

## 8. LUXEMBOURG

*K. Ligeti and F. Giuffrida*<sup>1</sup>

### 1. GENERAL FRAMEWORK

Before discussing the Luxembourgish rules on admissibility of evidence, it is worth noting that only a few OLAF cases have concerned Luxembourg so far.

In the area of EU Traditional Own Resources, Luxembourg is the only EU country where, between 2013 and 2017, there were *no* OLAF investigations closed with recommendations and *no* fraudulent and non-fraudulent irregularities were detected.<sup>2</sup> Likewise, in the area of the European Structural and Investment Funds and Agriculture, between 2013 and 2017 there were no OLAF investigations closed with recommendations in Luxembourg and only two cases of irregularities were detected.<sup>3</sup> In addition, Luxembourgish judicial authorities took action following OLAF's recommendations issued between 2010 and 2017 in five cases.<sup>4</sup>

The most relevant Luxembourgish criminal procedure rules are to be found in the *Code de procédure pénale* (CPP), which was adopted in December 1808 and has been amended several times over the years.

As for Luxembourgish administrative law, proceedings before administrative courts (*Tribunal administratif* and *Cour administrative*) are regulated by the Law of 7 November 1996 on the organisation of administrative jurisdictions (*Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif*) and the Law of 21 June 1999 (*Loi portant règlement de procédure devant les juridictions administratives*; hereinafter: '1999 Law on proceedings before administrative courts').

Administrative proceedings that do not take place before courts are instead regulated by a plethora of sectoral pieces of legislation, although the Law of 1 December 1978 (*Loi réglant la procédure administrative non contentieuse 1/12/1978*) and the Regulation of 8 June 1979 (*Règlement grand-ducal relatif à la procédure à suivre par les*

---

<sup>1</sup> The authors are greatly indebted to Mandy Marra (LLM student, University of Luxembourg) for her support with background research and interviews, and to Dr Valentina Covolo (postdoctoral researcher, University of Luxembourg) for her comments and remarks on a previous version of the report. They also wish to thank Jean-Paul Frising (*Procureur d'État*), Patrick Konsbrück (*Substitut principal au parquet de Luxembourg*), Jeannot Nies (*Procureur général d'État adjoint*), and the other experts who preferred to remain anonymous for kindly agreeing to be interviewed in the frame of this research, as well as Myra Courte (legal advisor at the *Commission de Surveillance du Secteur Financier*) and Nora Humbert (librarian at the *Commission de Surveillance du Secteur Financier*).

<sup>2</sup> OLAF, 'OLAF Report 2017' (2018) 40.

<sup>3</sup> *ibid* 41.

<sup>4</sup> *ibid* 43.

*administrations relevant de l'État et des communes*) lay down some common rules. For the purpose of this report, 'administrative proceedings' are those that do not take place before administrative courts, unless otherwise specified.

Among the sectoral regulations, the Law of 23 October 2011 (*Loi du 23 octobre 2011 relative à la concurrence*) ought to be mentioned. It bestows upon the Competition Council (*Conseil de la concurrence*) investigating and sanctioning powers in the field of competition law.<sup>5</sup> In the tax law domain – with exclusive reference to VAT for the purposes of this report – similar powers are attributed to the 'VAT Administration' (*Administration de l'enregistrement, des domaines et de la TVA*), the rules on which can be found in the Law of 10 August 2018 (*Loi du 10 août 2018 portant organisation de l'Administration de l'enregistrement, des domaines et de la TVA*) and in the Regulation of 5 December 2018 (*Règlement grand-ducal du 5 décembre 2018 fixant l'organisation des services d'exécution de l'Administration de l'enregistrement, des domaines*). For matters concerning VAT proceedings that are not regulated by these two recent pieces of legislation, the general rules (ie those enshrined in the Law of 1 December 1978 and the Regulation of 8 June 1979 on administrative proceedings) apply.<sup>6</sup>

As some interviewees confirmed, Luxembourgish law does not expressly refer to 'administrative punitive proceedings', yet the doctrine and the case law have sometimes extended the typical criminal law guarantees to administrative proceedings having a punitive nature. For instance, the Council of State (*Conseil d'État*), which has a consultative function in Luxembourg, has often noted that administrative sanctions may be regarded as having a penal nature, in the light of the criteria established by the European Court of Human Rights (ECtHR).<sup>7</sup> Administrative courts have taken a similar stance with respect to some administrative proceedings, such as those before the *Commission de Surveillance du Secteur Financier* (CSSF), when a sanction is issued at the end of these proceedings. Established by the Law of 23 December 1998, the CSSF supervises the financial sector in Luxembourg and is the competent authority for the purpose of the Market Abuse Regulation<sup>8</sup> and the European Market Infrastructure Regulation (EMIR).<sup>9</sup>

<sup>5</sup> See more in Philippe-Emmanuel Partsch and Joe Zeaiter, 'La Sanction en Droit de la Concurrence' (2017) 50 *Journal des Tribunaux* 53.

<sup>6</sup> Fernand Schockweiler, *La Procédure Administrative non Contentieuse et le Contrôle de l'Administration en Droit Luxembourgeois. Le Citoyen et l'Administration* (Paul Bauler 2004) 26–27; Alain Steichen, *Manuel de Droit Fiscal. Droit Fiscal Général* (5th edn, Éditions Saint Paul 2015) 136–137. The latter author acknowledges that sometimes Luxembourgish courts do not apply the Law of 1 December 1978 and the Regulation of 8 June 1979 to VAT proceedings because of the alleged special nature of VAT.

<sup>7</sup> See Georges Wivenes, 'Les Sanctions Administratives au Luxembourg' in *Les Sanctions Administratives en Belgique, au Luxembourg et aux Pays-Bas. Analyse Comparée* (2011) 22ff <[www.raadvst-consetat.be/?page=about\\_competent\\_electroniclibrary&lang=en&q=sanctions+administratives](http://www.raadvst-consetat.be/?page=about_competent_electroniclibrary&lang=en&q=sanctions+administratives)> accessed 19 April 2019. See also Marc Thewes, 'Quel Régime Juridique pour les Sanctions Administratives?' (2017) 50 *Journal des Tribunaux* 41.

<sup>8</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1.

<sup>9</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L 201/1. See Art 1(1) of the Law of 23 December 2016 on market abuses (*Loi du 23 décembre 2016 relative aux abus de marché*, Mémorial A –

In a case that was eventually referred to the Court of Justice for a preliminary ruling,<sup>10</sup> the CSSF ordered Mr DV, the director of an entity regulated by the CSSF, to resign on the ground that he was no longer trustworthy because of alleged links with Bernard Madoff and his fraudulent activities. The Luxembourgish Administrative Court of Appeal (*Cour administrative*), which was requested to review the validity of the CSSF's decision not to grant Mr DV access to documents possessed by the CSSF, expressly acknowledged that the administrative procedure before the CSSF was a 'procedure within which the rights of defence deserve the most scrupulous respect, especially when the sanction is [the order for Mr DV to resign as soon as possible] and resembles, in view of the requirements of Article 6 ECHR, a *procedure having penal nature*'.<sup>11</sup>

In a similar vein, the Administrative Tribunal (*Tribunal administratif*) has applied, by analogy, some principles laid down by the ECtHR in the criminal law domain and concerning the right to be tried within a reasonable time to the administrative proceedings at the end of which the Competition Council issued financial penalties against the Luxembourgish post and telecommunications company.<sup>12</sup>

Finally, the Constitutional Court has clarified that the *nullum crimen, nulla poena sine lege* applies to criminal penalties as well as to administrative sanctions.<sup>13</sup>

### 1.1 Function of admissibility rules in national criminal law

As discussed further below, Luxembourgish criminal procedure is based on the principle of freedom of proof. Any evidence is in principle admissible. However, if an investigative act is carried out in violation of the law, which includes the provisions of the European Convention of Human Rights (ECHR), the interested party can require the competent courts to declare that act – as well as the acts that are adopted as a consequence of that act – null and void.<sup>14</sup> If the request is granted, the evidence so collected will be declared inadmissible and discarded.<sup>15</sup> Even if this request is not lodged (or if it is rejected), trial

---

No 279 de 2016); Art 1(1) of the Law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories (*Loi du 15 mars 2016 relative aux produits dérivés de gré à gré, aux contreparties centrales et aux référentiels centraux*, Mémorial A – No 39 de 2016); Art 1(2) of the Law of 30 May 2018 on markets in financial instruments (*Loi du 30 mai 2018 relative aux marchés d'instruments financiers*, Mémorial A – No 446 de 2018). For an overview of the CSSF and its punitive powers, see André Lutgen and Marie Marty, 'La Pratique des Sanctions Administratives en Matière Financière' (2017) 50 *Journal des Tribunaux* 46–53.

<sup>10</sup> Case C-358/16 *UBS Europe*, EU:C:2018:715.

<sup>11</sup> Administrative Court of Appeal (*Cour administrative*), 16 December 2014 <[www.ja.etat.lu/30001-35000/34766C.pdf](http://www.ja.etat.lu/30001-35000/34766C.pdf)> accessed 19 April 2019 (translation of the authors; emphasis added). Some authors have noted that, in the field of market abuse, the CSSF can also order the restitution of the advantage gained by committing infractions, and that this measure is entirely equivalent to the confiscation that criminal courts may order (Lutgen and Marty (n 9) 47).

<sup>12</sup> Administrative Tribunal (*Tribunal administratif*), 21 November 2016 <[www.ja.etat.lu/35001-40000/35847a.pdf](http://www.ja.etat.lu/35001-40000/35847a.pdf)> accessed 19 April 2019.

<sup>13</sup> For some references, see Thewes (n 7) 39.

<sup>14</sup> See immediately below in the text.

<sup>15</sup> Valentina Covolo, 'Luxembourg' in Silvia Allegrezza and Valentina Covolo (eds), *Effective Defence Rights in Criminal Proceedings* (Wolters Kluwer-CEDAM 2018) 337.

courts keep nonetheless the power to ‘assess freely the admissibility and probative value of evidence’.<sup>16</sup>

According to a 2007 leading case by the Luxembourgish Court of Cassation (*Cour de Cassation*), criminal courts cannot base a conviction on evidence that has been unlawfully obtained if: i) the respect of given formal requirements is imposed by law under penalty of nullity; ii) the committed irregularity has tainted the credibility of evidence; or iii) the use of evidence is contrary to the defendant’s right to a fair trial.<sup>17</sup> It is for the court to assess the admissibility and reliability of evidence that has been unlawfully obtained, taking into account the elements of the case considered as a whole, including the way in which evidence has been obtained.

The wording of this judgment would imply that, in principle, evidence that has been unlawfully obtained could be admitted at trial, if none of the three above-mentioned conditions are met.<sup>18</sup> However, it is worth mentioning that the *Cour de Cassation* specifies that the defendant’s right to a fair trial can only be ensured if legality in the administration of evidence is respected. In the same case that gave rise to the 2007 decision of the *Cour de Cassation* and after this judgment, the Court of Appeal stressed indeed that the principle of legality in the administration of evidence is the fundamental requirement to ensure the right to a fair trial.<sup>19</sup> Hence, judicial authorities should evaluate the admissibility of evidence mostly with respect to the third above-mentioned criterion (use of evidence that is contrary to the right to a fair trial), with the further consequence that, in practice, ‘[i]llegally or improperly obtained evidence cannot be used at trial or before the *chambre du conseil* [ie the pretrial chamber]’.<sup>20</sup> In a recent case, for instance, the *Cour de Cassation* noted that neither the procedural rules that had been violated were prescribed under penalty of nullity nor the reliability of evidence was at stake, yet the lack of legality in the administration of evidence should lead to declaring the evidence inadmissible.<sup>21</sup>

It follows that admissibility rules in national criminal procedural law are mostly intended to safeguard the rights of the parties involved in the proceedings. In addition, admissibility rules aim to ensure the fairness of the proceedings by preventing judicial authorities from reaching a decision on the basis of acts and measures that are forbidden by law or not reliable enough.<sup>22</sup> For instance, the testimony of persons who are legally incapable of being a witness is not admissible (Articles 156-1 and 189 CPP).

---

<sup>16</sup> *ibid* 366.

<sup>17</sup> Court of Cassation, 22 November 2007, No 2474 available at <[www.stradalex.lu](http://www.stradalex.lu)> (this webpage, which is further mentioned in some footnotes below, was last accessed on 19 April 2019). This judgement is often mentioned in Luxembourgish decisions where the issue of admissibility of evidence comes up (see, for instance, Court of Cassation, 20 December 2017, No 493/17 available at <[www.stradalex.lu](http://www.stradalex.lu)>).

<sup>18</sup> Séverine Menetrey, ‘Preuve et Droits Fondamentaux en Droits Européen et Luxembourgeois’ (2013) 23 *Annales du droit luxembourgeois* 23, 33.

<sup>19</sup> Court of Appeal, 26 February 2008, No 106/08 available at <[www.stradalex.lu](http://www.stradalex.lu)>.

<sup>20</sup> Martin Petschko, Marc Schiltz and Stanislaw Tosza, ‘Luxembourg’ in Katalin Ligeti (ed), *Toward a Prosecutor for the European Union*, Vol 1 (Hart 2013) 466.

<sup>21</sup> Court of Cassation, 20 December 2017 (n 17).

<sup>22</sup> See, in that respect, Court of Cassation, 28 April 2015, No 158/15 available at <[www.stradalex.lu](http://www.stradalex.lu)>.

The rules and procedures laid down in Articles 24-2, 48-2, and 126 CPP shall be followed in order to declare the invalidity (or nullity, ‘*nullité*’) of acts of pretrial proceedings, and thus to exclude inadmissible evidence that was collected via those acts. In general, a nullity can be ‘formal’, ie it is provided for by the law,<sup>23</sup> or ‘substantial/virtual’. Substantial/virtual nullities have been introduced via case law, when serious irregularities, including irregularities affecting the rights of defence, occur.<sup>24</sup> In line with the monist approach adopted by Luxembourgish courts,<sup>25</sup> alleged violations of the rights enshrined in the ECHR, especially the rights of defence, could determine the nullity of a given procedural act.<sup>26</sup>

The public prosecutor, as well as any interested party with a legitimate interest, can ask the pretrial chamber of the district court (*chambre du conseil du tribunal d’arrondissement*) to decide on the validity of acts (*requête en nullité*) of the *instruction*, ie the investigation conducted by the investigative judge (*juge d’instruction*) (Article 126 CPP). As in a few other countries in Europe, the *juge d’instruction* is still a party to the pretrial proceedings. Once he or she is seised by the prosecutor – which is mandatory for the most serious crimes<sup>27</sup> – the investigative judge ‘has the exclusive authority to decide whether and how to investigate the case’.<sup>28</sup> If the investigation was carried out by the public prosecutor without involving the investigative judge (*enquête préliminaire*), and an *instruction* is then not opened at the end of the *enquête préliminaire*, the defendant shall ask the district court (*tribunal d’arrondissement*) to rule on the invalidity of acts of the investigation before raising any other argument (save for the exception of incompetence).<sup>29</sup>

<sup>23</sup> In regulating investigative measures, the CPP provides that some formalities shall be respected under penalty of nullity (‘*à peine de nullité*’). For instance, if the investigative judge fails to inform the suspected person of the right to be assisted by a lawyer before questioning him or her, such questioning is invalid (Art 81(2) and (12) CPP; see Petschko, Schiltz and Tosza (n 20) 469).

<sup>24</sup> Covolo, ‘Luxembourg’ (n 15) 366.

<sup>25</sup> On the monist approach of Luxembourgish courts, see *ibid* 330–331. Covolo notes that ‘Luxembourg judges give direct effect to the fundamental rights guaranteed under the Convention as well as to EU Directives harmonising defence rights in criminal proceedings, which prevail over national legal provisions’ (*ibid* 331).

<sup>26</sup> See, for instance, Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d’appel*), 16 May 2012, No 301/12 available at <[www.stradalex.lu](http://www.stradalex.lu)>; Court of Cassation, 31 January 2013, No 7/2013 <[https://juricaf.org/recherche/+/facet\\_pays%3ALuxembourg](https://juricaf.org/recherche/+/facet_pays%3ALuxembourg)> accessed 19 April 2019; Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d’appel*), 12 February 2014, No 102/14 available at <[www.stradalex.lu](http://www.stradalex.lu)>; Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d’appel*), 24 December 2015, No 1017/15 available at <[www.stradalex.lu](http://www.stradalex.lu)>.

<sup>27</sup> According to Luxembourgish law, ‘*crimes*’ are the most serious infractions, which are subject to a ‘*peine criminelle*’ such as imprisonment from a minimum of five years to life imprisonment, financial penalty of minimum €250 (‘*amende*’), or confiscation (Arts 1(1), 7, 8(1), and 9 of the Luxembourgish Penal Code). ‘*Délits*’ are less serious than *crimes* and are punished with a ‘*peine correctionnelle*’ such as imprisonment between eight days and five years, financial penalty of minimum €250 (‘*amende*’), or confiscation (Arts 1(2), 14, 15(1), and 16 of the Luxembourgish Penal Code). Finally, ‘*contraventions*’ are the least serious offences and they are punished with a ‘*peine de police*’, which does not include imprisonment but only sanctions such as a financial penalty of between €25 and €250 or confiscation (Arts 1(3), 25, and 26 of the Luxembourgish Penal Code).

<sup>28</sup> Petschko, Schiltz and Tosza (n 20) 452.

<sup>29</sup> Art 48-2(3) CPP. See more in Covolo, ‘Luxembourg’ (n 15) 365–366. The same rule applies to acts of the *mini-instruction*, if no *instruction* is eventually opened (Art 24-2(3) CPP). ‘*Mini-instruction*’ refers to

As anticipated, if the *requête en nullité* is well-founded, the pretrial chamber of the district court annuls the act as well as the acts that have been adopted after, and as a consequence of, the act that has been declared null and void.

The above rules lead to two final considerations. First, if no control on illegally or improperly obtained evidence is triggered on time (or at all), such evidence becomes valid (*'purge de nullité'*).<sup>30</sup>

Second, the legislator clearly aims to ensure that the objections to the admissibility of evidence are confined to the pretrial phase. The fact that the *requête en nullité* cannot – save for exceptional circumstances – be lodged before the trial court is meant to ensure the good administration of justice within a reasonable time, as decisions taken within the pretrial phase cannot be called again into question during the trial.<sup>31</sup>

## 1.2 Function of admissibility rules in national punitive administrative law

Admissibility rules in national administrative law aim to ensure that the competent authorities take decisions on the basis of relevant evidence and information. More broadly, they are meant to ensure the fairness of the proceedings.

The Regulation of 8 June 1979 does not contain any specific provision on admissibility of evidence, while Article 1 of the Law of 1 December 1978 provides – in rather general terms – that the rules on administrative proceedings shall ensure the respect of the defence rights of the individuals subject to the administration (*administré*) by arranging, as much as possible, their participation in the decision-making process of public bodies. This implies, among other things, the right of individuals to be heard. Article 5 of the Regulation of 8 June 1979 indeed requires that interested persons shall have the possibility of bringing their observations to the attention of the public administration.

In competition law, as well in financial market regulation and in banking supervision, the Council of competition and the CSSF have a wide array of powers to collect all evidence needed to reach a decision (eg request information, inspections, etc).<sup>32</sup>

Admissibility rules of administrative court proceedings are not very strict either (see more in section 1.3.2 below). For instance, Article 8(2) of the 1999 Law on proceedings before administrative courts states that the elements on which the defendant

---

the procedure in which the public prosecutor is 'entitled to ask the investigative judge to perform certain acts without formally opening an investigation ... This procedure is generally used for cases which appear to be clear and may be sent directly to the *chamber du conseil* or the Court (for lower crimes (*délits*)) without a formal investigation being open, but the public prosecutor needs a piece of evidence that only the investigative judge may obtain (eg the video recording from a CCTV camera)' (Petschko, Schiltz and Tosza (n 20) 464–465; see also Jeannot Nies, 'Detecting Economic and Financial Crime: A Special Toolkit of Investigation Techniques in Luxembourg' in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart 2017) 88–89).

<sup>30</sup> Petschko, Schiltz and Tosza (n 20) 466–467; Covolo, 'Luxembourg' (n 15) 366.

<sup>31</sup> Court of Appeal, 28 February 2017, No 9/17 available at <[www.stradalex.lu](http://www.stradalex.lu)>. See also Court of Cassation, 28 April 2016, No 17/2016 available at <[https://juricaf.org/recherche/+/facet\\_pays%3ALuxembourg](https://juricaf.org/recherche/+/facet_pays%3ALuxembourg)> accessed 19 April 2019.

<sup>32</sup> See Arts 14–19 of the Law of 23 October 2011 (competition), Art 45 of the Law of 30 May 2018 (financial market), and Art 53 of the Law of 5 April 1993 on the financial sector.

or a third party wishes to rely shall be indicated in the statement of case (*mémoires en réponse*) and deposited at the court's registry (*greffe*) together with those *mémoires*. There is no specification or limit on the nature and content of these elements.<sup>33</sup> In addition, Article 8(5) of the same Law requires the administration that adopted the act that is subject to judicial review to submit the full dossier to the court's secretariat. Parties to the proceedings can obtain a copy of the documents of the dossier, in line with the adversarial principle (*principe du contradictoire*).<sup>34</sup>

### 1.3 System of proof: Free or controlled?

#### 1.3.1 Criminal law

While *contraventions* shall be proved by means of either official reports or witnesses in the absence of official reports, or in support of those reports,<sup>35</sup> the Luxembourgish system is proof free as far as *crimes* and *délits* are concerned.<sup>36</sup> The Court of Cassation posits that the principle of freedom of proof (*liberté de la preuve*) is linked to the fact that criminal proceedings require the proof of the material and psychological elements of a given fact rather than that of a legal act, as is instead the case in civil or commercial proceedings.<sup>37</sup>

According to Luxembourgish criminal law, it is however of the essence that evidence is useful,<sup>38</sup> 'loyally' obtained,<sup>39</sup> and subject to the adversarial principle (*contradictoire*).<sup>40</sup>

<sup>33</sup> As far as tax matters are concerned, however, Art 59(3) of the 1999 Law on proceedings before administrative courts excludes the oath from the admissible means of proof (see more in section 1.3.2 below).

<sup>34</sup> In exceptional cases, the court may limit the parties' access to the dossier.

<sup>35</sup> Art 154 CPP.

<sup>36</sup> Court of Cassation, 12 October 2016, No 481/16 available at <[www.stradalex.lu](http://www.stradalex.lu)>. See also Court of Cassation, 14 March 2017, No 112/17 available at <[www.stradalex.lu](http://www.stradalex.lu)>.

<sup>37</sup> Court of Cassation, 12 October 2016 (previous n).

<sup>38</sup> See, for instance, Art 53(1) CPP, which allows the public prosecutor to ask the investigative judge to undertake any act that he or she deems useful to find the truth (*utiles à la manifestation de la vérité*). Likewise, the investigative judge carries out all the measures that he or she deems useful to find the truth (Art 51(1) CPP). See also Art 218 CPP. The defendant has the right to present all the elements that he or she believes are useful for his or her defence (see, in this respect, Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 6 February 2009, No 91/10 available at <[www.stradalex.lu](http://www.stradalex.lu)>).

<sup>39</sup> For example, evidence by means of *provocation policière* is inadmissible. In other words, the police shall not encourage someone to commit a crime in a way that the police's manoeuvres determine that person to commit the crime and dominate his or her will to such an extent that he or she could have not behaved differently (Court of Cassation, 12 June 2007, No 304/07 available at <[www.stradalex.lu](http://www.stradalex.lu)>; see also Petschko, Schiltz and Tosza (n 20) 462). Luxembourgish case law refers in similar instances to the necessary 'loyalty' (*loyauté*) in the administration of evidence (see, for instance, Court of Cassation, 26 February 2008, No 106/08 available at <[www.stradalex.lu](http://www.stradalex.lu)>; District Court (*Tribunal d'arrondissement de Luxembourg*), 2 July 2014, No 1872/2014 available at <[www.stradalex.lu](http://www.stradalex.lu)>).

<sup>40</sup> For example, unilateral expert reports are admissible as long as the parties have the possibility to freely discuss them (Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 6 December 2013, No 699/13, available at <[www.stradalex.lu](http://www.stradalex.lu)>; see also Court of Appeal, 28 February 2017 (n 31)).

Evidence that has been legally obtained in another Member State or even in third countries is admissible in Luxembourgish criminal proceedings,<sup>41</sup> as long as it has been duly communicated to the defence.<sup>42</sup>

### 1.3.2 Punitive administrative law

The Luxembourgish administrative law system is proof free,<sup>43</sup> as long as the adversarial principle (*contradictoire*) is respected with regard to each piece of admitted evidence.<sup>44</sup> There are however a few exceptions. In tax matters, Article 59(3) of the 1999 Law on proceedings before administrative courts allows any kind of evidence with the exception of the oath. Likewise, in VAT administrative proceedings, the VAT Administration can prove taxpayers' violations by means of any evidence with the exception of the oath.<sup>45</sup>

## 1.4 Review of the decision on admissibility

### 1.4.1 Criminal law

In principle, decisions on admissibility cannot be subject to judicial review as such.<sup>46</sup> However, decisions of the pretrial chamber of the district court, including those concerning the nullity of pretrial measures, can be appealed before the pretrial chamber of the Court of Appeal (*chambre du conseil de la Cour d'appel*) (Article 133 CPP).<sup>47</sup> On the other hand, once the district court decides on a case, its decision can be appealed before the Court of Appeal. The appeal is the last opportunity for the interested party to challenge the admissibility of evidence. If no control on illegally or improperly obtained evidence is requested, that evidence cannot be further challenged before the Court of Cassation.<sup>48</sup>

---

<sup>41</sup> Petschko, Schiltz and Tosza (n 20) 467.

<sup>42</sup> See, for example, Court of Cassation, 7 July 2000, No 235/00 available at <[www.stradalex.lu](http://www.stradalex.lu)>, where the Court – despite the differences between US and Luxembourgish law in the field of evidence gathering – declared admissible the testimony given by witnesses before US federal courts, which was duly communicated to the defence.

<sup>43</sup> According to Administrative Court of Appeal (*Cour administrative*), 16 December 2014 (n 11), for instance, administrative courts can order all the measures they deem necessary to resolve the case pending before them. As for the proof free nature of tax proceedings, see Steichen (n 6) 213.

<sup>44</sup> See Arts 14, 30, and 51 of the 1999 Law on proceedings before administrative courts. On the importance of the adversarial principle (*contradictoire*) in Luxembourgish administrative law, see Schockweiler (n 6) 52–53 and 64–65; Jérôme Guillot and Marc Feyereisen, *Procédure Administrative Contentieuse* (4th edn, Larcier 2018) 111–112 and 259.

<sup>45</sup> Art 68 of the Law of 12 February 1979 on VAT (*Texte coordonné de la loi du 12 février concernant la taxe sur la valeur ajoutée telle que modifiée en dernier lieu par la loi du 26 mai 201*, Mémorial A – No 93 de 2014.1444).

<sup>46</sup> See Covolo, 'Luxembourg' (n 15) 370.

<sup>47</sup> *ibid* 338.

<sup>48</sup> *ibid* 374.

### **1.4.2 Punitive administrative law**

As for administrative court proceedings, there are no specific rules concerning the review of admissibility decisions, which can thus be subject to appeal together with the decision on the merits of the case.

Likewise, there are no specific rules concerning the review of admissibility decisions in non-judicial administrative proceedings. Issues concerning admissibility of evidence could be discussed before the competent judicial authorities, if administrative decisions are subject to judicial review. For instance, decisions taken by the CSSF and the Competition Council can be appealed before the Administrative Tribunal,<sup>49</sup> which can quash or reform those decisions.<sup>50</sup> VAT Administration decisions that impose financial penalties (*'amendes fiscales'*) are instead first subject to the so-called *'reclamation'*, by which the individual requires the Administration to reconsider its decision. This further decision of the Administration may then be challenged before the civil chamber of the district court of Luxembourg.<sup>51</sup>

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

In principle, evidence that has been declared inadmissible in administrative proceedings can be used in criminal proceedings, due to the principle of autonomy of criminal law. On a case by case basis, however, national criminal courts can exclude such evidence.

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

In principle, evidence that has been declared inadmissible in criminal proceedings can be used in administrative proceedings. In the field of tax law, it has been noted that, in the light of the principle of independence of the procedures, irregularities that occur in criminal proceedings do not have any influence on tax proceedings.<sup>52</sup>

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

### **2.1 Admissibility of OLAF-collected evidence in punitive administrative proceedings**

There are no specific provisions on the admissibility of OLAF-collected evidence in punitive administrative proceedings. OLAF-collected evidence is thus subject to the ordinary rules of administrative law (see section 1 above). As mentioned, the system of Luxembourgish administrative law is one of free proof and is based on the adversarial

<sup>49</sup> See, for the Council of Competition, Art 28 of the Law of 23 October 2011, and, for the CSSF, Art 2-1(5) of the Law of 23 December 1998 and Art 65 of the Law of 30 May 2018.

<sup>50</sup> See Georges Ravarani, 'Les Sanctions Administratives en Jurisprudence Luxembourgeoise' (2012) 35 *Publications du Benelux* 673, 691.

<sup>51</sup> Art 79 of the Law of 12 February 1979 on VAT.

<sup>52</sup> Steichen (n 6) 153.

principle (*contradictoire*), which requires public authorities (CSSF, Council of Competition, etc) to share their files with the other parties to the proceedings, and vice versa.

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

No case law has been found.

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

No case law has been found.

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

The concerned person in an OLAF investigation can challenge evidence which was allegedly obtained in violation of EU rules on investigatory powers and procedural safeguards in accordance with the ordinary rules of national administrative proceedings. In other words, issues concerning admissibility of evidence could be discussed before the competent judicial authorities, if administrative decisions are subject to judicial review.

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

As far as national administrative proceedings are concerned, in Luxembourg there are no specific provisions concerning the admissibility of evidence collected and transmitted by: a) the European Central Bank (ECB), in accordance with Article 136 SSM Framework Regulation;<sup>53</sup> b) the European Securities and Markets Authority (ESMA), in accordance with Article 64(8) EMIR; and c) the Commission's Directorate-General for Competition (DG COMP) according to Article 12 of Regulation No 1/2003.<sup>54</sup> The general rules will thus apply (see section 1 above).

No information has been found on cases where such evidence has been expressly declared inadmissible, nor are higher national standards in relation to procedural safeguards believed to impact its admissibility.

In addition, it shall be noted that Article 136 of the SSM Framework Regulation requires the ECB to request the relevant national competition authority (NCA) to refer the matter to the appropriate authorities for investigation and possible *criminal* prosecution. Hence, it is for national *criminal* – and not administrative – authorities to check the admissibility of evidence that may be shared by the ECB, in accordance with

---

<sup>53</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] L 141/1.

<sup>54</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

the general principles discussed above. At the national level, Article 33(3) of the Organic Law of the Central Bank of Luxembourg<sup>55</sup> provides that Article 23 CPP applies to board members and Central Bank staff members. Pursuant to Article 23(2) CPP, any public official or person charged with public service functions who becomes aware of facts that may amount to a criminal offence shall inform without undue delay the public prosecutor's office.

Likewise, Article 64(8) EMIR requires ESMA to refer matters for *criminal* prosecution to the relevant national authorities. Hence, it is for national *criminal* – and not administrative – authorities to check the admissibility of evidence that may be shared by ESMA, in accordance with the general principles discussed above. At the national level, a similar duty to inform public prosecutors – as enshrined in Article 23(2) CPP – is bestowed upon the CSSF, which is the competent authority for the purpose of EMIR.<sup>56</sup>

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

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

The Luxembourgish system of criminal law allows for the admissibility of information gathered by national administrative authorities as evidence in criminal proceedings. As the system is one of free proof, these pieces of information are admissible in accordance with the general conditions discussed in section 1 above (eg, evidence shall be useful, collected in a loyal way, etc). There are neither sectoral nor general rules on the matter in the code of criminal procedure, so the general principles on evidence apply.

It is worth adding that, pursuant to Article 16(1) of the Law of 19 December 2008 on the cooperation between tax administrations,<sup>57</sup> the VAT Administration shall transmit to judicial authorities – upon their request – relevant pieces of information that may be used within a criminal procedure.

---

<sup>55</sup> Law of 23 December 1998 on the monetary regime and on the Central Bank of Luxembourg (*Loi du 23 décembre 1998 relative au statut monétaire et à la Banque centrale du Luxembourg*, Mémorial A – No 112 de 1998).

<sup>56</sup> CSSF, 'Rapport d'Activités 2017' (2018) 108 and 138 <[www.cssf.lu/fileadmin/files/Publications/Rapports\\_annuels/Rapport\\_2017/CSSF\\_RA\\_2017.pdf](http://www.cssf.lu/fileadmin/files/Publications/Rapports_annuels/Rapport_2017/CSSF_RA_2017.pdf)> accessed 19 April 2019.

<sup>57</sup> Law of 19 December 2008 on the interadministrative and judicial cooperation and on the enhancement of the means of the Administration of direct taxes, the Administration of the registration and estates, and the Administration of customs and excise (*Loi du 19 décembre 2008 ayant pour objet la coopération interadministrative et judiciaire et le renforcement des moyens de l'Administration des contributions directes, de l'Administration de l'enregistrement et des domaines et de l'Administration des douanes et accises*, Mémorial A – No 206 de 2008).

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

There are no specific rules on the admissibility of evidence collected by EU bodies in criminal proceedings. Hence, the general principles on evidence apply. This also means that the ordinary rules on the *requête en nullité* should apply, including those concerning the time limits for lodging the *requête*.<sup>58</sup> According to recent case law, these time limits apply to all cases of invalidity, independently of whether such invalidity allegedly derives from the violation of national or supranational rules.<sup>59</sup> Although there is no case law on inadmissibility of OLAF-collected evidence, one would however imagine that – in line with the *Sigma Orionis* case<sup>60</sup> and with the case law of other Member States, eg France<sup>61</sup> – the *requête en nullité* would aim to exclude such evidence from the case file, if it was gathered illegally: in other words, OLAF-collected evidence could not be used by national criminal law authorities to adopt their decisions but would still remain valid in the EU legal order.

## 5. PROBLEMS AND PRACTICES IN DEALING WITH ADMISSIBILITY OF OLAF-COLLECTED EVIDENCE IN NATIONAL CRIMINAL PROCEEDINGS

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

OLAF has been reported to carry out its investigations in a way that pays considerable attention to defence rights and avoids any risk of inadmissibility of its reports. Our interviewees explained that OLAF usually gets in touch with national authorities (*police judiciaire* and public prosecutors) in the early phase of its investigations and transmits the file to them, who then continue with the investigation. This takeover of investigations by national authorities has been explained as a way to enhance the admissibility and credibility of evidence.<sup>62</sup> Reports by Luxembourgish judicial police officers, indeed, are presumed true until it is proven that the officer falsified the report (*'jusqu'à inscription de faux'*).<sup>63</sup> Reports by other agents (such as OLAF ones) are also admissible yet their content may be denied simply by proving that facts stated therein are not true (*'preuve du fait contraire'*).<sup>64</sup>

<sup>58</sup> See more in section 1.

<sup>59</sup> Valentina Covolo, 'National Report: Luxembourg' in Serena Quattrocolo and Stefano Ruggeri (eds), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and in Absentia Trials in Europe* (Springer 2019) 302, who refers to Court of Cassation, 19 February 2013, No 3/13.

<sup>60</sup> Case T-48/16 *Sigma Orionis v Commission*, EU:T:2018:245.

<sup>61</sup> See French report, section 4.2.

<sup>62</sup> A consequence of the fact that national authorities usually take over OLAF investigations is that joint on-the-spot checks are reported to be very rare in Luxembourg.

<sup>63</sup> Art 154 CPP.

<sup>64</sup> Petschko, Schiltz and Tosza (n 20) 467.

## 5.2 Duplication of OLAF activities

Activities already performed by OLAF are not repeated according to the relevant national rules of criminal procedure as OLAF-collected evidence is admissible as such in national criminal proceedings.

In a case decided in 2015, the defendant complained that the investigative judge limited himself to including OLAF's report in the dossier without carrying out his own investigations. Article 51 CPP requires the investigative judge to conduct investigations by gathering inculpatory ('à charge') and exculpatory ('à décharge') evidence, while OLAF allegedly only carried out investigations à charge.

The pretrial chamber of the Court of Appeal rejected the defendant's argument by expressly recognising that the *juge d'instruction* can base his or her decisions on OLAF-collected evidence without any need to repeat activities already performed by OLAF.<sup>65</sup> In addition, it recognised that OLAF had carried out its investigations à charge and à décharge, so that no violation of the right to a fair trial occurred.

According to our interviewees, especially bearing in mind that Luxembourg is a monist system,<sup>66</sup> the need not to repeat OLAF investigative activities also follows from the general principle of *effet utile* of EU law. The fact that OLAF-collected evidence is admissible in national criminal proceedings does not imply, however, that such evidence is always enough to indict or convict the suspect. It may also be the case that national authorities consider OLAF-collected evidence insufficient to prove the suspect's criminal liability.

---

<sup>65</sup> Pretrial Chamber of the Court of Appeal (*Chambre du conseil de la cour d'appel*), 6 January 2015, No 09/15 available at <[www.stradalex.lu](http://www.stradalex.lu)>.

<sup>66</sup> See n 25.