it is incorrect to assume that private parties ought to know beforehand which set of rules will be applied to their affairs, in cases where multiple laws may be applied. Like private parties should in principle not be in in the position to influence the choice of the investigative measure against them,[86] the same arguably goes for the decision in which jurisdiction these measures are deployed. Those decisions belong to the domain of the executive, which of course needs to be able to account for its decisions if necessary. In a similar vein, one may wonder to what extent judicial control has been negatively affected in situations where the exercise of specific investigative measures was put to test against the yardsticks of the laws of a specific legal order and found to be in

[86] Cf Case C-247/14 P *HeidelbergCement AG v European Commission* [2015] ECLI:EU:C:2015:694, Opinion of AG Wahl, para 56, discussed by chapter 3 (Ligeti and Robinson) in this volume.

compliance with those laws. Can an interference with the right to privacy be unlawful, if it is in line with the laws of the legal order where the investigative actions were ultimately performed? Is there a right for individuals to have at their disposal the procedural rights, safeguards and remedies of the laws of other legal orders, that potentially could also have been applied?

The significance of these questions in my view varies, depending on the intrusiveness of the investigative measures at stake. In a purely national case, wherein a single authority applies a single set of rules, the law will force that authority to subject its case to the conditions of that law. It is the law itself, and not the authority bound by it, that structures the assessment of the necessity, feasibility and proportionality of the requested investigative measure at stake by including formal (for instance the intervention of an independent judicial body) or substantive conditions (such as the necessity of a degree of suspicion or purpose limitations) for their lawful application. The more intrusive or covert the investigative measures become, the stronger the need to have these laws in place, as the Strasbourg Court has consistently emphasized.

Enforcement reality, however, shows that a proper balancing of the privacy of the individual and the interests of the investigations can be achieved in many different ways. Composite enforcement is markedly different from a purely national situation. In such a reality, the applicable laws become a part of the decision making process, as the aforementioned legal texts clearly demonstrate,[87] rather than that they structure and subject the decision making process to the rule of law. Which executive authority would refrain from deploying an investigative measure that is allowed in legal order A, but not in legal order B, if that measure is deemed important, if not essential, for the course of its investigations? Consequently, the necessary connection between the degree of precision of the law, the intrusiveness of the measure and the assessment of its proportionality gets lost. This problem appears to be most urgent for measures that are covert and not easily subjectable to public scrutiny. Particularly intrusive are also coercive measures that can be executed without the help of the persons involved, thus de facto reducing those persons or their affairs to mere objects of investigation (searches, for instance), instead of parties to a procedure. The collection of bulk data are a third category of measures that raise concerns.

Incidentally, these concerns are not only relevant in light of the interests of the persons concerned, but also in light of the legitimacy of the applicable laws themselves. What is the point, after all, of inserting certain conditions to the exercise of investigative powers if the same, single authority can also obtain the information elsewhere, where such additional conditions or restrictions on the access to information do not exist? If such a single authority can avail itself of powers that are available under a multitude of potentially applicable laws, all of them defining the scope of the right to privacy and the lawfulness of its interference differently, it will be relatively easy to find a legal regime that allows the authority what it seeks for. Again, it appears to be vital not only that the EU offers more guidance, particularly for the more intrusive types of measures, but also that Member States open up and if necessary, adjust their legal systems to the composite reality.

The question is to what extent the application of this third rule of thumb poses problems for composite enforcement. Existing research leads to the provisional conclusion that the problem does not appear to be a particular pressing issue in composite administrative enforcement, for two reasons.[88] First of all, investigative

[87] See the text to notes 69-71 above.
[88] See Karagianni (n 144) and Bovend'Eerdt in their forthcoming dissertations.

measures usually take place 'out in the open', ie in public, and are subject to judicial review. Second, the conditions that apply for administrative investigative powers are usually subjected to more or less comparable and usually broadly defined conditions. In some cases, however, there is room for improvement. Specifically with respect to administrative enforcement, the lack of harmonization of ex ante judicial authorizations for on-site inspections and dawn raids are problematic.[89] I will come back on this in the next section. As regards OLAF, moreover, it is striking to note that the applicable legal rules do not define powers for OLAF, but merely investigative techniques.

More issues are expected within the framework of criminal investigations. Powers of criminal investigation are usually subjected to a number of stringent criteria, yet within national margins of appreciation. However, looking at the EPPO Regulation,[90] harmonization of those conditions has hardly taken place, nor have national legal orders tackled this problem bottom up.

The foregoing analysis illustrates that the legality principle in composite procedures is a topic that has many different facets. 'Composite legality' seeks to secure the position of individuals in a highly complicated, transnational legal reality and to empower, yet also to regulate the actions of the relevant authorities in punitive enforcement procedures. However, that finding does not inevitably point towards a full harmonization or unification of the legal framework of the studied EU authorities. Rather, the different rights at stake seem to allow for different approaches.[91] The need for harmonization is most urgent for the more intrusive powers of investigation. For other fundamental rights clear rules on a timely choice of forum may be an equally suitable mechanism to deal with issues of legality and fairness. What should be kept in mind then is that rules for forum choices should not only allow persons to determine their position once involved in procedures, but also – depending on the applicable rules of jurisdiction – to assess the consequences of their actions at the time they commit the offences. Again, all of this means that there is more work to be done for both the EU legal order as well as those of its Member States. Despite their decentralized frameworks, composite procedures are in need of a minimum degree of coherence.

3.2. JUDICIAL PROTECTION AND UNLAWFULLY OBTAINED EVIDENCE (II)

In section 2.3 above, I made an analysis of the potential impact of recent case-law of the Court of Justice on unlawfully obtained or transferred evidence in composite procedures.[92] It remains to be seen whether that case-law will be applied in that setting. From the perspective of legal protection, the most pertinent question is to what extent composite procedures show loopholes in legal protection, due to a lack of coordination of the work of the courts in different legal orders. In the previous section, I discussed a number of problems that relate to the legality principle in such procedures and to the identification of the applicable law. There are two other issues that also have a significant negative impact on legal protection, even in cases where the applicable law can be identified. These two issues are the potential adverse consequences of the

[89] As is already noted by many others, see chapter 2 (De Vries and Widdershoven) in this volume, with further references.
[90] Particularly Articles 30-32 Regulation 1939/2017.
[91] Sometimes the scope of these rights overlap, for instance with respect to legal professional privilege. I will disregard that situation here. It seems wise to cumulatively apply the requirements of all the relevant fundamental rights standards in those situations.
[92] See also chapter 3 (Ligeti/Robinson) and chapter 2 (De Vries and Widdershoven) in this volume.

application of the principle of mutual trust in composite procedures and the systemic flaws that may hamper effective remedies for interferences with fundamental rights. A third issue concerns the question what the procedural consequences are in cases where unlawful action by the authorities in enforcement procedures is established.[93]

Regarding the first issue, it is striking how poorly developed the case-law still is on points of composite law enforcement, particularly on the national side of it.[94] Questions that relate to the mutual division of responsibilities between courts in composite procedures have not yet reached the EU courts.[95] These questions not only relate to the division of labor between the EU and national courts, but also to the horizontal relations between national courts, in cases where materials were gathered by national authorities in jurisdiction X are introduced as evidence in jurisdiction Y. It may be that these issues have not yet been raised before national courts or that national courts decided on their own motion that unlawfully obtained or transferred materials could not be used as evidence.[96] We cannot exclude, however, that such lawfulness was not tested, because of arguments that rely on the principle of mutual trust.[97] Indeed, we have occasionally seen court rulings where that line of reasoning was apparently used. National courts sometimes appear to refrain from testing the lawfulness of investigative actions, because they are of the opinion that they are not allowed to do so. In their view, the lawfulness is either to be tested at EU level (for which, however, a preliminary reference will often be needed) or in another national jurisdiction; it is, however, not considered to be a responsibility of the trial court.

Though this 'separationist' approach is, as said, not uncommon in international criminal law, a 'chain approach' appears to be more appropriate for composite procedures, at the least in situations where legitimate doubt as to the lawfulness of the gathering or transfer of the materials were raised. For materials to be used as evidence, a full judicial review of the materials must be guaranteed, either by the court itself or after confirmation that it has indeed been already guaranteed by another court. Existing rules on the admissibility of evidence do not contradict this approach. That materials that were obtained in one legal order should also be admissible in another, does not automatically imply, after all, that unlawfully obtained materials should also be admissible evidence.

The chain approach that is advocated here, and which does not yet seem to be a common standard in composite procedures, does not in itself tackle the second issue that was identified, i.e. the existence of so-called systemic flaws. Systemic flaws occur where investigative powers are not harmonized and the respective conditions and safeguards for their application consequently diverge from legal order to legal order.[98] The result may be that the individual lacks the protection that each of the involved legal

[93] See also chapter 9 (Vervaele) in this issue.
[94] See also chapter 3, section 4.4 (Ligeti/Robinson) in this volume.
[95] A rare example is *FSL Holdings*, dealing with (allegedly) unlawfully obtained and transferred evidence obtained by the Italian fiscal police to the European Commission, see Case C-469/15 P *FSL Holdings and others* [2017] ECLI:EU:C:2017:308.
[96] Cf RJGM Widdershoven and P Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement' in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).
[97] Cf T Duijkersloot, A Karagianni and R Kraaieveld, 'Political and Judicial Accountability in the EU Shared System of Banking Supervision and Enforcement' 28, and M Luchtman and M Wasmeier, 'The Political and Judicial Accountability of OLAF' in M Scholten and MJJP Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017) 221.
[98] MJJP Luchtman, *European Cooperation Between Financial Supervisory Authorities, Tax Authorities and Judicial Authorities* (Intersentia 2008) 162.

orders individually would have provided him or her.[99] Interferences with the privacy of persons – an on-site inspection, for instance – may be allowed in one jurisdiction, because there is an ex ante judicial authorization required, whereas in another jurisdiction such an authorization is not mandatory, but ex post remedies are available. Both types of safeguards are accepted in the case-law of the European Courts with respect to the inspection powers of competition authorities and, presumably, comparable other administrative bodies.[100] It can thus happen that investigative acts are performed in a legal order that does not require an ex ante authorization and the results are subsequently used in another legal order, where such authorizations are mandatory. The concept of ex ante judicial intervention, that is regarded as an important safeguard for the more intrusive investigative measures (dawn raids, inspection of premises, large scale interceptions of data, et cetera), then literally falls between two stools. The fact that there has been no judicial authorization cannot be part of any subsequent legality assessment, in none of the jurisdictions involved, because it is not a requirement in the gathering jurisdiction. Worse still, the defendant may also lack the protection that the legal order of the forum would normally have offered him. That goes certainly in cases where the forum court refuses to hear arguments with respect to the legality of the measure in the gathering jurisdiction, because of the principle of mutual trust. The present situation therefore not only raises concerns in light of the legality principle, but also in light of the principle of effective judicial protection. As said in the above (section 3.1), this problem is best prevented by harmonizing the applicable safeguards, particularly for the more intrusive investigative measures.

Systemic flaws may also relate to vertical divisions of labor, ie between the EU and national levels involved. For instance, the purpose of an ex ante judicial authorization (eg for on-site inspections) is to have the proportionality of a measure tested by an independent body before the interference takes place and thus to prevent arbitrary interferences with fundamental rights. Some national legal orders have such safeguards in place. Yet the well-known case-law of the ECJ in competition law cases[101] and its subsequent implementation in secondary law is said to hinder the full application of those guarantees.

To be able to give an ex ante authorization , the authorizing judge or court will need a clear assessment frame, responsive to the intrusiveness of the measure at stake, and detailed information, perhaps even access to the file. If either of the two conditions are not fulfilled, the authorizing judge or court will not be in the position to question the competent authority critically, to form its own informed opinion and to motivate it with sufficient authority.

Are these conditions met? On the one hand, we should note that the lawfulness of the inspection decision (as well as the execution of it) always remain under the full jurisdiction of the EU courts. Moreover, the applicable EU laws indeed indicate the relevant criteria for the assessment.[102] The Commission is to provide the relevant detailed information, if asked to do so by the courts. To that extent, one may say there are no gaps in the system of legal protection. On the other hand, in the relevant rules of competition law and banking supervision, the scope of the assessment that is performed

[99] The opposite may also be true, incidentally; the defendant then enjoys the cumulated safeguards of both legal orders, which may be seen as a problem for effective enforcement, as discussed in sections 2.2 and 2.3.

[100] See Case C-583/13 P *Deutsche Bahn* [2015] ECLI:EU:C:2015:404 and *Delta Pekárny v the Czech Republic* App no 97/11 (ECtHR, 2 October 2014).

[101] Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603.

[102] See for instance Articles 28(8) and 21(3) of Regulation 1/2003.

by the national courts is limited to issues of proportionality in the strict sense of the word and of preventing arbitrariness. Access to the files is moreover explicitly prohibited,[103] whereas review by the European Courts of the inspection decision may take place only years later. The question is whether such an ex post review can ever be a substitute for ex ante authorizations.[104]

Clearly, the current model sends mixed signals. For some legal orders authorizations are an important safeguard against abuses, but for others – under the same composite framework – they are not. The question is also why the bar is not raised. Should intrusive measures, such as dawn raids and on-site inspections decisions, not always require an ex ante judicial test of proportionality and lawfulness?[105] Moreover, why is this test is in the hands of a judge or court in the gathering jurisdiction, now that that choice brings along significant limitations to the nature and degree of the test these judicial bodies have to perform. Similar concerns are known in international or European criminal law, where legal protection in the requested or executing state is severely limited by a combination of the rule of non-inquiry and the (practical or even legal) impossibility to enter into an assessment of 'the substantive reasons for issuing' of a request or European investigation order in the requested or executing state.[106] Even more than in the area of composite administrative enforcement, this issue is pertinent in criminal law – in the setting of the EPPO for instance – where the investigative measures are particularly invasive.

Finally, some remarks on the procedural consequences of unlawfully obtained or transferred materials are in place. There are no EU-rules for this yet. Case-law that relates specifically to composite procedures is also absent. In *Prokuratuur*, the Court held 'that the objective of national rules on the admissibility and use of information and evidence is, in accordance with the choices made by national law, to prevent information and evidence obtained unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences. That objective may be achieved under national law not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighting of such material, or by factoring in whether that material is unlawful when determining the sentence (…).'[107] In the absence of EU law, the legal consequences are to be determined by the national legislators. Whereas the requirement that defendants must be able to comment effectively on 'evidence pertaining to a field of which the judges have no knowledge and that is likely to have a preponderant influence on the findings of fact' predominantly implements the principle of effectiveness, the procedural sanctions of a finding of unlawfulness seem to relate more to the principle of equivalence; they are to be determined in accordance with the applicable national rules.

It is not that easy, however, to find the relevant comparative yardstick for that in composite punitive procedures. In fact, there are multiple dividing lines, ie those between different jurisdictions, but also those between non-punitive and punitive

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[103] Cf chapter 4 (Böse and Schneider) in this volume, section 1.1.

[104] S Brammer, *Co-Operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart 2009) 103.

[105] RJGM Widdershoven and P Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement' in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017).

[106] Cf Article 14 Directive 2014/41 (EIO); see also Article 31(2) Regulation 1939/2017, discussed by M Luchtman, 'Het Europees Openbaar Ministerie in Nederland: Over Zijn Ondeelbaarheid en Verhouding tot De Nederlandse strafrechter' (2021) Delikt en Delinkwent 63, 806.

[107] Case C-746/18 *Prokuratuur* [2021] ECLI:EU:C:2021:152, para 43.

administrative enforcement. As far as the interface between administrative and criminal enforcement is concerned, this adds a third dividing line.[108] It is not necessarily so that the procedural consequences of a finding of unlawfulness in these three situations are all the same. Not only does the case-law of different national courts show significant differences in their approaches,[109] the question is also what the relevant measure for comparison is in composite procedures? It appears to me that this measure cannot be the case-law of national courts on the appreciation of unlawfully obtained or transferred evidence from other jurisdictions. In those cases, there usually is no responsibility to remedy, for instance, unlawful interferences with the right to privacy in other jurisdictions, as long as the right to a fair trial is not violated. Rather, it makes sense to follow in composite procedures the national case law that deals with the use of unlawfully obtained or transferred materials in punitive enforcement procedures and its use at the interface of administrative and criminal law enforcement. I discussed this in sections 2.3 and 2.4 in the above.

3.3. COMPOSITE ENFORCEMENT PROCEDURES AND CRIMINAL JUSTICE (II)

Many of the issues that have been touched upon in the preceding sections also play a role in relation to criminal justice. I have already mentioned, in section 2.3, that a lack of attention for fundamental rights may backfire on the effectiveness of EU law enforcement, though this is far from certain. Where no specific legislative arrangements are made, the impact of criminal procedures in one jurisdiction may for instance affect the operations of composite enforcement and its possibility to exercise compulsion in another. A lack of coordination between the procedures may moreover have an impact on the scope of protection of the ne bis in idem guarantee of Article 50 CFR.

Whether these concerns will actually materialize is uncertain. In fact, it is not unrealistic to assume that the fragmented enforcement landscape is at present more likely to affect the legal position of the persons concerned, than to constitute a threat to effective law enforcement. Double prosecutions for the same conduct, double punishments and a risk of excessive sanctioning are prime candidates in this respect. Fragmentation of legal protection at the interface of administrative and criminal law enforcement is also not unrealistic.[110]

To avoid repetition, I will limit myself to one additional point. Even though composite enforcement by its very definition involves the legal orders of multiple EU states, the interactions with the respective criminal justice systems remain underregulated. For instance, where EU banking supervision rules do have a clear system of case allocation implementing the home state control system, this does not go for the criminal law implications of it.[111] The manners and ways in which ECB reports a case to State X and not State Y, which may also have jurisdiction, can have a profound influence on the course of the subsequent criminal procedures. Reporting to X instead

[108] See also MJJP Luchtman, AM Karagianni and KHP Bovend'Eerdt, 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' in F Giuffrida and K Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (Luxembourg University 2019).
[109] See chapter 6 (Giuffrida and Theodorakakou) and chapter 9 (Vervaele) in this volume.
[110] See my remarks in section 2.4.
[111] See also chapter 8 (Allegrezza et al.) in this volume and S Allegrezza, 'The Single Supervisory Mechanism' in S Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (CEDAM/Wolters Kluwer 2021) 36.

of Y may well be completely opposed to the interests and legitimate expectations of the EU citizen or economic actor concerned.

This also impacts the effective exercise of defence rights. (How) can one – a natural[112] or, depending on the rules of the national jurisdiction, a legal person – for instance anticipate the initiation of criminal proceedings during administrative investigations, if the competent forum is unclear and has yet to be determined? Does this affect the effectiveness of composite procedures procedures or does it place the defendant in a disadvantageous position? I have discussed the relevant case-law of the Strasbourg Court in the above and noted that where administrative and criminal enforcement become 'suffisamment liées',[113] the criminal limb safeguards of Article 6 ECHR – and the same will go for Articles 47 and 48 CFR – cast forward their shadow over the exercise of compulsion in administrative procedures. In cases where there is a clear link to only one national jurisdiction, this case-law, as I have argued in the above, is capable of being applied to the composite EU setting. It would mean that the exercise of compulsion is at odds with the right to a fair trial if criminal procedures are running in parallel or can reasonably be anticipated.

In horizontal, transnational situations, however, this is not always that evident. One essential difference to situations like in *Chambaz,*[114] is that in such cases, it is not all that clear *where* criminal procedures will be initiated. The consequence of this will most likely be that the privilege against self-incrimination will play a role (only) when it is used as evidence in criminal proceedings. It does not preclude, as is the case in purely national investigations, that materials that have been obtained under compulsion are used for other purposes in criminal procedures, such as enhancing the information position of the criminal authorities involved. The result is a certain paradox in which one may rhetorically ask oneself whether or not it is improper for an EU authority to exercise compulsion if criminal procedures clearly lurk at the horizon, in light of the information that was asked for, yet that possibility cannot be demonstrated, as it is cannot be foreseen, and consequently neither be concluded, nor excluded, how and where such criminal procedures will eventually be initiated.

4. BENCHMARKS FOR ENFORCEMENT IN A COMPOSITE LEGAL ORDER

It is time to come to a conclusion. European integration has had a significant impact on law enforcement. It affects both the enforcement structures at the national level, but also manifests itself in transnational and vertical relations. Law enforcement by EU authorities is characterized by its integrative goals and effects. Instead of dividing the tasks among the authorities of the EU states along territorial lines, EU enforcement authorities aim to overcome or redesign the role and significance of national borders all together. Whereas some of those models, such as in EU competition law, almost entirely do away with national borders for DG Comp's competences, others retain elements of it. Under the latter type of models, like in the EPPO, a genuine concept of European territoriality does not exist; the operational powers of the European (delegated) prosecutors are limited to their own territory. It is fair to say however, that the notion

[112] I will disregard the issue of to what extent representatives of undertakings also enjoy the protection of the privilege of their undertaking; see *in extenso* S Lamberigts, *The Privilege Against Self-Incrimination of Corporations* (Leuven 2018).
[113] *Chambaz v Switzerland* App no 11663/04 (ECtHR, 5 April 2012), para 43.
[114] ibid.

of enforcement jurisdiction has been transformed under those systems into a system of territorial 'enforcement competence' (*örtliche Zuständigkeit*),[115] that has done away with traditional international mechanisms of mutual administrative or legal assistance to the benefit of often very informal types of transnational evidence gathering and evidence sharing.

The foregoing analysis has made it clear that even in these EU-structures national law is never far away. Even the most autonomous models of composite enforcement need to reconnect to the national level at some point. That goes a fortiori for their relationships to national criminal justice. The composite enforcement structures that have emerged thus have strong integrative effects. This goes particularly for the executive branches within those models. Under all of the models that we have studied, officials from national legal orders and EU officials work together in the pursuit of common goals. This is most visible under the SSM-structure, but also goes for competition law (particularly via the ECN network, which in itself would fall outside my definition of composite procedures) and to a lesser extent also for OLAF. It is very likely that prosecutors within the EPPO structure will also gradually point their noses towards these common goals, as defined within the confines of that EU authority.

There can be no doubt that the integration of these national elements in the EU enforcement structures will have consequences in terms of policy development, operational strategies and specific investigations. The mindset of the participating officials is likely to shift away from national perspectives towards a shared mission. In fact, I don't think it is an exaggeration to state that this is – in addition to their EU wide mandates – one of the underlying goals of establishing such authorities.

For the legal analysis of the impact of these processes, the notion of composite enforcement procedures is important. All the models are characterized by a legal design in which EU authorities are clearly in the lead, and meant to be in the lead, as well as capable of guiding and steering the actions of their national partners. This guidance is, however, not always translated into a legal obligation to achieve a certain result, but rather takes shape as a duty of diligence for national authorities, without the possibility of formally refusing a 'request', 'order' or 'instruction'.

The degree of coherence (vertically and horizontally) that is thus achieved has normative consequences, despite the remaining numerous references to national legal orders. What is meant to be a functional unity should also be approached as one. Watertight distinctions along the lines of the involved legal orders consequently no longer exist. That is a fundamental difference to, for instance, the operation of the principle of mutual recognition in the area of Freedom, Security and Justice, that rather emphasises the strict division of responsibilities along territorial lines.[116] In the foregoing analysis, I have explored the impact of this for fundamental rights, particularly issues of legality, fairness and legal protection.

Whereas executive powers have found each other within composite enforcement structures, the same does not appear to be true for the other traditional branches of government. That goes particularly for the legislative branches. Yet the question is to what extent enforcement integration can be achieved by merely removing the building blocks or barriers of international law-types of cooperation. What appears to be missing at the EU level, particularly, is an accompanying narrative, implemented

[115] Cf CMJ Ryngaert and JAE Vervaele, 'Core Values Beyond Territories and Borders: The Internal and External Dimension of EU Regulation and Enforcement' in Ton van den Brink, Michiel Luchtman and Miroslava Scholten (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (Intersentia 2015) 299.
[116] Case C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902.

by legislation, that integrates transnational agency for individuals and fundamental rights in the enforcement design.

Moreover, the question is to what extent the involved national legal orders are sufficiently aware of the need to open their own legal orders to these new enforcement structures and are prepared to do so. This also affects the many relationships that exist with criminal law enforcement. It is as if both types of enforcement are considered as two distinct, separate domains, which is obviously not correct. Another strategy of curtailing the influence of EU authorities over, particularly, criminal justice is to deny those authority direct enforcement powers, making them dependent on the national enforcement structures for their work. OLAF is a clear example of this. Even the EPPO is still presented by some as a mechanism for interstate 'coordination', in which the real power remains with the national criminal justice authorities (including the courts). However, the need to open up – for instance by allowing 'composite evidence' in national enforcement procedures[117] – is essential not only for the protection of the individual, but also for effective law enforcement itself.

What, then, could be this narrative, that needs further thought and subsequent implementation in the enforcement designs? The preceding analysis has identified a number of benchmarks. They mainly, though not exclusively, relate to the enhancement of legal protection under composite enforcement structures and their relationships to criminal justice. I have identified the following benchmarks for composite enforcement:

1. It is necessary to develop an integrated enforcement policy that integrates different policy areas into a single policy, bridging the gaps between specific policy domains and the horizontal domain of criminal justice. Such a policy implies that the goals are set in common, for the common European areas (the internal market, the Area of Freedom, Security and Justice).

At the national side, legislators need to open up their national legal orders, by including clear tasks in the national statutes for the partners of the EU authorities. Moreover, where EU law so requires, national law must provide for clear provisions to share information, to guarantee sufficient investigatory powers, as well as sufficient possibilities, also for national courts, to use information as evidence in national punitive procedures.

At the EU side, specific attention for levelling the playing field of powers and safeguards and the coordination between the different legal orders are focal points. The latter relates to the need to have clear mechanisms for forum choices in place, but also to the division of responsibilities for the many courts that may get involved in composite procedures. In the absence of such procedures, a 'chain approach' is most likely to prevent gaps in legal protection.

In relation to criminal justice, an unresolved issue is the impact that ongoing criminal procedures may have on administrative composite enforcement. These relationships are left untouched at present, but do have an impact on, for instance, the ne bis in idem principle and the exercise of defense rights in criminal procedures. Because of that, they are capable of affecting the effectiveness of punitive enforcement procedures.

[117] Other obvious examples are: to need provide the national partners of EU authorities with clarity on their tasks in relation to the EU authorities, and with the possibility (legal bases) to share (confidential) information. Opening up also implies – more controversial – the willingness to accept lower standards than one's own constitutional standards if that is necessary for the effective enforcement of EU law.

Specifically in relation to criminal justice, the question is also whether these measures should form part of the composite structures, or rather of horizontal measures under the Area of Freedom, Security and Justice. I argue in favor of the latter. Prime candidates appear to be rules on choice of forum and on the admissibility of evidence.[118]

2. Composite enforcement structures should take better account of the consequences of the legality principle for their work. There is a clear tension between, on the one hand, the efforts that are put in making sure that EU authorities are capable of guiding and directing national authorities in an often decentralized structure and the consequences that follow from this in terms of the legality principle, fairness and legal protection. Yet with the influence should also come the responsibility. Three specific requirements follow from this:

a. 'Composite legality': as stated before, legality as such is a multi-faceted concept. In the preceding sections, I have developed three requirements that follow from it. This interpretation is grounded in the fact that the European Union and its Member States have established a legal order in which transnational agency for individual plays an important role. Within the specific context of composite administrative enforcement, the legality principle is the corollary of the coherence that is strived for in those frameworks. It brings along three basic requirements:

i. That natural and legal persons are in the position to assess the punitive consequences of their behavior – ie the norms, the fact that punitive enforcement is an option, as well as the applicable sanctions – by being able to determine the applicable law or applicable laws.

   In the 'thin' version, this requirement brings along that individuals should be able to know that their conduct is capable of attracting the attention of a multitude of legal orders. Should we use a 'thicker' version, one could also argue that contradictory signals by those legal orders – eg conduct being punishable in one legal order, but not in another, without an indication of which laws applies, or diverging sanctions – should be prevented by a statutory framework. That framework – thin or thick – is necessary to allow individuals to determine their position in a transnational setting.

ii. That individuals are in the position to design their defence strategy autonomously once involved in punitive procedures, without the executive being able to change the applicable procedures.

   This requirement essentially requires two things. In the first place, a mechanism is needed that guarantees that the opening of punitive procedures cannot be exclusively determined or even manipulated by the executive, for instance by postponing that moment. Secondly, consistency – in terms of the foreseeability of the applicable rules – after procedures have commenced is vital.

   This requirement points to a number of needed actions, including a mechanism that defines the official commencement of procedures and the competent forum, and,

[118] See also JJM Graat, *The European Arrest Warrant and EU Citizenship: EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure* (Springer 2022, forthcoming).

secondly, a mechanism that ensures that procedural acts from then on follow the procedures of that forum.

In turn, this requires, as a minimum, that national legal orders accept that the legal procedures of the forum are applied on their territories, also if they are different or even of lower standards than their own. No need to say that such a rule would also greatly facilitate the admissibility of evidence by the forum.

iii. That the intrusive categories of investigative powers (including coercive powers and covert investigatory powers) are subjected to further harmonization with respect to their conditions of and safeguards for application.

Particularly for interferences with the right to privacy and property (as well as liberty) there is a need to harmonize the conditions under which these powers can be invoked. This requirement is particularly important in the domain of criminal justice, where those powers are usually available. In the fragmented, decentralized enforcement landscapes of most of the EU authorities, there is no other way of preventing abuses.

b. 'Composite fairness': composite fairness and composite legality are not easily separated. In addition to the need for clear rules on the applicable procedures and the impossibility for the executive to change the procedural rules after procedures have commenced, issues of fairness predominantly seem to relate to the intersections between the non-punitive and punitive stages of the enforcement procedure and to the interfaces with criminal justice.

The integrative elements of composite administrative enforcement procedures are capable of connecting specific investigative acts in one legal order to punitive procedures in another. This goes for acts that are conducted within the administrative procedures as well as their impact on criminal procedures. Where punitive procedures have commenced or can reasonably be anticipated, the use of coercion can only be possible under the legal guarantee that they are cannot be used in punitive procedures, if they would fall within the scope of the privilege against self-incrimination.

c. 'Composite legal protection': formal separations between legal orders are not part of composite administrative enforcement structures. That implies that these separations may not be suitable to allocate court responsibilities within composite legal protection, certainly not in the absence of legal rules that define the responsibilities of the respective courts.

In the former sections, I have derived four guiding principles:

i. where investigative acts interfere with EU-rights, particularly Charter rights, and the investigating authority is not itself an independent judicial body or the measure was not authorised by such an authority, the principle of effective judicial protection requires that a legal remedy is available to the person that is directly adversely affected by it;

ii. when no concerns are raised as to the legality, proportionality or lawfulness of certain investigative acts or to their transmission, whereas this would have been

legally possible to the party concerned, materials obtained in or transferred by one legal order can as a rule be used as evidence in another;

iii. where remedies were available for the parties concerned and used in the transferring legal order, a finding of unlawfulness is not to be discussed again by the court of the sanctioning legal order; and

iv. where no remedies were or could be offered by the transferring legal order to the (later) defendant, yet his EU-rights were at stake,[119] the authorities, as well as the courts that are competent to review the sanctioning decision need to provide for the opportunity to comment effectively on the 'evidence of which they have no knowledge'.

In all other situations, one could end up in a situation wherein the defendants could not 'comment effectively on evidence pertaining to a field of which the judges have no knowledge.' That would lead to a breach of the right to affair trial.

As was noted, most of the benchmarks relate to the legal protection-dimension of enforcement. That, of course, cannot come as a surprise. In addition to these benchmarks, one may add (at the least) two other that have not or only to a limited extent been the object of study of the Hercule projects. Those benchmarks relate to the need to prevent double prosecutions and excessive sanctioning, both within composite enforcement procedures, as well as in their relationship to criminal justice and, last but not least, to the political accountability for those procedures. Again, it will be clear that also these elements require more work for the cooperating branches of government, both at the EU and at the national levels.

[119] A typical example would be the interception of his communications.