

10. GATHERING OF ELECTRONIC EVIDENCE IN PUNITIVE ADMINISTRATIVE PROCEEDINGS IN LUXEMBOURG

S. LANNIER and S. TOSZA

1. COMPETENT AUTHORITIES IN SELECTED AREAS OF PUNITIVE ADMINISTRATIVE ENFORCEMENT¹

The five selected areas of punitive administrative law are enforced in Luxembourg by the following six authorities.

Customs enforcement is conducted by the Customs and Excise Administration (*Administration des Douanes et des Accises*, ADA). The ADA is under the authority of the Minister of Finance.² Its enforcement is mixed, as its agents can investigate violations of both administrative laws related to customs and excise obligations, and specific sectoral criminal offenses.³ When investigating criminal offenses, its agents act as judicial police officers and apply the Code of Criminal Procedure (*Code de procédure pénale*). For instance, its Article 67-1 provides the possibility to request phone and location data from online service providers (OSPs), and Article 66.8 to request information by electronic means. It should be mentioned that Luxembourg is part of the Belgo-Luxembourg economic union. As such, Luxembourg applies the Belgian General Law on Customs and Excise (GLCE). From a custom perspective, both countries are forming a unique

¹ The authors are grateful to all the professionals who shared their expertise and perspectives in the course of this research. Special thanks are due to Dr. Michel Erpelding for his insights on Luxembourgish administrative law, Dr. Fatima Chaouche, Dr. Julie Kaprielan and Dr. Arthur Bianco for their help with the Luxembourgish tax legislation, and Dr. Clémentine Boulanger for her support regarding data protection enforcement. All errors are our own.

² Article 2.1 of the Law Organising the ADA (*Loi du 27 juillet 1993 portant organisation de l'administration des douanes et accises*).

³ Law conferring New Powers and amending the Existing Powers of the ADA (*Loi du 27 juillet 1993 attribuant des compétences nouvelles et modifiant les compétences actuelles de l'administration des douanes et accises concernant la fiscalité indirecte et les attributions policières*); and Law empowering Customs Officials to exercise certain General Police Powers (*Loi du 9 juin 1994 ayant pour objet d'habiliter les agents de l'administration des douanes à exercer certaines attributions de la police générale*).

territory.⁴ Similarly, the European Union (EU) has created a unique customs territory.⁵ In practice, to ensure enforcement, the ADA requests mutual administrative assistance concerning entities established outside of Luxembourg.

Tax enforcement is mainly regulated under the general tax code.⁶ However, the 1979 Value Added Tax (VAT) Law⁷ creates an autonomous tax, which excludes the application of the general tax code. Such an exclusion has been criticised due to the many protective provisions under the general tax code that receive no equivalent in the VAT Law.⁸ VAT enforcement is conducted by the Registration, Domains and VAT Administration (*Administration de l'enregistrement, des domaines et de la TVA*, AEDT),⁹ which is under the authority of the Minister of Finance.¹⁰ Although the VAT Law provides for both administrative tax fines and criminal penalties, the AEDT can only issue tax fines, meaning that its enforcement is administrative.¹¹ In implementing its investigative powers, the AEDT is competent over the national territory:¹² its powers based on national law only regards persons residing or established in Luxembourg.¹³

The enforcement of administrative frameworks on banking and financial markets lies in two authorities: the Financial Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier*, CSSF) and Insurances Commissariat (*Commissariat aux Assurances*, CAA). Both authorities have legal personality and financial autonomy and they are under the authority of the Minister responsible for these sectors.¹⁴ The nature of the enforcement of the CSSF is administrative as it can impose administrative

⁴ Articles 1 and 2 of the Convention establishing the Belgo-Luxembourg Economic Union (*Convention instituant l'Union économique belgo-luxembourgeoise*).

⁵ Article 4 of the Regulation (EU) no. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

⁶ *Abgabenordnung*.

⁷ *Loi modifiée du 12 février 1979 concernant la taxe sur la valeur ajoutée*.

⁸ Legitech, 'TVA: Droit des assujettis', Articles LexNow, 18/07/2013.

⁹ The AEDT refused to participate to the research project.

¹⁰ Article 1.1.1.b of the AEDT Law (*Loi du 10 août 2018 portant organisation de l'Administration de l'enregistrement, des domaines et de la TVA, du recouvrement des impôts indirects*).

¹¹ Articles 77 to 80 of the VAT Law. Above certain amounts, specific administrative offenses automatically become criminal offenses and thus lies in the jurisdiction of courts only.

¹² Article 14.1 of the AEDT Law.

¹³ P. Mellina, 'Acteurs et déclenchement du contrôle TVA au Luxembourg', *Cahiers de fiscalité luxembourgeoise et européenne*, 2024, vol. 2024/2, p. 108.

¹⁴ Article 1.1 of the Law creating the CSSF (*Loi du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier*) and article 1.1 of the Insurance Sector Law (*Loi du 7 décembre 2015 sur le secteur des assurances*).

sanctions.¹⁵ It is interpreted by the literature as the ‘economic administrative police’.¹⁶ The European Court of Justice (ECJ) also considers as administrative the enforcement by similar national authorities.¹⁷ However, the literature questioned the nature of the enforcement by the CSSF, particularly in light of the case law of the European Court of Human Rights (ECtHR).¹⁸ In view of the level of fines that can be adopted by the CSSF, the literature considers that its enforcement can qualify as criminal.¹⁹ Similarly, the administrative court declared that an administrative sanction proceeding ‘is similar to criminal proceedings’.²⁰ As the CAA can only impose administrative fines, the nature of its enforcement is administrative.²¹

Enforcement of competition law is conducted by the Competition Authority (*Autorité de la concurrence*). It is an independent administrative authority with legal personality,²² which can adopt administrative sanctions. Hence, its enforcement is administrative.

Finally, the regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) is enforced by the National Commission for Data Protection (*Commission nationale pour la protection des données*, CNPD),²³ an independent public entity with legal personality.²⁴ As the CNPD can only issue administrative sanctions,²⁵ its enforcement is administrative by nature. However, due to the seriousness of these sanctions, part of the literature considers that the GDPR enforcement by competent authorities should

¹⁵ See, for instance, articles 63 and followings of the Law on the Financial Sector (*Loi du 5 avril 1993 relative au secteur financier*).

¹⁶ M. Limpach, F. Goergen, ‘Les compétences, pouvoirs et moyens d’intervention de la CSSF’, in: Association luxembourgeoise des juristes de droit bancaire (ed.), *Droit bancaire et financier au Luxembourg 2014: recueil de doctrine*, Larcier ; Anthemis, Hors collection Larcier, 2014, p. 165.

¹⁷ ECJ, *UBS Europe SE and Alain Hondequin and Others v. DV and Others*, 13.09.2018, C-358/16, §§ 41-47.

¹⁸ ECtHR, *Engel and Others v. the Netherlands*, 08.06.1976, no. 48272/17, 57479/17, 510/18, 7936/18, 27115/18.

¹⁹ Limpach, Goergen, (n. 16), p. 217; A. Lutgen, M. Marty, ‘La pratique des sanctions administratives en matière financière’, *Journal des tribunaux Luxembourg*, Larcier, 2017, vol. 2, no. 50, p. 52.

²⁰ Cour administrative, 16.12.2014, no. 34766C, p. 9.

²¹ See, for instance, Article 303 and followings of the Insurance Sector Law.

²² Articles 6.1 and 7 of the Competition Law (*Loi du 30 novembre 2022 relative à la concurrence*).

²³ The CNPD refused to participate to the research project.

²⁴ Article 3 of the Law organising the CNPD (*Loi du 1er août 2018 portant organisation de la Commission nationale pour la protection des données*).

²⁵ Article 48 of the Law organising the CNPD.

qualify as criminal.²⁶ The CNPD is competent to exercise its powers on the territory of Luxembourg.²⁷

2. PUNITIVE ADMINISTRATIVE PROCEEDINGS: GENERAL FRAMEWORK

The general framework on administrative proceedings is rather limited in Luxembourg. The Law of 1978 governing the Non-Contentious Administrative Procedure (henceforth, the Law of 1978)²⁸ and Grand-Ducal Regulation of 1979 on Non-Contentious Administrative Procedure (henceforth, Regulation on Non-Contentious Administrative Procedure)²⁹ are applicable whenever sectoral laws do not consider at least equivalent guarantees³⁰ and regulate the procedure to elaborate an administrative individual decision.³¹ These texts are also to be applied even by civil courts when those are competent, for instance, on VAT enforcement.³² Yet, the applicability of the Law of 1978 to VAT proceedings is still being discussed by courts.³³

However, the guarantees and remedies provided by this framework might not be applicable to request for data to OSPs by administrative authorities, given the nature of these requests. Indeed, remedies and guarantees are in general available against administrative individual decisions.³⁴ However, the preparatory acts do not qualify as administrative decisions. As a result, the case law interpreted requests for data (when no sanction is mentioned) as not amounting to an individual decision, in that case, in the field of competition enforcement. A decision to realise a control or to request information are qualified as mere steps of the investigation and not as final administrative decision.³⁵ Hence, many safeguards against

²⁶ O. Tambou, J.F. López Aguilar, *Manuel de droit européen de la protection des données à caractère personnel*, Bruylant, Droit administratif, 2020, ¶ 418.

²⁷ Articles 55.1 and 57.1.h of the GDPR.

²⁸ *Loi du 1er décembre 1978 réglant la procédure administrative non contentieuse*. The law aims at implementing Committee of Ministers, *Resolution (77) 31 on protection of the individual in relation to the acts of administrative authorities*, Council of Europe, 28/09/1977.

²⁹ *Règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes*.

³⁰ Article 4 of the Law on Non-Contentious Administrative Procedure.

³¹ P. Schmit, *La protection de l'administré dans le cadre de la procédure administrative*, Conseil d'Etat, 2015, p. 39.

³² Cour de cassation, 17.10.2012, no. 55/2012.

³³ O. Coulon, 'Les sources du contrôle TVA', *Cahiers de fiscalité luxembourgeoise et européenne*, 2024, vol. 2024/2, pp. 90-93.

³⁴ Schmit, (n. 31), pp. 15-20.

³⁵ Tribunal administratif, 28.05.2018, no. 38364, 39127, 39876.

individual decisions might not be available to requests for data to OSPs, unless a decision imposing a sanction is adopted.

2.1. Framework on non-contentious administrative procedure

The Law of 1978 and the Regulation on Non-Contentious Administrative Procedure are relevant to the gathering of data by administrative authorities from OSPs as it sets basic guarantees and rights for any person concerned by an administrative proceeding and potential third parties involved in such proceeding. Article 1 of the Law of 1978 mandates the regulation to provide rules to implement the rights of defence and the adversary principle. These include the right to be heard when an administration prepares a decision independently of the initiative of the concerned person, such as a sanction against an OSP. It requires that, unless such delay would jeopardise the investigation, the administration informs by mail ‘the party concerned of its intention by communicating the factual and legal grounds for its action’.³⁶ The person has then eight days to present any observation and can request to be heard. The case law assessed, particularly regarding CSSF’s decisions, that administrative authorities cannot refer in general to this provision and should explicitly mention to the person their right to be heard.³⁷ However, an administrative decision can be annulled due to a violation of the right to be heard only if the hearing of the person, for instance an OSP fined for not providing data for a technical impossibility, would have led to a different outcome.³⁸ The rights of defence also mandate the administration to notify the concerned person of their right to be assisted by a legal or technical counsellor.³⁹

The adversary principle translates into a right to obtain access to the administrative file.⁴⁰ The access to certain documents can be refused due to important public or private interests, or in case of emergency, but a document the inspection of which has been refused to a party may only be used to their

³⁶ Article 9 of the Regulation on Non-Contentious Administrative Procedure.

³⁷ Cour administrative, 03.05.2022, no. 46817C. Decision commented by P. Schmit, ‘Procédure administrative non-contentieuse : la Cour administrative sanctionne de nullité la non-information de l’administré sur son droit de demander à être entendu en personne Cour administrative, 3 mai 2022’, *Revue luxembourgeoise de droit public*, 2023, vol. 15/2023, p. 170; M. Mathieu, S. Minette, ‘Les garanties procédurales encadrant le pouvoir de sanction de la CSSF’, in: N. Thieltgen (ed.), *Droit bancaire et financier au Luxembourg 2024 Vol. I Évolution législative – Cadre légal et réglementaire*, Larcier-Intersentia, Hors collection Larcier, 1st ed., 2024, pp. 456-458.

³⁸ Cour administrative, 03.05.2014, no. 34051C.

³⁹ Article 10 of the Regulation on Non-Contentious Administrative Procedure. This provision must be interpreted along the Law on Transparent and Open Administration (*Loi du 14 septembre 2018 relative à une administration transparente et ouverte*).

⁴⁰ Cour administrative, 03.10.2002, no. 14687C.

disadvantage if the authority has previously communicated to them in writing the essential content relating to the case and given them the opportunity to submit their observations.⁴¹ However, this limitation of access must be considered an exception and as such be applied restrictively.⁴² The case law interpreted that the communication of the administrative file has to ‘necessarily include the factual elements and documents that may be relevant to the exercise of the authority’s jurisdiction over the person concerned and the decision actually envisaged’.⁴³ Therefore, it is not an ‘unlimited and absolute right of access to all information processed by the competent authority as part of its investigation’, as the administration can exclude elements that are not relevant to the specific case.⁴⁴ A person concerned may seek remedy against a decision not to provide elements, which that person considered to be relevant.⁴⁵

The legality of an administrative decision depends on the validity of its motive,⁴⁶ which can be supplemented during appeals if insufficient.⁴⁷ While formal motivation is required for certain decisions,⁴⁸ such as the outcome of an administrative remedy against a coercive fine to mandate an OSPs to provide data, the request for data, *per se*, does not seem to have to be explicitly motivated. The lack of motivation, when mandatory, will suspend the remedies’ delays.⁴⁹

This framework offers basic rules on remedies open to affected persons and third parties against the implementation of the powers of administrative authorities. Indeed, the Regulation on Non-Contentious Administrative Procedure provides for administrative remedies whenever a law does not consider them. These remedies are threefold: firstly, the persons concerned by an administrative decision can request the decision to be reassessed by the same authority who adopted it (e.g., the investigator); secondly, they can request its reassessment by the hierarchical superior of the authority (e.g., the director); thirdly, they can file a remedy at the supervising authority, which

⁴¹ Article 13 of the Regulation on Non-Contentious Administrative Procedure.

⁴² Cour administrative, 27.06.2017, no. 39457C.

⁴³ Cour administrative, 17.12.2019, no. 42666C, p. 12. Decision commented by M. Trienbach, ‘Procédure administrative non contentieuse et accès au dossier dans une procédure de sanction administrative’, *Revue luxembourgeoise de droit public*, 2021, vol. 9/2021, pp. 47-48.

⁴⁴ Mathieu, Minette, (n. 37), p. 452.

⁴⁵ Cour administrative, (n. 43), p. 12. The judge will decide on this case based on the balancing test from ECJ, (n. 17).

⁴⁶ Conseil d’Etat, *Deutsche Buchgemeinschaft*, 11.03.1970, *Pasicrisie luxembourgeoise – Recueil Trimestriel de la Jurisprudence Luxembourgeoise*, vol. 1969-1971/1a, pp. 339-347; Cour administrative, 09.02.1999, no. 11084C.

⁴⁷ Cour administrative, 20.10.2009, no. 25738C.

⁴⁸ Article 6 of the Regulation on Non-Contentious Administrative Procedure.

⁴⁹ Cour administrative, 08.07.1997, no. 9918C.

will only verify the legality of the decision (e.g., the ministry).⁵⁰ The absence of an answer to any of those requests within three months is to be understood as a negative answer.⁵¹ In parallel to administrative remedies, a complaint can be filed to the Ombudsman.⁵² Against the administrative decision(s) resulting from the previous administrative remedies, further remedies are open to the administrative tribunal.⁵³

These remedies are open to third parties, meaning, to persons who are not the addressees of the administrative decision, whenever they have a personal, direct and legitimate interest to file a complaint.⁵⁴ For instance, the investigated person could file a complaint against a sanction decision adopted against an OSP refusing to provide data to an administration, on the basis that such data is protected by professional secrecy.

2.2. General principles of administrative law

Some general principles of administrative law identified by administrative courts remain uncodified but apply as core values essential to the legal system.⁵⁵ Firstly, the decision power of administrative authorities must be implemented impartially. Secondly, authorities must act and decide within a reasonable delay. Such a delay includes the timeframe of the investigation, assessed by courts, balanced with the need for a detailed investigation to obtain a proportional and adequate outcome.⁵⁶ Finally, the principle of proportionality is recognised as a constitutional principle,⁵⁷ which requires administrative authorities to balance between individual rights and the objective of public interest of the investigation or decision.

⁵⁰ Article 6 of the Regulation on Non-Contentious Administrative Procedure, detailed by the case law, Schmit, (n. 31), pp. 59-70.

⁵¹ Article 13.3 of the Law on the Rules of Procedure before the Administrative Courts.

⁵² Law establishing an Ombudsman (*Loi du 22 août 2003 instituant un Ombudsman*).

⁵³ Articles 2 and 3 of the Law on the Organisation of Administrative Courts (*Loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administrative*).

⁵⁴ Articles 5 and 12 of the Regulation on Non-Contentious Administrative Procedure.

⁵⁵ Cour constitutionnelle, 22.01.2021, no. 152/21. Commented by Mathieu, Minette, (n. 37), pp. 463 and followings.

⁵⁶ Cour administrative, 08.12.2022, no. 47780C.

⁵⁷ Cour constitutionnelle, 19.03.2021, no. 146/21; A. Klethi, 'Le principe de proportionnalité à la lumière de la jurisprudence de la Cour constitutionnelle et des juridictions administratives luxembourgeoises', *Revue luxembourgeoise de droit public*, 2023, vol. 15/2023, p. 145.

3. PUNITIVE ADMINISTRATIVE PROCEEDINGS: SECTORAL FRAMEWORK

3.1. Requests for data to online service providers

Specific legal bases to request certain data to certain OSPs rely on categories transposed from EU law. Those laws refer to providers of electronic communication services and public communication networks operators, as for example in the Law on the Electronic Communications Sector.⁵⁸ Operators provide transmission systems and, ‘where applicable, switching or routing equipment and other resources [...] which permit the conveyance of signals’, used wholly or mainly for the provision of publicly available electronic communications services.⁵⁹ Providers deliver those electronic communications services, meaning ‘a service normally provided for remuneration which consists wholly or mainly in the transmission of signals over electronic communications networks’.⁶⁰ This provision transposes only partially Article 2.4 of the European Electronic Communications Code, as there is no mention of internet access services and interpersonal communication services.

For these requests, legal bases mention the obtaining of traffic data. This category was defined under the national law before the adoption of the Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (European Production Order Regulation), and those definitions are not aligned. It relates to ‘all data processed for the purpose of routing a communication via an electronic communications network or for billing purposes’,⁶¹ and it is distinguished from location data.⁶²

3.1.1. Customs enforcement

No specific legal basis exists for the ADA to request data from OSPs. However, the ADA has a general power to request any information deemed

⁵⁸ *Loi du 30 mai 2005 relative aux dispositions spécifiques de protection de la personne à l’égard du traitement des données à caractère personnel dans le secteur des communications électroniques.*

⁵⁹ Article 2.h.2 and i.2 of the Law on the Electronic Communications Sector. This definition transposes Article 2.1 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

⁶⁰ Article 2.j.2 of the Law on the Electronic Communications Sector.

⁶¹ Article 2.e.2 of the Law on the Electronic Communications Sector.

⁶² Article 2.f.2 of the Law on the Electronic Communications Sector.

necessary.⁶³ Aside the concerned persons, meaning, importers and exporters, the ADA can request information from ‘all persons directly or indirectly involved in the import or export of goods’, which could, potentially, include OSPs.⁶⁴

The administration can specifically request ‘invoices, bills, copies of letters, cash books, inventory books and all books, registers, documents and correspondence relating to their commercial or professional activity’, and generally any ‘documents and correspondence that establish or help to establish a customs or excise offence’, which could include electronic information. The transfer of information must be done by mail or electronically. Electronic documents should be provided ‘in a legible and intelligible form’,⁶⁵ and the ADA can request to receive their copy in a specific form.⁶⁶ The owner of the retained documents should receive a list of those documents. Refusal to comply with the request can be punished by a fine between 25 to 250 euros.⁶⁷

Once a request for documents qualifies as a decision with legal effects for one of various persons,⁶⁸ any person who is directly and individually affected, such as an OSP fined for not answering to a preliminary request, or the concerned person, has an administrative redress against the decision.⁶⁹ Such a remedy must be motivated and filed, in general, within the three months after the third open day after the sending of the decision.⁷⁰ The GLCE details the right to be heard during the redress proceedings.⁷¹ Before adopting an unfavourable decision, the ADA must communicate its motivation by writing and the affected person has then thirty days to communicate their point of view by writing. When adopting the decision, the ADA must justify its divergence with the affected person. The affected person can request to be heard again. The final decision is notified to the affected person.⁷²

3.1.2. Tax enforcement as regards VAT

The AEDT has no specific investigative power to request data from OSPs. Yet, the power to obtain data from third parties is particularly relevant

⁶³ Article 203 of the GLCE (*Loi générale du 18 juillet 1977 sur les douanes et accises*), similarly provided at Article 15 of the Union Customs Code.

⁶⁴ When requests are directed to credit institutions, bankers and stockbrokers, the request must be previously authorised by the director of the ADA.

⁶⁵ Article 230.1 in relation with Article 201.2 of the GLCE.

⁶⁶ Article 230.2 of the GLCE.

⁶⁷ Article 230.3 of the GLCE.

⁶⁸ Article 211 of the GLCE.

⁶⁹ Articles 211 and 212 of the GLCE.

⁷⁰ Article 213 of the GLCE.

⁷¹ Articles 212/1 and 217 of the GLCE.

⁷² Article 219 of the GLCE.

as ‘it enables the AEDT to cross-check taxpayers’ declarations with data supplied by third parties’.⁷³ Therefore, the AEDT can generally gather information from any person⁷⁴ under Article 70 of the VAT Law, whenever it is necessary to detect tax infringements and to verify their correct collection.⁷⁵ The AEDT can request from any person ‘documents and invoices received at the time of delivery of goods or provision of services and [...] all information relating to these operations’,⁷⁶ which can include information stored electronically. Additionally, any VAT taxpayer – even the one who is not being investigated – must provide ‘all books, journals and accounting records, receipts, bank statements, purchase orders and shipping and transport documents’.⁷⁷ Warehouse or logistics platform for storing goods for delivery and payment service providers receive additional obligations to retain and transmit information.⁷⁸ In practice, it seems that the AEDT is regularly requesting data from taxpayers, but it remains rare that it requests ‘any person’.⁷⁹

In principle, information and documents must be consulted on site.⁸⁰ However, when documents exist in an electronic format, they must be transferred by mail or any other way decided by the AEDT, potentially, electronically. If the amount of data or the weight of the files so requires, the AEDT can provide a one-time exchange platform to share the requested information. Yet, it seems that this platform is not properly working in practice, leading to most documents being sent by email or post, or through both channels.⁸¹ Furthermore, such data must be legible and intelligible, as well as conform with the original.⁸² No deadline is set by law, leading to diversified practice of the AEDT’s agents, between one week to more than a month.⁸³ The absence of answer to a request for information qualifies for a

⁷³ Mellina, (n. 13), p. 100.

⁷⁴ By exception, due to the banking secrecy, financial institutions cannot provide individual information on their clients and on accounts, articles 1 and 2 of the regulation on banking secrecy (*Règlement grand-ducal du 24 mars 1989 précisant le secret bancaire en matière fiscale et délimitant le droit d’investigation des administrations fiscales*). The literature also considers that the AEDT must respect the legal professional privilege, *Ibid.* p. 109.

⁷⁵ Article 70.1§1 of the VAT Law.

⁷⁶ Article 70.1§1 of the VAT Law.

⁷⁷ Article 70.1§2 of the VAT Law.

⁷⁸ Articles 70*bis* and 70*ter* of the VAT Law.

⁷⁹ M. Lambion, ‘Le déroulement du contrôle. TVA Pouvoirs de contrôle de l’AEDT et analyse de la pratique administrative du contrôle’, *Cahiers de fiscalité luxembourgeoise et européenne*, 2024, vol. 2024/2, p. 128.

⁸⁰ Article 70.1§3 of the VAT Law.

⁸¹ Lambion, (n. 79), p. 129.

⁸² Article 70.3 of the VAT Law.

⁸³ Lambion, (n. 79), p. 130.

tax fine of 250 to 10.000 EUR,⁸⁴ or 10 to 50 per cent of the VAT evaded or refund unduly obtained.⁸⁵ The director of the AEDT can also decide on a daily fine of up to 25.000 euros, from the date set in their decision – and not from the date of the request for information.⁸⁶

A remedy exists only for OSPs against a decision imposing a sanction, hence if no sanction was imposed, there is no formal way of questioning a decision of the AEDT to request data.⁸⁷ If applicable, the taxpayer will be notified of any outcome of the investigation, which can be challenged through a complaint to civil courts.⁸⁸ The complaint of the taxpayer should be duly motivated,⁸⁹ which interpretation has enabled, in some cases, to limit access to remedies.⁹⁰ Yet, the possibility for the AEDT to reject a complaint due to not being ‘duly’ motivated is currently being debated by courts, as well as it is widely criticised by the literature as it creates a heavy evidence burden on the taxpayer.⁹¹ In case of a judicial complaint, there is a lack of clarity regarding its addressee due to the lack of legal personality of the AEDT. Despite this situation, most of the case law designated the AEDT as the addressee of both the notification and the subpoena.⁹² Yet, legal insecurity remains on that topic.⁹³

A study of tax controls by the AEDT further highlighted practical issues regarding remedies for taxpayers, deriving from legal gaps. Firstly, at the beginning of the control, very few taxpayers receive information about their rights, such as concerning legal assistance, on the consequences of a refusal to provide information, on the right to not self-incriminate oneself, or on the potential transfer of such information to other administrations or to judicial

⁸⁴ Article 77.1 of the VAT Law.

⁸⁵ Article 77.3 of the VAT Law.

⁸⁶ Article 77.2 of the VAT Law.

⁸⁷ Article 79 of the VAT Law.

⁸⁸ See, for instance, Articles 55.9 and 10, 67-3, 76.2, and 79 of the VAT Law.

⁸⁹ Article 76.3 of the VAT Law.

⁹⁰ J. Kaprielian, ‘Droit au recours effectif de l’assujetti et caractère dûment motivé de la réclamation en matière de TVA : une conciliation délicate clarifiée par le tribunal d’arrondissement’, *Cahiers de fiscalité luxembourgeoise et européenne*, 2023, vol. 2023/2, pp. 259-264.

⁹¹ M.-I. Richardin, L. Griffon, ‘L’exigence d’une réclamation dûment motivée en matière de TVA mise à mal par le juge luxembourgeois’, *Revue générale de fiscalité luxembourgeoise*, 2024, vol. 2024/2, p. 60; J. Kaprielian, ‘La protection effective de l’assujetti et le contrôle TVA’, *Cahiers de fiscalité luxembourgeoise et européenne*, 2024, vol. 2024/2, pp. 192-193; O. Coulon, ‘La clôture du contrôle fiscal’, *Cahiers de fiscalité luxembourgeoise et européenne*, 2024, vol. 2024/2, pp. 238-239.

⁹² T. Hoscheit, ‘Les instances dirigées contre l’Administration de l’enregistrement, des domaines et de la TVA : chronique d’un désastre judiciaire’, *Revue des procédures*, 2020, vol. 1/2020, p. 44. Recently, see Cour d’appel, 30.10.2024, no. 131/24.

⁹³ Coulon, (n. 91), pp. 241-242.

authorities.⁹⁴ Secondly, records of the proceedings are drafted by the AEDT and do not have to be discussed previously with the addressee.⁹⁵ The latter problem is criticised for bringing evidence *a posteriori*, which cannot be then contested.⁹⁶ Furthermore, these records are often lengthy and complex to understand, and they usually do not discuss the elements discussed by the taxpayer. The legal motivation of a decision is often only provided in the director's decision or during judicial proceedings.⁹⁷ Additionally, some taxpayers do not receive any records, and even are denied by the AEDT to access them.⁹⁸ Thirdly, when the control does not lead to a fine, the taxpayer is not always notified of the end of the control.⁹⁹ When the addressee of a decision is notified, the AEDT merely has to post the letter, independently of its effective receipt.¹⁰⁰ Independently of the outcome of the control, it remains provisional, enabling the AEDT to control again at a later stage, as long as the taxpayer's obligations are not prescribed.¹⁰¹ Finally, when the director decides on a fine, no prior discussion with the addressee of the fine is provided for.¹⁰²

3.1.3. Punitive enforcement in the area of banking law and financial markets

The core of enforcement powers of the CSSF lies in the Law on the Financial Sector. Enforcement powers of the CAA are regulated by the Insurance Sector Law. Additional powers of investigation are granted to the CSSF and the CAA by special sectoral laws. The CSSF receives additional legal bases for administrative investigations under 18 laws, including from the Law on Payment Services,¹⁰³ the Law on Undertakings for Collective Investment (UCI),¹⁰⁴ the Law on Alternative Investment Fund Managers (AIFM),¹⁰⁵ the Law on Market Abuse,¹⁰⁶ or the Law on Markets in Financial

⁹⁴ Kaprielian, (n. 91), pp. 174-176.

⁹⁵ Article 68 of the VAT Law.

⁹⁶ Lambion, (n. 79), p. 125.

⁹⁷ Kaprielian, (n. 91), pp. 178, 188.

⁹⁸ *Ibid.* p. 179.

⁹⁹ Lambion, (n. 79), p. 141.

¹⁰⁰ Coulon, (n. 91), p. 224.

¹⁰¹ *Ibid.* pp. 219-221, 226-228.

¹⁰² Coulon, (n. 91), p. 215.

¹⁰³ *Loi du 10 novembre 2009 relative aux services de paiement à l'activité d'établissement de monnaie électronique et au caractère définitif du règlement dans les systèmes de paiement et les systèmes de règlement des opérations sur titres.*

¹⁰⁴ *Loi du 17 décembre 2010 concernant les organismes de placement collectif.*

¹⁰⁵ *Loi du 12 juillet 2013 relative aux gestionnaires de fonds d'investissement alternatifs.*

¹⁰⁶ *Loi du 23 décembre 2016 relative aux abus de marché.*

Instruments.^{107,108} Powers under the following laws are common to both authorities: Law on OTC Derivatives, Central Counterparties and Trade Repositories (Law on OTCD),¹⁰⁹ Law on Key Information Documents for Packaged Retail and Insurance-Based Investment Products (Law on KID),¹¹⁰ Law on Indices,¹¹¹ Law on the Operationalisation of European Regulations in the Area of Financial Services,¹¹² Law establishing a Register of Fiducies and Trusts,¹¹³ and Law on Inactive Accounts, Inactive Safe-Deposit Boxes and Unclaimed Insurance Contracts (Law on Inactive Accounts).¹¹⁴ This diversity of texts results in a lack of harmonisation of investigatory powers, complicating the interpretation of whether they refer to distinct powers or should instead be understood as equivalent.

¹⁰⁷ *Loi du 30 mai 2018 relative aux marchés d'instruments financiers.*

¹⁰⁸ As well as from: Law on Investment Companies in Risk Capital (*Loi du 15 juin 2004 relative à la société d'investissement en capital à risque*), Law on Institutions for Occupational Retirement Provision (*Loi du 13 juillet 2005 relative aux institutions de retraite professionnelle sous forme de SEPCAV et ASSEP*, Law on institutions for occupational retirement provision), Law on Specialised Investment Funds (*Loi du 13 février 2007 relative aux fonds d'investissement spécialisés*), Law on Transparency Requirements (*Loi du 11 janvier 2008 relative aux obligations de transparence des émetteurs*), Law on Mandatory Squeeze-Out and Sell-Out of Securities (*Loi du 21 juillet 2012 relative au retrait obligatoire et au rachat obligatoire de titres de sociétés admis ou ayant été admis à la négociation sur un marché réglementé ou ayant fait l'objet d'une offre au public*), Law on Short Selling of Financial Instruments (*Loi du 12 juillet 2013 relative à la vente à découvert d'instruments financiers*), Law concerning the Audit Profession (*Loi du 23 juillet 2016 relative à la profession de l'audit*), Law on Payment Accounts (*Loi du 13 juin 2017 relative aux comptes de paiement*), Law implementing Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions (*Loi du 27 février 2018 relative aux commissions d'interchange et modifiant différentes lois relatives aux services financiers*, Law implementing Regulation 2015/751), Law on Central Securities Depositories (*Loi du 6 juin 2018 relative aux dépositaires centraux de titres*), Law on Prospectuses for Securities (*Loi du 16 juillet 2019 relative aux prospectus pour valeurs mobilières*), Law establishing an IBAN Central Electronic Data Retrieval System (*Loi du 25 mars 2020 instituant un système électronique central de recherche de données concernant des comptes IBAN et des coffres-forts*), and Law relating to the Issue of Covered Bonds (*Loi du 8 décembre 2021 relative à l'émission de lettres de gage*).

¹⁰⁹ *Loi du 15 mars 2016 relative aux produits dérivés de gré à gré, aux contreparties centrales et aux référentiels centraux et modifiant différentes lois relatives aux services financiers.*

¹¹⁰ *Loi du 17 avril 2018 relative aux documents d'informations clés relatifs aux produits d'investissement packagés de détail et fondés sur l'assurance.*

¹¹¹ *Loi du 17 avril 2018 relative aux indices de référence.*

¹¹² *Loi du 16 juillet 2019 relative à l'opérationnalisation de règlements européens dans le domaine des services financiers.*

¹¹³ *Loi du 10 juillet 2020 instituant un Registre des fiducies et des trusts.*

¹¹⁴ *Loi du 30 mars 2022 relative aux comptes inactifs, aux coffres-forts inactifs et aux contrats d'assurance en déshérence.*

3.1.3.1. Requests for electronic information

Twelve of those texts enable to specifically request electronic information, meaning, data, although drafted all slightly differently, thus creating incoherences and confusion.¹¹⁵ Yet, three categories of requests can be inferred: those addressed to certain categories of OSPs, those addressed to any persons, and those addressed to specific entities.

The Law on the Financial Sector (Article 53.1.16), the Law on Market Abuse (Article 4.1.7), and the Law on Markets in Financial Instruments (Article 45.2.20) enable the CSSF to request data traffic records to providers of electronic communication services and public communication networks operators, meaning, OSPs, after judicial authorisation. The authorities would need, in these cases, ‘a reasonable suspicion of an infringement and [that] such records may be useful to ascertaining the truth in the context of an investigation’. In these cases, the CSSF will transfer a reasoned request to the Luxembourg district tribunal and an investigating judge will verify the justification and proportionality of the request.¹¹⁶ The order of the investigating judge is then subject to the same remedies (non-suspensive) as any order by the same judge.¹¹⁷ According to Article 133 of the Criminal Procedure Code,¹¹⁸ the public prosecutor and the suspect can lodge an appeal against the order of an investigative judge, as well as the plaintiff when it affects their civil interests. Here, the criminal provision does not seem adapted to the administrative proceedings, as they leave no room for an appeal by an investigated person who is not yet criminally charged. Furthermore, only a partial appeal by the CSSF is allowed.

No personal scope of application is specified in four texts,¹¹⁹ which could thus potentially include OSPs. This power can be used to request three

¹¹⁵ Law on the Financial Sector, article 53.1.4 and 16; Law on Institutions for Occupational Retirement Provision, Article 62.1.c; Law on Specialised Investment Funds, Article 45.3.d; Law on Payment Services, Article 58-5.1.4; Law on UCI, Article 147.2.d; Law on AIFM, Article 50.2.d; Law on Short Selling of Financial Instruments, Article 2, referring to Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and certain aspects of Credit Default Swaps (regulation 236/2012), Article 33.2.d; Law on Market Abuse, Article 4.1.6 and 7; Law on Markets in Financial Instruments, Article 45.2.4 and 20; Law on Indices, Article 2.1.5; Law on Central Securities Depositories, Article 2.4; and, Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 7 referring to Law on AIFM, Article 50.2.d.

¹¹⁶ Article 53.3 of the Law on the Financial Sector, Article 5 of the Law on Market Abuse, and Article 45.3 of the Law on Markets in Financial Instruments.

¹¹⁷ Article 53.3 of the Law on the Financial Sector.

¹¹⁸ Articles 133, 134 and 134-1 detail the rules on the adversarial principle to the appeal.

¹¹⁹ Law on the Financial Sector, Article 53.1.4; Law on Specialised Investment Funds, Article 45.3.d; Law on AIFM, Article 50.2.d; Law on Short Selling of Financial Instruments, Article 2, referring to Regulation 236/2012, Article 33.2.d.

categories of existing data.¹²⁰ Firstly, all texts mention the request of recordings of telephone conversations. Secondly, most texts, except four of them,¹²¹ lists the request of electronic communications. Thirdly, texts usually mention other categories of data, in a non-harmonised manner: ‘other electronic exchanges’,¹²² ‘data’,¹²³ ‘traffic data’,¹²⁴ ‘records of data exchanges’,¹²⁵ and ‘electronic records’.¹²⁶

Under most legal frameworks, these requests can only be addressed to supervised or concerned entities according to the laws.¹²⁷ For instance, the Law on Market Abuse refers to data ‘held by the persons subject to [the] prudential supervision’ of the CSSF;¹²⁸ and the Law on Markets in Financial Instruments lists investment firms, credit institutions, ‘any other entity regulated by this Law or by Regulation (EU) No 600/2014’.¹²⁹ More precisely, the Law on Payment Services mentions ‘payment service providers authorised or registered in Luxembourg, the Luxembourg branches of payment service providers whose home Member State is a Member State other than Luxembourg and the agents established in Luxembourg to which these payment service providers have recourse, which provide transfer of funds services’.¹³⁰ However, these laws do not specify if data can only be requested to the investigated entity or also to another supervised entity as third-party. In that latter case, an OSP should qualify as a supervised entity to be the addressee of such a request.

3.1.3.2. Requests for information

More generally, all sectoral laws in the area of banking and financial markets grant the CSSF and the CAA ‘considerable powers to obtain the necessary information’.¹³¹ These powers are drafted as general bases to access

¹²⁰ It is therefore not possible to request the retention of future data.

¹²¹ Law on Specialised Investment Funds, Law on AIFM, Law on Short Selling of Financial Instruments, and the Law on Central Securities Depositories.

¹²² Law on the Financial Sector, Law on Institutions for Occupational Retirement Provision, Law on UCI, Law on Markets in Financial Instruments.

¹²³ Law on Specialised Investment Funds.

¹²⁴ Law on Payment Services, Law on Market Abuse, Law on Indices.

¹²⁵ Law on AIFM, Law on Short Selling of Financial Instruments.

¹²⁶ Law on Central Securities Depositories.

¹²⁷ Law on Institutions for Occupational Retirement Provision, Article 62.1.c; Law on UCI, Article 147.2.d; Law on Indices, Article 2.1.5; Law on Central Securities Depositories, Article 2.4.

¹²⁸ Article 4.1.6 of the Law on Market Abuse.

¹²⁹ Article 45.2.4 of the Law on Markets in Financial Instruments.

¹³⁰ Article 58-5.1.4 referring to Article 58-2 of the Law on Payment Services.

¹³¹ Limpach, Goergen, (n. 16), p. 181.

or request information.¹³² Regarding the access to documents, no personal scope is defined: such a request could be directed to OSPs. Regarding the request of information, there are three types of powers. Firstly, some laws grant a general power to request information to any person,¹³³ or restrictively any person with a link with the supervised activities,¹³⁴ or any professional.¹³⁵ This first category is broad enough to include OSPs. General powers to request any person within the framework of the law on markets in financial instruments is particularly supported by the ECJ case law.¹³⁶ According to the court, ‘competent authorities must have all supervisory and investigatory

¹³² Law on the Financial Sector, Article 53.1.1, 2 and 8 and Article 53.2.a; Insurance Sector Law, Article 4.b and e; Law on Investment Companies in Risk Capital, Article 32; Law on Institutions for Occupational Retirement Provision, Article 62.1.a and b; Law on Specialised Investment Funds, Article 45.3.a and b and Article 58; Law on Transparency Requirements, Article 22.2.a to c; Law on Payment Services, Article 31.4; Law on UCI, Article 147.2.a, b and h; Law on Mandatory Squeeze-Out and Sell-Out of Securities, Article 6-2.a and b; Law on AIFM, Article 50.2.a, b and h; Law on Short Selling of Financial Instruments, Article 2 referring to Regulation 236/2012, Article 33.2.a and b; Law on OTCD, Article 2.1.1 and 2; Law concerning the Audit Profession, Article 37; Law on Market Abuse, Article 4.1.1 to 3; Law on Payment Accounts, Article 31.1; Law implementing Regulation 2015/751, Article 2.1 and 2; Law on KID, Article 4.1.1 and 2; Law on Indices, Article 2.1.1 to 3; Law on Markets in Financial Instruments, Article 45.2.1, 2, 7 and 10; Law on Central Securities Depositories, Article 2.1 and 2; Law on Prospectuses for Securities, Article 7.2.1 to 3 and 12, Article 35.1 to 3, and Article 58.1; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 2.2.2 and 3, Article 7 referring to Article 50 of the Law on AIFM, Article 12.1 to 3, Article 17.2.1 and 2, Article 20-3.2.1 to 3, Article 20-9.2.1 to 3, and Article 20-16.2.1 to 3; Law establishing a IBAN Central Electronic Data Retrieval System, Article 4.1.a and b; Law establishing a Register of Fiducies and Trusts, Article 8.1.1, 2, 5 and 6; Law relating to the Issue of Covered Bonds, Article 20.1, 3 and 8; and, Law on Inactive Accounts, Article 40.1.1, 2 and 5.

¹³³ Law on the Financial Sector, Article 53.1.2; Insurance Sector Law, Article 4.e; Law on Specialised Investment Funds, Article 45.3.b; Law on UCI, Article 147.2.b; Law on Short Selling of Financial Instruments, Article 2 referring to Regulation 236/2012, Article 33.2.b; Law concerning the Audit Profession, Article 37; Law on Market Abuse, Article 4.1.2; Law implementing Regulation 2015/751, Article 2.2; Law on Markets in Financial Instruments, Article 45.2.2 and 10; Law on KID, Article 4.1.2; Law on Central Securities Depositories, Article 2.2; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 17.2.2; Law establishing a Register of Fiducies and Trusts, Article 8.1.2; Law on Inactive Accounts, Article 40.1.2.

¹³⁴ Activities of the manager of the alternative investment fund, Law on AIFM, Article 50.2.b; of a qualifying venture capital fund or social entrepreneurship fund or monetary fund, Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 2.2.3, Article 12.3, Article 20-3.2.3, and Article 20-9.2.3; of the issuance of covered bonds, Law relating to the Issue of Covered Bonds, Article 20.3.

¹³⁵ Law establishing a IBAN Central Electronic Data Retrieval System, Article 4.1.b; Law establishing a Register of Fiducies and Trusts, Article 8.6.

¹³⁶ Regarding Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, replaced by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014.

powers that are necessary for the exercise of their functions, including the rights to have access to any document and to demand information from any person'.¹³⁷ Secondly, some laws draft a specific power to request information to supervised entities¹³⁸ or generally entities related to the regulated activity.¹³⁹ In that case, an OSPs should qualify as such to have to answer a request for information. Thirdly, additionally, some laws specifically enable to request information from other entities.¹⁴⁰ For instance, the Law on Market Abuse extends these requests to any market participants,¹⁴¹ potentially, OSPs.

Under such a general power, the authorities can access any document, information, or data, under any format, and receive or realise their copy. Some texts specify that the accessed documents or data shall be likely to be relevant for the performance of authorities' supervisory mission,¹⁴² investigatory

¹³⁷ ECJ, *Annett Altmann and Others v. Bundesanstalt für Finanzdienstleistungsaufsicht*, 12.11.2014, C-140/13, § 29. Recalled in ECJ, *Bundesanstalt für Finanzdienstleistungsaufsicht v. Ewald Baumeister*, 19.06.2018, C-15/16, ¶ 29; ECJ, (n. 16), § 34.

¹³⁸ Law on the Financial Sector, Article 53.2.a; Insurance Sector Law, Article 4.b; Law on Investment Companies in Risk Capital, Article 32; Law on Institutions for Occupational Retirement Provision, Article 62.1.b; Law on Specialised investment funds, Article 58; law on payment services, Article 31.4; law on payment accounts, Article 31.1; law on the Operationalisation of European Regulations in the Area of Financial Services, Article 2.2.2, Article 12.2, Article 20-3.2.2, and Article 20-9.2.2. Supervised entities can be extended to related entities. Extension to entities who 'act in concert with them and persons who control them or are controlled by them', Law on Mandatory Squeeze-Out and Sell-Out of Securities, Article 6-2.a; extension to 'non-financial counterparties, central counterparties and trading venues', Law on OTCD, Article 2.1.2. The literature considers that these should extend to other, non-supervised entities, particularly to assess if they should be supervised, Limpach, Goergen, (n. 15), p. 182.

¹³⁹ Entities linked to the definition and provision of indices, Law on Indices, Article 2.1.2; Law on Prospectuses for Securities, Article 7.2.1 and 2 and 12, Article 35.1 and 2, and Article 58.1, particularly issuers, offerors or guarantors; entities and persons linked to crowdfunding service providers for business, Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 20-16.2.1; trustees and fiduciaries of the investigated fiducie or trust, Law establishing a Register of Fiducies and Trusts, Article 8.5.

¹⁴⁰ Such as approved statutory auditors, Law on the Financial Sector, Article 53.1.8; Law on Payment Services, Article 31.4 and Article 58-5.8; Law on Mandatory Squeeze-Out and Sell-Out of Securities, Article 6-2.b; Law on Markets in Financial Instruments, Article 45.2.7; Law on Prospectuses for Securities, Article 7.2.3, and Article 35.3; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 20-16.2.1 and 3; Law relating to the Issue of Covered Bonds, Article 20.8; Law on Inactive Accounts, Article 40.1.5. Entities linked to securities admitted to trading on a regulated market, Law on Transparency Requirements, Article 22.2.a to c. Or operators under Law on Indices, Article 2.1.3.

¹⁴¹ Law on Market Abuse, Article 4.1.3.

¹⁴² Law on the Financial Sector, Article 53.1.1; Insurance Sector Law, Article 4.b; Law on Markets in Financial Instruments, Article 45.2.1.

mission,¹⁴³ functions,¹⁴⁴ or duties.¹⁴⁵ Considering that the authorities can impose sanctions under all those frameworks, the term of ‘supervision’ does not seem adapted, as these powers are actually aimed at administrative investigatory proceedings. Therefore, it appears that the use of the powers to request information is not limited to already opened investigations but can also be used outside of them. Other texts specify that the requested documents or data shall be relevant,¹⁴⁶ particularly ‘for the exercise of its tasks’¹⁴⁷ or missions.¹⁴⁸ Additionally, the Insurance Sector Law highlights that the CAA should implement its powers ‘promptly and in a proportionate manner’.¹⁴⁹

Only Article 31.4 of the Law on Payment Services details the content of the request, which should specify its purpose and a deadline. Only the Law on the Operationalisation of European Regulations in the Area of Financial Services specifies that the requested information shall be provided without delay.¹⁵⁰ According to Article 53.2.a of the Law on the Financial Sector, the CSSF can also request supervised entities to provide information on a regular basis and in a specified format. It should be mentioned that the CSSF is developing secured application programming interfaces to enable the interconnections of systems for automatised transfer of data.¹⁵¹ Both Article 4.1.3 of the Law on Market Abuse and Article 2.1.3 of the Law on Indices enable to request information to market participants and operators through standardised formats, reports on transactions or through a direct access to their systems.

3.1.3.3. Common rules

Under both types of powers (general or specific), the addressee usually cannot refuse the answer the request of the authority due to the professional

¹⁴³ Law relating to the Issue of Covered Bonds, Article 20.1.

¹⁴⁴ Law on Inactive Accounts, Article 40.2.1.

¹⁴⁵ Law on Specialised Investment Funds, Article 58.

¹⁴⁶ Law on Markets in Financial Instruments, Article 45.2.2; or necessary, Insurance Sector Law, Article 4.e.

¹⁴⁷ Law on Payment Services, Article 31.4.

¹⁴⁸ Law on the Financial Sector, Article 53.2.a, regarding requests to supervised entities; Law on Investment Companies in Risk Capital, Article 32; Law on Payment Accounts, Article 31.1.

¹⁴⁹ Insurance Sector Law, Article 4.k.

¹⁵⁰ Law on the Operationalisation of European Regulations in the Area of Financial Services, Articles 2.2.2, 12.2, 20-3.2.2 and 20-9-2.2.

¹⁵¹ CSSF, *Rapport annuel 2022 Retour sur les activités et initiatives de la CSSF en 2022*, Luxembourg, 2023, p. 13.

secrecy.¹⁵² On the contrary, the powers of the CSSF under the law on market abuse apply ‘without prejudice to the legal provisions on professional secrecy’.¹⁵³

To enforce these powers, the CSSF can adopt coercive fines to compel addressees to cooperate under the Law on the Financial Sector. These fines can amount to a maximum of 1.250 euros per day, and a maximum total amount of 25.000 euros against supervised entities, ‘on the grounds of an observed failure to perform’.¹⁵⁴ The CAA can impose coercive fines of the same amount on supervised entities in order to compel them to answer a request.¹⁵⁵

Differently, other laws enable to sanction addressees who failed to cooperate. The sanctions can be directed against any addressee in certain laws;¹⁵⁶ while, in others, only supervised¹⁵⁷ or concerned¹⁵⁸ entities or ‘entities obliged to provided information’ can be sanctioned.¹⁵⁹ It should be mentioned that the sanction of supervised entities for not providing

¹⁵² Law on the Financial Sector, Article 41.1 and 2; Insurance Sector Law, Article 300.2.a; Law on Payment Services, Article 30.1; Law on Markets in Financial Instruments, Article 43.2; Law concerning the Audit Profession, Article 28.3, recalled in Law on Investment Companies in Risk Capital, Article 27.3.

¹⁵³ Law on Market Abuse, Article 4.2.

¹⁵⁴ Law on the Financial Sector, Article 63.3. Although coercive fines are provided for the enforcement of other powers of the CSSF, they are not applicable in case of refusal to comply with a request for information, under Article 58-5.2 of the Law on Payment Services, Article 3.3 of the Law implementing Regulation 2015/751 and Article 4.3 of the Law establishing a IBAN Central Electronic Data Retrieval System.

¹⁵⁵ Insurance Sector Law, Article 305.

¹⁵⁶ Law on Market Abuse, Article 12.4; Law on Markets in Financial Instruments, Article 47.4; Law on KID, Article 5.3; Law on Indices, Article 4.1; Law on Central Securities Depositories, Article 5.3; Law on Prospectuses for Securities, Article 12.3; Law on Inactive Accounts, Article 41.2; Law on the operationalisation of European regulations in the area of financial services, Article 3.2, Article 8.2, Article 13.2, Article 18.2, Article 20-4.1, Article 20-10.1, Article 20-17.3; Law establishing a IBAN Central Electronic Data Retrieval System, Article 5.3; Law establishing a Register of Fiducies and Trusts, Article 9.4.

¹⁵⁷ Law on the Financial Sector, Article 63.1; Insurance Sector Law, Article 303.1 and 2a; law on institutions for Occupational Retirement Provision, Article 65.1; Law on UCI, Article 148.1; Law on AIFM, Article 51.1; Law on OTCD, Article 3.1; approved statutory auditors, approved audit firms and audit firms only, Law concerning the Audit Profession, Article 43.1; Law on Payment Accounts, Article 32.1; Law implementing Regulation 2015/751, Article 3.1; Law relating to the Issue of Covered Bonds, Article 23.

¹⁵⁸ Such as the directors, managers, and liquidators of supervised entities, Law on Payment Services, Article 46.1; Law relating to the Issue of Covered Bonds, Article 23; Law on Investment Companies in Risk Capital, Article 17.1; Law on Institutions for Occupational Retirement Provision, Article 65.1; Law on Specialised Investment Funds, Article 51.1; Law on UCI, Article 148.1.

¹⁵⁹ Law on Transparency Requirements, Article 25.1; Law on Short Selling of Financial Instruments, Article 7.1.

information that could incriminate them has been criticised by the literature¹⁶⁰ as well as by the State Council (*Conseil d'Etat*).¹⁶¹ Thus, even when OSPs can be requested to provide information, they might not be sanctionable.

These provisions usually sanction (1) the refusal to provide the information,¹⁶² and/or (2) the provision of incomplete, incorrect, or false¹⁶³ information. Some laws only sanction this second category when committed knowingly¹⁶⁴ or purposefully.¹⁶⁵ The sanctions usually include an administrative fine. Most fines amount to between 250 and 250.000 euros.¹⁶⁶ Some laws provide for lesser fines,¹⁶⁷ while other set fines up to 5.000.000

¹⁶⁰ Lutgen, Marty, (n. 18), p. 52.

¹⁶¹ Conseil d'Etat, Avis complémentaire sur le projet de loi portant modification de la loi du 9 mai 2006 relative aux abus de marché et portant complément de transposition de la directive 2003/6/CE du Parlement européen et du Conseil du 28 janvier 2003 sur les opérations d'initiés et les manipulations de marché (abus de marché), 06/07/2010, 48.602, p. 2.

¹⁶² Except Law on the Operationalisation of European Regulations in the Area of Financial Services, Articles 3.2, 13.2, 18.2, 20-4.1, 20-10.1, and 20-17.3; Law establishing a IBAN Central Electronic Data Retrieval System Article 5.3; Law establishing a Register of Fiducies and Trusts, Article 9.4; Law relating to the Issue of Covered Bonds, Article 23. However, a refusal to answer a request could be penalised as an obstruction to the missions of the CSSF.

¹⁶³ However, some laws do not sanction when the information provided is false: Law on Transparency Requirements, Article 25.1; Law on Central Securities Depositories, Article 5.3; Law on Prospectuses for Securities, Article 12.3; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 3.2, Article 8.2 Article 13.2, Article 18.2, Article 20-4.1, Article 20-17.3; Law on Inactive Accounts, Article 41.2.

¹⁶⁴ Law on Markets in Financial Instruments, Article 47.4; Law on KID, Article 5.3; Law on Indices, Article 4.1; Law on Central Securities Depositories, Article 5.3; Law on Prospectuses for Securities, Article 12.3; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 3.2, Article 8.2, Article 13.2, Article 18.2, Article 20-10.1, Article 20-17.3; Law on Inactive Accounts, Article 41.2; Law establishing a Register of Fiducies and Trusts, Article 9.4; Law relating to the Issue of Covered Bonds, Article 23.

¹⁶⁵ Law establishing a IBAN Central Electronic Data Retrieval System, Article 5.3.

¹⁶⁶ Law on the Financial Sector, Article 63.2; against insurance and reinsurance undertakings under the Insurance Sector Law, Article 303.1; Law on Institutions for Occupational Retirement Provision, Article 65.2; Law on Transparency Requirements, Article 25.1; Law on AIFM, Article 51.2; Law on Market Abuse, Article 12.4; Law on Payment Accounts, Article 32.2, although here the minimum fine is of 251 euros; Law implementing Regulation 2015/751, Article 3.2; Law on KID, Article 5.3; law on Central Securities Depositories, Article 5.3; Law on Prospectuses for Securities, Article 12.3; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 3.2, Article 8.2, Article 13.2, Article 18.2, Article 20-10.2, Article 20-17.3; Law on Inactive Accounts, Article 41.2; Law establishing a IBAN Central Electronic Data Retrieval System, Article 5.3; Law establishing a Register of Fiducies and Trusts, Article 9.4.

¹⁶⁷ Such as a fine of between 15 to 500 euros under Article 17.1 of the Law on Investment Companies in Risk Capital; between 125 to 12.500 euros under Article 51.1 of the Law on Specialised Investment Funds, Article 46.1 of the Law on Payment Services, and Article 7.1 of the Law on Short Selling of Financial Instruments; up to 50.000 euros against supervised entities other than insurance and reinsurance undertakings under the Insurance Sector Law,

euros, or, alternatively, a fine up to 10% of the total annual turnover, or twice the amount of the benefit (if known) derived from the infringement.¹⁶⁸ Some other types of sanctions are also included, such as a warning or a reprimand,¹⁶⁹ or a public statement or an order to cease the infringement.¹⁷⁰

Criminal sanctions can also be imposed against addressees who failed to cooperate. Firstly, under Article 26 of the Law on Transparency Requirements, any person ‘who knowingly disclose to the CSSF [...] inaccurate or incomplete information shall incur a fine of between 250 and 125.000 euros’. Secondly, obliged entities under Article 7.3 of the Law on Mandatory Squeeze-Out and Sell-Out of Securities can be sanctioned by ‘imprisonment of between eight days and five years and a fine of between 251 and 125.000 euros or only one of these sanctions’ when giving knowingly ‘false or incomplete information in relation with their shareholdings or with a mandatory squeeze- or sell-out transaction’.

Various rules can protect the interests of the persons concerned by the requests for information sent by the CSSF or the CAA. Several laws provide that, unless there is a risk that the situation may deteriorate, the decisions are taken after an adversarial investigation.¹⁷¹ Also, various laws provide for the communication of the decision to the concerned supervised entity or person.¹⁷² Regarding the motivation of the decisions, it is explicit in some

Article 303.1. Differently, Article 3.3 of the Law on OTCD sets up a fine between 125 and 1.500.000 euros.

¹⁶⁸ Law on the Financial Sector, Article 63-2a.4; Law on UCI, Article 148.4; Law on Markets in Financial Instruments, Article 47.4; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 20-4.2; Law relating to the Issue of Covered Bonds, Article 23. Article 4.2 of the Law on Indices does not set a fixed fine but only a maximum fine up to three times the amount of the profits gained or losses avoided because of the infringement where those can be determined.

¹⁶⁹ Law on the Financial Sector, Article 63.2; Insurance Sector Law, Article 303.2; Law on Institutions for Occupational Retirement Provision, Article 65.1; Law on AIFM, Article 51.2; Law on OTCD, Article 3.3; Law on Payment Accounts, Article 32.2; Law implementing Regulation 2015/751, Article 3.2.

¹⁷⁰ Law on the Financial Sector, Article 63-2a.4; Law on UCI, Article 148.4; Law concerning the Audit Profession, Article 43.3; Law on Markets in Financial Instruments, Article 47.6; Law on Indices, Article 4.2; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 20-4.2, and, only mentioning the public statement, Article 20-10.2; Law relating to the Issue of Covered Bonds, Article 23.

¹⁷¹ Insurance Sector Law, Article 303.4, including the right to be assisted or represented; Law on Institutions for Occupational Retirement Provision, Article 66.1; Law on Investment Companies in Risk Capital, Article 16.1; Law on Institutions for Occupational Retirement Provision, Article 66.1; Law on Specialised Investment Funds, Article 45.1; Law on UCI, Article 142.1; Law on AIFM, Article 52.1; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 52.

¹⁷² Insurance Sector Law, Article 307; Law on Investment Companies in Risk Capital, Article 16.1; Law on Institutions for Occupational Retirement Provision, Article 66.1; Law on

laws.¹⁷³ However, Articles 24 and 24-18 of the law on payment services only provides for the motivation of decisions which includes ‘penalties or restrictions on the freedom to establish branches, to use agents or to provide services’. Once the addressee has provided information at the request of the authorities, the interest of the concerned person is protected by the professional secrecy applicable to the CSSF and the CAA, criminalising the disclosure of confidential information.¹⁷⁴ However, it remains unclear if a request for information is considered as an administrative decision or a mere investigatory step. In any case, these rules will be applicable to a decision on sanctioning an OSP.

Some definitive decisions, especially on imposing sanctions, must be published, while it is a mere possibility for others. However, when the publication is disproportionate, on the basis of a case-by-case assessment, the decision may not be disclosed or only disclosed partially or anonymously.¹⁷⁵

Payment Services, Articles 24 and 24-18; Law on Specialised Investment Funds, Article 45.1; Law on AIFM, Article 52.1.

¹⁷³ Law on the Financial Sector, Article 53.4 regarding supervisory powers, and Article 63-4 regarding administrative sanctions; Insurance Sector Law, Article 307; Law on Investment Companies in Risk Capital, Article 16.1; Law on Institutions for Occupational Retirement Provision, Article 66.1; Law on Specialised Investment Funds, Article 45.1; Law on UCI, Article 142.1; Law on AIFM, Article 52.1; Law on Prospectuses for Securities, Articles 15, 35 and 61; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 52; Law relating to the Issue of Covered Bonds, Article 23.3.

¹⁷⁴ Article 16 of the Law creating the CSSF, recalled in Law on the Financial Sector, Article 44; Insurance Sector Law, Article 7; Law on Investment Companies in Risk Capital, Article 15; Law on Institutions for Occupational Retirement Provision, Article 59; Law on Payment Services, Article 32; Law on UCI, Article 134; Law on AIFM, Article 47.3; Law on Payment Accounts, Article 3.2; Law on Markets in Financial Instruments, Article 50; Law on Short Selling of Financial Instruments referring to Regulation 236/2012, Article 34. According to the ECJ, confidential information must not be public and its disclosure ‘is like y to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the [prudential] system’, ECJ, (n. 137), ¶46. See C. Farinhas, ‘Access to confidential information in the financial and banking sectors: judgements of the Court of Justice in Altmann, Baumeister, UBS and Buccioni’, *Law and Financial Markets Review*, Routledge, 02/10/2019, vol. 13, no. 4, pp. 203-210, DOI:10.1080/17521440.2019.1668130.

¹⁷⁵ Law on the Financial Sector, Article 63.2; Insurance Sector Law, Article 306; Law on Institutions for Occupational Retirement Provision, Article 67-1; Law on Prospectuses for Securities, Article 14; Law on Transparency Requirement, Article 26b; Law on Payment Services, Article 46.3; Law on Short Selling of Financial Instruments, Article 7.2; Law on AIFM, Article 51.2; Law on Specialised Investment Funds, Article 51.3; Law on Payment Accounts, Article 32.3; Law on Markets in Financial Instruments, Article 49.1; Law on Central Securities Depositories, Article 7.1; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 5.1, Article 10.1, Article 15.1, and Article 20-12.1; Law establishing a IBAN Central Electronic Data Retrieval System, Article 5.6; Law establishing a Register of Fiducies and Trusts, Article 9.9; Law relating to the Issue of Covered Bonds, Article 25.2; Law on Inactive Accounts, Article 44.1.

Such a publication supposes that the consequences of the publication might be worse than the impact on the reputation of the concerned person, and are independent from the seriousness of the infringement.¹⁷⁶ Yet, the exception to publication is not contemplated in some laws.¹⁷⁷ Various laws specify that no publication is required for ‘decisions imposing measures that are of an investigatory nature’.¹⁷⁸

Regarding remedies, for the investigated person or the sanctioned addressee of a request for information, most laws provide that decisions concerning fines can be ‘referred to the administrative tribunal which deals with the substance of the case’ within one month¹⁷⁹ from the notification of the decision.¹⁸⁰ Other laws provide for a full review of the merits of the decision by the administrative tribunal,¹⁸¹ within one month from the date of notification of the decision.¹⁸² For the laws which do not set a delay for this remedy,¹⁸³ Article 13.1 of the Law on the Rules of Procedure before the Administrative Tribunals¹⁸⁴ sets a three-month delay from the moment of the

¹⁷⁶ Cour administrative, 19.07.2023, no. 48647C; based on Tribunal of the EU, *VQ v. European Central Bank*, 08.07.2020, T-203/18.

¹⁷⁷ Law on UCI, Article 149; Law on OTCD, Article 3.4; Law on Market Abuse, Article 14; Law on KID, Article 7; Law on Indices, Article 4.5; Law on the Operationalisation of European Regulations in the Area of Financial Services, Article 20-6.

¹⁷⁸ Law on the Financial Sector, Article 63-3a; Law on Institutions for Occupational Retirement Provision, Article 67-1; Law on UCI, Article 149.1; Law on Markets in Financial Instruments, Article 49.1, Law on the Operationalisation of European Regulations in the Area of Financial Services, Articles 5.1, 10.1, 15.1, and 20-12.1.

¹⁷⁹ Law on the Financial Sector, Article 63.2 and Article 63-5; Law on Investment Companies in Risk Capital, Article 16.2; Law on Specialised Investment Funds, Article 45.2; Law on AIFM, Article 52.2; Law on Payment Services, Article 46.4; Law on Payment Accounts, Article 33; Law implementing Regulation 2015/751, Article 3.4; Law on Markets in Financial Instruments, Article 65; Law on KID, Article 6; Law on Indices, Article 4.4; Law on Central Securities Depositories, Article 8; Law on the Operationalisation of European Regulations in the Area of Financial Services, Articles 4, 9, 14, 19, 20-5, 20-11 and 20-20. Article 8 of the Law on Short Selling of Financial Instruments provides for the same remedy, although in a three-month delay.

¹⁸⁰ However, various laws do not include this comment on the start of the delay: Law on the Financial Sector, Article 63.2 and Article 63-5; Law on Payment Services, Article 46.4; Law on KID, Article 6; Law on Indices, Article 4.4; Law on the Operationalisation of European Regulations in the Area of Financial Services, Articles 4, 9, 14, 19, 20-5, 20-11 and 20-20.

¹⁸¹ Articles 15, 35 and 61 of the Law on Prospectuses for Securities and Article 4 of the Law on OTCD provide that the decisions of the CSSF can ‘be subject to a right to apply for reversal with the administrative tribunal’.

¹⁸² Insurance Sector Law, Article 307; Law establishing a IBAN Central Electronic Data Retrieval System, Article 6; Law establishing a Register of Fiducies and Trusts, Article 10; Law relating to the Issue of Covered Bonds, Article 24.

¹⁸³ Law on Transparency Requirement, Article 27; Law concerning the Audit Profession, Articles 46 and 43.5; Law on Market Abuse, Article 15.

¹⁸⁴ *Loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives.*

notification of the decision or the date the person acquired knowledge of it. More problematically, no specific information on the remedies is to be found in the Law on Specialised Investment Funds, and the Law on Inactive Accounts. In that case, an action for annulment is generally open in front of the administrative tribunal.

3.1.4. Competition law enforcement

On the one hand, Article 24 of the Competition Law enables the Competition Authority to collect, upon invitation, any information, document, or justification, ‘in whatever hands they may find themselves’,¹⁸⁵ for instance in the ones of the OSPs. The authority can also request access to software and retained data when the investigation relates to ‘operations involving the use of information technology’.¹⁸⁶ In that case, the data should be provided ‘in clear’, meaning, for instance, not encrypted; and the authority can request the transcription of the documents. In both cases, the information must support the authority’s mission or be necessary to the control. According to Article 8 of the law on mergers bill,¹⁸⁷ these powers will be extended also to merger control carried out by the Competition Authority.

On the other hand, Article 27 of the Competition Law provides for a general power to request information necessary to carry out the missions of the authority or likely to be relevant.¹⁸⁸ Such a request can be addressed to undertakings and associations of undertaking, meaning ‘any entity carrying on an economic activity, regardless of its legal status or method of financing’,¹⁸⁹ as well as to any legal or natural person.¹⁹⁰ Such a broad definition would thus include OSPs, most of them being undertakings and legal persons. In particular, the request is not limited to information retained but can be extended to any information the addressee has access to.¹⁹¹

Under both provisions, investigative powers require the previous opening of a procedure by the Competition Authority itself or following a complaint.¹⁹² The investigation is directed by a head investigator.¹⁹³ The

¹⁸⁵ Article 24.4 of the Competition Law.

¹⁸⁶ Article 24.5 of the Competition Law.

¹⁸⁷ *Projet de loi 8296 relative au contrôle des concentrations entre entreprises et portant modification de: 1° la loi modifiée du 10 août 1915 concernant les sociétés commerciales ; 2° la loi modifiée du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier ; 3° la loi modifiée du 7 décembre 2015 sur le secteur des assurances ; 4° la loi modifiée du 30 novembre 2022 relative à la concurrence.*

¹⁸⁸ Article 27.1 and 2 of the Competition Law.

¹⁸⁹ Article 27.1 of the Competition Law in relation to Article 2.7.

¹⁹⁰ Article 27.2 of the Competition Law.

¹⁹¹ Article 27.1 of the Competition Law.

¹⁹² Article 21 of the Competition Law.

¹⁹³ Article 23 of the Competition Law.

decision to request information shall include, under penalty of nullity, the object and aim of the control,¹⁹⁴ and the legal basis and aim of the request.¹⁹⁵ In that latter case, the request should be proportionate and not lead the addressee, when it is an undertaking, to admit the existence of an infringement to competition law.¹⁹⁶ Also, the Competition Authority shall set a reasonable delay to answer a request of information directed to undertakings, and a specific and reasonable delay to answer a request directed to any other person.¹⁹⁷

Coercive fines can be adopted against undertakings, including OSPs, only when failing to provide accurate, complete, and non-misleading information within the deadline.¹⁹⁸ The decision is adopted by the College of the authority after notification to the undertaking of its right to be heard. The sanction can amount up to 5% of the global medium daily turnover of the preceding business year for each day of delay.¹⁹⁹ If the undertaking does not answer within the delay or provides an inaccurate, incomplete or misleading information, intentionally or negligently, the College can adopt a fine, after notification to the undertaking of its right to be heard. The fine can amount up to 1% of the global turnover of the preceding business year.²⁰⁰ No sanctions are provided regarding powers to request information based on Article 24.

Various safeguards are dedicated to protecting the interests of the investigated undertaking. Firstly, the agents of the authority shall respect the professional secrecy of their function.²⁰¹ Thus, the information gathered shall only be used for limited purposes, meaning these linked to the missions of the authority. Secondly, a number of procedural guarantees are introduced in order to guarantee the adversarial principle. The undertakings are notified of the objections raised against them, and they can submit observations within a period of at least a month.²⁰² Once notified, they have access to the file of the investigation, with exception to, for instance, confidential data and information protected by the secrecy of communications between lawyers and their clients.²⁰³ Thirdly, at any moment of the investigation, interested persons can request a confidential processing of the information provided or

¹⁹⁴ Article 24 of the Competition Law.

¹⁹⁵ Article 27 of the Competition Law.

¹⁹⁶ Article 27.1 of the Competition Law.

¹⁹⁷ Article 27 of the Competition Law.

¹⁹⁸ Article 27 of the Competition Law.

¹⁹⁹ Article 31 of the Competition Law.

²⁰⁰ Article 32 of the Competition Law.

²⁰¹ Both public servants and investigators take an oath on that regard, Articles 9, 18.2 and 19.2 of the Competition Law.

²⁰² Article 37.1 of the Competition Law.

²⁰³ Articles 38 and 39 of the Competition Law.

accessed.²⁰⁴ The decision of the head investigator in that respect is notified and can be appealed in front of the President of the Competition Authority. The maintaining of confidentiality of the information is then decided upon by the appointed magistrate, who shall not be a member of the College which will decide on the case.²⁰⁵ Finally, once a decision has been adopted by the Competition Authority, the concerned person has the right to lodge a complaint in front of the administrative tribunal.²⁰⁶

Various safeguards are provided for third parties, such as OSPs, requested by the Competition Authority to transfer information. Firstly, a control under Article 24 of the competition law must be notified to the head of the undertaking or the occupier of the premises or their representative. Following the control, a record is drafted by the agents and signed by the head of the undertaking or the occupier of the premises or their representative, who receives a copy of the document. Secondly, the addressee can benefit from the same safeguards as the concerned person (*see supra*) when a decision of penalties or fine has been adopted against them. This concerns in particular the right to be heard, the right to request the confidential processing of information or the right to a remedy. However, the right to appeal in front of an administrative tribunal directly against a decision to request information has been denied, since it does not qualify an administrative decision. The legality and the merits of such a request can only be challenged if a sanctioning decision is adopted. The administrative tribunal considered that offering a right to complaint against these requests would multiply the appeals and prolong the investigation, while the objectives of these sanctions are primarily dissuasive. According to the judges, in such context, the denial of remedy is necessary for the efficiency of competition law.²⁰⁷

3.1.5. GDPR enforcement

The CNPD can ‘access all personal data and to all information necessary for the performance of its tasks’.²⁰⁸ However, this power seems limited to request information from the data controller and the data processor affected by the investigation. However, the law does not provide an explicit

²⁰⁴ Article 33 of the Competition Law. The request must be written and specially motivated.

²⁰⁵ Article 34 of the Competition Law. The interested person can request to be heard by the magistrate. The final decision by the magistrate cannot be appealed in front of courts.

²⁰⁶ Article 63 of the Competition Law. However, against a decision on penalties and fines, any element that could have led to a complaint during the investigation cannot be questioned in front of the judge.

²⁰⁷ Tribunal administratif, (n. 34). On the contrary, for a direct remedy against a request for information by the European Commission, see Tribunal of the EU, *Cemex SAB de CV and Others v. European Commission*, 14.03.2014, T-292/11.

²⁰⁸ Article 58.1.e of the GDPR and Article 14.1 of Law organising the CNPD.

power to request information from third parties such as OSPs if they are not under investigation.

The Internal Rules on the Investigative Procedure²⁰⁹ grant the power to request information to third parties, however without imposing an obligation on that third party to respond to the request. Yet, the normative instrument used to extend investigatory powers can be debated, as these must usually be modified by laws, and not based on internal rules. Nevertheless, such an extension is in conformity with the interpretation of the GPDR by the ECJ: authorities should ‘possess, in particular, investigative powers, such as the power to collect all the information necessary for the performance of their supervisory duties’.²¹⁰ As underlined by European institutions, ‘the powers of the supervisory authority must be interpreted broadly to ensure full effectiveness of data protection for data subjects in the EU’.²¹¹ Since that power is granted under Internal Rules, it should not be possible to enforce them through the GDPR²¹² or national sanctions.²¹³

Whenever an investigation is open,²¹⁴ the Internal Rules provide that the head investigator can request any document on any support, including to make a copy of it, and access any electronic program or data and their transcription.²¹⁵ According to these rules, the professional secrecy cannot justify a refusal to answer a request.²¹⁶ The request must focus on useful data, documents necessary for the performance of the investigation, or any information and justification useful and necessary for the completion of the

²⁰⁹ *Règlement relatif à la procédure d'enquête*, from 22.01.2020.

²¹⁰ ECJ, *Maximillian Schrems v. Data Protection Commissioner (Schrems I)*, 06.10.2015, C-362/14, ¶ 43.

²¹¹ European Union Agency for Fundamental Rights et al., *Handbook on European data protection law*, Luxembourg, Publications Office of the EU, 2018, p. 195, DOI:10.2811/58814.

²¹² Article 83.5.e of the GPDR, referred to by Article 48 of the Law organising the CNPD: ‘administrative fines up to 20.000.000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher’.

²¹³ Article 49 of the Law organising the CNPD: coercive fine of up to 5 per cent of the average daily turnover for the previous financial year, or for the last financial year for which the accounts have been closed, for each day of delay from the date set by the Board in its decision.

²¹⁴ However, the opening of an investigation by the CNPD requires a very low threshold of clues of non-compliance to the GDPR, V. Wellens, ‘RGPD – Procédures préalables à une décision de l’autorité nationale de contrôle et devant les tribunaux’, *Articles LexNow*, 03.06.2019. It can be proposed by any member of the college to the whole college, at any time, by written or oral means, and this proposition must be approved at the majority by the college, Article 38 of the Law organising the CNPD and Article 2 of the Internal Rules on the Investigation Procedure.

²¹⁵ Article 8.2 of the Internal Rules on the Investigation Procedure.

²¹⁶ Article 8.2 of the Internal Rules on the Investigation Procedure, in application of Article 67 of the Law organising the CNPD, considering the professional secrecy of lawyers, notaries and audit professionals.

investigation.²¹⁷ If applicable, the rules require the requested person to transcribe electronic program or data into documents that can be used directly for the investigation.²¹⁸ Despite the lack of official interpretation of this provision, it might be construed as allowing to request intelligible data, meaning that it should not be encrypted, or containing an explanation of the relevant algorithms.²¹⁹

The data controller or processor under investigation benefit from various safeguards during the investigation. The decision to open an investigation, can be appealed in front of the administrative tribunal.²²⁰ The investigation must be both incriminating and exculpatory and must respect the adversarial principle.²²¹ Once evidence of violations of the GDPR are found, they must be notified to the concerned controller or processor, which can then provide written observations in the delay set by the head investigator (at least 15 days). If the head investigator responds to the inspected person's observations, the latter has a second opportunity to provide observations (within 15 days).²²² The investigated person (and their lawyer if designated) can request access to the case file.²²³ The collegial formation adopting the final decision shall be independent, meaning, the head investigator will not be part of it.²²⁴ The final decision of the CNPD can be appealed in front of the administrative tribunal.²²⁵

Considering that the safeguards are designed for the investigated person and that the request for data does not qualify as an administrative decision, the third parties receiving such a request have no specific remedies.

3.2. Administrative requests to online service providers: the bigger picture

Despite the apparent broadness of the powers of competent authorities to request information, including data, to third parties, such as OSPs, this power is particularly intrusive to fundamental rights, mainly, the right to privacy. Such an assessment has already been highlighted by the ECtHR in

²¹⁷ Article 8.2 of the Internal Rules on the Investigation Procedure.

²¹⁸ Article 8.2 of the Internal Rules on the Investigation Procedure.

²¹⁹ By comparison, rights to access and to portability, Articles 15 and 20 of the GDPR.

²²⁰ Article 55 of the Law organising the CNPD.

²²¹ Articles 39 and 40 of the Law organising the CNPD.

²²² Article 8.3 of the Internal Rules on the Investigation Procedure.

²²³ Article 8.4 of the Internal Rules on the Investigation Procedure.

²²⁴ Article 41 of the Law organising the CNPD. To avoid any other interest conflict, investigators can also be replaced, Article 5 of the Internal Rules on the Investigation Procedure.

²²⁵ Article 55 of the Law organising the CNPD.

the context of criminal proceedings.²²⁶ According to the European Production Order Regulation, in criminal proceedings, the request for content data and most traffic data must be authorised by a judge. The ECJ highlighted, as in that regulation, that other types of data, particularly data requested for the sole purpose of identifying the user, interfere in a lesser extent with the right to privacy, and can thus be requested by an administrative authority with no need for a prior judicial control.²²⁷ However, in Luxembourg, it does not seem to be authorised for administrative authorities to require in a compelling way any type of data to OSPs. In order to reflect whether such a power could be granted to those authorities it is then necessary to examine these investigatory powers within the constitutional framework, as well as in light of the Law on the Electronic Communications Sector.

Article 28 of the former Constitution of 1868 safeguarded the secrecy of letters and telegrams, primarily understood as protecting the privacy of their contents. In contrast, Article 30 of the new Constitution of 2023 broadly ensures the inviolability of communications, a right that may be limited by law.²²⁸ This updated approach to communications aims to align the constitutional text with the rapid advancements of technology. The concept of ‘communications’ is understood by the literature as including ‘correspondence, which is written, whatever its form (letters, facsimiles, e-mails, SMS (Short Message Service), MMS (Multimedia Messaging Service); dialogue (live, by telephone); and audiovisual communication (FaceTime, etc.)’.²²⁹ The term receives a definition under the Law on the Electronic Communications Sector: ‘any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service’.²³⁰ If the information is not directed towards a specific group, such as a publication visible to anyone with an account on a website or within a group (e.g. on Facebook) that is not accessible to a general visitor, it is possible that the criterion of a ‘determined number of parties’ is not fulfilled. In such cases, the published information may not be regarded as a communication, and hence, would not be protected under the right of the inviolability of communications. Moreover, this definition does not clarify whether traffic data associated with these communications falls within the scope of the term ‘communication’. The literature suggests that the inviolability of communications pertains solely to the content of the

²²⁶ ECtHR, *Benedik v. Slovenia*, 24.04.2018, no. 62357/14; ECtHR, *Ringler v. Austria*, 12.05.2020, no. 2309/10.

²²⁷ ECJ, *La Quadrature du Net and Others v. Premier ministre and Ministère de la Culture*, 30.04.2024, C-470/21.

²²⁸ The right to privacy is more generally protected at Article 11.3 of the Constitution.

²²⁹ A. Steichen, *La constitution luxembourgeoise commentée*, Bertrange, Legitech, 2024, p. 167.

²³⁰ Article 2.d of the Law on the Electronic Communications Sector.

message.²³¹ By opposition, another author extends the notion of communication to traffic data.²³² In sum, from a constitutional perspective, the protection of traffic data remains unclear.

The Law on the Electronic Communications Sector regulates the access to retained data by providers of electronic communication services and public communication networks operators. As a principle, electronic communications are confidential, including traffic data.²³³ Thus, retained traffic data in general can only be accessed upon an order from judicial authorities, or by request ‘of competent bodies for the purpose of settling disputes’.²³⁴ Retained location data can only be accessed upon order of judicial authorities.²³⁵ However, the law remains unclear as to whether ‘competent bodies’ include administrative authorities, and whether ‘disputes’ include administrative investigatory proceedings. These provisions pertain solely to the conditions for accessing data retained under the legal obligation to do so, and do not apply to data retained for other reasons, such as user consent, a legal requirement, or the necessity of processing to fulfil a contract.²³⁶

Nonetheless, the legislator has expressed a clear intention to impose specific safeguards regarding access to data, including traffic data, by ensuring prior oversight from a judicial authority or the Public Prosecutor’s Office, like in the Criminal Procedure Code. It can thus be questioned what types of data can be requested from OSPs by administrative authorities under their general powers to obtain information.

However, in absence of the interpretation of the Constitutional Court, the High Court (*Cour de Cassation*) has decided that the secret of correspondence does not protect messages of a professional nature in the context of relations between employers and employees. All correspondence exchanged using professional equipment is presumed to be professional

²³¹ Steichen, (n. 233), p. 168. Differently, the ECtHR has extended the notion of correspondence to include traffic data, which are thus protected under the right to privacy, ECtHR, *Malone v. the United Kingdom*, 02.08.1984, no. 8691/79, § 84; ECtHR, *Heglas v. Czech Republic*, 01.03.2007, no. 79650/16, § 61; ECtHR, *Copland v. the United Kingdom*, 03.04.2007, no. 62617/00, § 44.

²³² J.-L. Putz, *Cybercriminalité: criminalité informatique en droit luxembourgeois*, Luxembourg, Larcier, Regards sur le droit luxembourgeois, 2019, p. 484.

²³³ Article 4.1 of the Law on the Electronic Communications Sector, as the transposition of Article 5 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

²³⁴ Article 5.2 of the Law on the Electronic Communications Sector.

²³⁵ Article 9.2 of the Law on the Electronic Communications Sector.

²³⁶ Article 6 of the GDPR.

unless it is identified as being of a private nature.²³⁷ Extending the interpretation of that case law could enable to circumvent the protection of communications and allow access to content and traffic data of professional communications, which are particularly relevant when investigating the selected areas of enforcement.

4. TRANSFER OF DATA BETWEEN PROCEEDINGS

4.1. Transfers of data between national proceedings

In general, transfer of information between administrative sanctioning proceedings at the national level is regulated under the Law on Inter-Administrative and Judicial Cooperation.²³⁸ It enables the transfer of information either automatically, based on a secure, limited and controlled access, or upon request or spontaneously.

For example, the AEDT, the ADA and the Direct Taxes Administration can exchange information (*Administration des Contributions Directes*, ACD), upon request and for a specific case, or spontaneously.²³⁹ The AEDT and the ACD also share a common database to process information for their respective missions.²⁴⁰ The AEDT has direct access to the import/export database and road vehicle tax database of the ADA; and the ADA has direct access to the database of taxable persons for VAT purposes of the AEDT.²⁴¹ The AEDT can also exchange information with the Common Centre for Social Security, in general to assess the appropriateness of a bankruptcy petition, or specific information relevant to VAT assessment.²⁴² In that latter case, the Law on Inter-Administrative and Judicial Cooperation specifies that information should be shared electronically. Specific information is also shared by the Transport Ministry on motor vehicles to the ADA and the

²³⁷ Cour de Cassation, 15.12.2022, no. 156/2022. Analysed by J. Madert, E. Hullar, 'En matière de preuve : les bons réflexes pour un bon dossier !', *Revue Pratique de Droit Social*, 2023, vol. 18/2023, p. 25.

²³⁸ *Loi du 19 décembre 2008 ayant notamment pour objet la coopération interadministrative et judiciaire.*

²³⁹ Articles 3 and 4 of the Regulation on the Cooperation between the ACD and the AEDT (*Règlement grand-ducal du 22 janvier 2009 concernant la coopération interadministrative de l'Administration des Contributions Directes et de l'Administration de l'Enregistrement et des Domaines*). Articles 4 and 5 of the Regulation on the Cooperation between the AEDT and the ADA (*Règlement grand-ducal du 3 décembre 2009 concernant la coopération interadministrative de l'Administration de l'Enregistrement et des Domaines et de l'Administration des Douanes et Accises*).

²⁴⁰ Article 1 of the Regulation on the Cooperation between the ACD and the AEDT.

²⁴¹ Article 1 of the Regulation on the Cooperation between the AEDT and the ADA.

²⁴² Articles 8 and 9 of the Law on Inter-Administrative and Judicial Cooperation.

AEDT, in that latter case, electronically with strong authentication;²⁴³ and by the Labour Inspectorate to the AEDT, electronically.²⁴⁴ The AEDT and the Employment Development Agency can also exchange information from records and reports.²⁴⁵ The AEDT can also request information from the CSSF. Any information obtained from the CSSF must be used only for the purposes it has been transferred for.²⁴⁶ In case the information was received from a foreign competent authority, an authority of that authority is necessary to transfer the information to a different authority in Luxembourg.²⁴⁷ Tax authorities, the AEDT and the ACD, and judicial authorities, can also mutually share information.²⁴⁸

Furthermore, sectoral laws provide for rules on transfer of information between administrative authorities. The ADA can transfer information to any public entity, as long as the information is necessary for the implementation of its mission, and the transfer is in conformity with EU law. Tax secrecy shall be protected by the receiving authority.²⁴⁹ The CSSF as well as the CAA may exchange information upon several legal bases,²⁵⁰ particularly to ‘cooperate with the Government, with the Luxembourg Central bank and with other [national] prudential supervisory authorities’.²⁵¹ When receiving information, the CSSF can only use it for the purpose set in the legal basis of the transfer, unless the sending authority consent to its use for a different purpose.²⁵² Cooperation among the CSSF, the CAA and the Consignment Office is also possible, and any further transmission needs the approval of the sending authority.²⁵³

Other legal bases provide for the transfer of data between administrative and judicial authorities. Information can also be transferred between the

²⁴³ Article 14 of the Law on Inter-Administrative and Judicial Cooperation and Regulation on the Cooperation between the Transport Ministry and the AEDT (*Règlement grand-ducal du 21 mars 2024 concernant la coopération interadministrative entre le Ministère de la mobilité et des travaux publics et l’Administration de l’enregistrement, des domaines et de la TVA*).

²⁴⁴ Article 15 of the Law on Inter-Administrative and Judicial Cooperation.

²⁴⁵ Article 15^{ter} of the Law on Inter-Administrative and Judicial Cooperation.

²⁴⁶ Article 15^{quater} §2 of the Law on Inter-Administrative and Judicial Cooperation.

²⁴⁷ Article 15^{quater} of the Law on Inter-Administrative and Judicial Cooperation.

²⁴⁸ Article 16 of the Law on Inter-Administrative and Judicial Cooperation.

²⁴⁹ Article 320 of the GLCE.

²⁵⁰ For instance, Article 8 of the Insurance Sector Law, Article 44.3 of the Law on Markets in Financial Instruments. Confidential information can only be used for the limited purposes listed at Article 11 of the Insurance Sector Law; and exchange of information to other authorities shall conform to the criteria of Article 12.

²⁵¹ Article 3-2 of the Law creating the CSSF and Article 3 of the Insurance Sector Law for the CAA. The resolution council of the CSSF can also exchange information with the Luxembourg Central Bank, Article 12-9.2 of the Law creating the CSSF.

²⁵² Article 16 of the Law creating the CSSF.

²⁵³ Article 38 of the Law on Inactive Accounts.

police and the ADA, upon judicial authorisation if the data concerns an open criminal investigation.²⁵⁴ In general, the police can transmit information to administrative authorities, upon judicial authorisation if the data is related to an open criminal investigation and when it is necessary for the implementation of the mission of the CNPD.²⁵⁵ These transmissions are controlled by the CNPD.

In general, any public authority knowing about facts that could constitute an offense must report to the Public Prosecutor's Office.²⁵⁶ As a result, various laws in the area of banking and financial markets grant the CSSF and the CAA the power to transfer information to the Public Prosecutor's office for opening a criminal prosecution.²⁵⁷ Particularly, the CSSF, the Public Prosecutor's Office and the Police 'may exchange any information they deem useful or necessary' regarding market abuse infringements.²⁵⁸ Cooperation between the CSSF and the Public Prosecutor's Office is mandatory to decide whether a specific infringement might be investigated and prosecuted in criminal or administrative proceedings. Courts can also require the Competition Authority to produce evidence from the administrative file to quantify damages.²⁵⁹

4.2. Transfers of data between foreign and national proceedings

Transfers of data between foreign and national proceedings under national law is significantly impacted by EU law. When exchanging data with third countries, this chapter will focus on national legal bases and thus exclude international and European law bases.

²⁵⁴Article 5 of the Police Exchange of Information Law (*Loi du 22 février 2018 relative à l'échange de données à caractère personnel et d'informations en matière policière*).

²⁵⁵ Articles 23 to 26 of the Police Exchange of Information Law.

²⁵⁶ Article 23.2 of the Criminal Procedure Code.

²⁵⁷ Law on the Financial Sector, Article 53.1.10; Law on Institutions for Occupational Retirement Provision, Article 62.1.g; Law relating to Specialised Investment Funds, Article 45.3.l; Law on Payment Services, Articles 31.4 and 58-5.1.10; Law on UCI, Article 147.2.l; Law on AIFM, Article 50.2.l; Law on Market Abuse, Article 4.1.5; Law on Payment Accounts, Article 31.5; Law on Markets in Financial Instruments, Article 45.2.8; Law on KID, Article 4.1.7, Law on Central Securities Depositories, Article 2.8; Law on Prospectuses for Securities, Articles 7.2.15° and 35.10°; Law on the Operationalisation of European Regulations in the Area of Financial Services, Articles 2.2.7, 7, 12.7, 17.2.6, 20-3.2.7, 20-9.2.8, and 20-16.2.15; Law relating to the Issue of Covered Bonds, Article 20.9°; Law on Inactive Accounts, Article 40.2.6°.

²⁵⁸ Article 7 of the Law on Market Abuse.

²⁵⁹ Article 75 of the Competition Law.

The ADA can exchange information with other EU customs authorities, which must be done through ‘electronic data-processing techniques’.²⁶⁰ Based on national law, any information to prevent and investigate infringements can be exchanged with foreign competent authorities on condition of reciprocity.²⁶¹ Furthermore, the exchange of confidential information outside of the EU customs territory can only be undertaken upon a specific legal basis, which is ‘an international agreement or Union legislation in the area of the common commercial policy’.²⁶²

The AEDT can exchange information with national competent authorities in other Member States based on Article 7 of the Council Regulation (EU) No 904/2010 of 7 October 2010 on Administrative Cooperation and Combating Fraud in the field of VAT. The request must be reasoned, and grounds for refusal are strictly limited. When the authority has already access to the information, the deadline for providing it is one month.²⁶³ The exchange of information can also occur spontaneously.²⁶⁴

Laws on the banking and financial sectors all include similar provisions on cooperation.²⁶⁵ In particular, Article 44-1 of the Law on the Financial Sector enables cooperation and exchange of information with other national competent authorities, and European supervisory bodies in the same area. The CSSF can indicate to the national authority, to which it transfers information that it cannot be further transferred or used without its express consent; the CSSF must abide to the same restriction if so requested. Grounds for refusal are limited to *ne bis in idem* issues: the existence of judicial proceedings for ‘the same actions and against the same persons before the Luxembourg

²⁶⁰ Article 6.1 of the Union Customs Code. See Commission implementing Regulation (EU) 2023/1070 of 1 June 2023 on technical arrangements for developing, maintaining and employing electronic systems for the exchange and storage of information under Regulation (EU) no. 952/2013 of the European Parliament and the Council; and Commission implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) no. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

²⁶¹ Article 325 of the GLCE.

²⁶² Article 12 of the Union Customs Code.

²⁶³ Article 10 of Council Regulation (EU) no. 904/2010 of 7 October 2010 on Administrative Cooperation and Combating Fraud in the field of VAT.

²⁶⁴ Article 13 of Council Regulation no. 904/2010 on Administrative Cooperation and Combating Fraud in the field of VAT.

²⁶⁵ See also Articles 52 and 53 of the Law on Markets in Financial Instruments; Article 10 and 11 of the Law on Market Abuse; Article 15 of the Law on Investment Companies in Risk Capital; Article 59 of the Law on Institutions for Occupational Retirement Provision; Article 23 of the Law on Transparency Requirements; Article 33 of the Law on Payment Services; Article 134 of the Law on UCI; Articles 53 to 57 of the Law on AIFM; Articles 56 and 60 of the Law concerning the Audit Profession; Article 34 of the Law on Payment Accounts; Articles 11, 36 and 59 of the Law on Prospectuses for Securities; Article 21 of the Law relating to the Issue of Covered Bonds.

courts, or [the existence of] a final judgment [that] has already been delivered in relation to such persons for the same actions in Luxembourg'.²⁶⁶ The CSSF can also transmit information to international bodies such as the International Monetary Fund under specific conditions, or to third countries authorities based on cooperation agreements.²⁶⁷ The receiving authority must provide safeguards equivalent to the professional secrecy of the CSSF and the right to information, and guarantee purpose limitation.²⁶⁸

Based on EU law, the CSSF must also cooperate with other national competent authorities, the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pensions Authority.²⁶⁹ The CAA can also exchange information with other EU national competent authorities, or authorities of third countries based on an agreement, as long as the professional secrecy is maintained. If information comes from another EU national authority, it can only be shared with third countries' authorities upon the express authorisation of the initial authority.²⁷⁰ The CAA can also transmit information to European supervision authorities, such as the European Securities and Markets Authority.²⁷¹ Confidential information received by the CSSF or the CAA can only be used for specific purposes, such as to impose penalties.²⁷²

The Competition Authority can exchange information with other national competent authorities, as well as with the European Commission. The information shall only be used for the purpose for which it was

²⁶⁶ Article 44-2 of the Law on the Financial Sector.

²⁶⁷ Articles 44-2a and 44-3 of the Law on the Financial Sector.

²⁶⁸ Article 44.4 of the Law on the Financial Sector.

²⁶⁹ For instance, Article 43 of the Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds; Article 23 of the Regulation (EU) no. 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds; Article 22 of the Regulation (EU) no. 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds; Article 35 of the Regulation (EU) no. 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds; Article 36 of Regulation (EU) no. 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation; Article 35 of Regulation (EU) no. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Articles 35 and 36 of Regulation (EU) no. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps. Under this text, disclosure of information to third countries requires an agreement and an express written authorisation, Article 40.

²⁷⁰ Articles 9 and 10 of the Insurance Sector Law.

²⁷¹ Articles 12 and 13 of the Insurance Sector Law.

²⁷² Article 44.6 of the Law on the Financial Sector and article 11 of the Insurance Sector Law.

requested.²⁷³ Furthermore, the authority can also exchange information, including confidential, with other competent national authority, based on the Digital Markets Act.²⁷⁴ Additionally, the Competition Authority must abide to cross-border cooperation provisions of the Law on Services in the Internal Market.²⁷⁵ This law does not apply to banking and financial, and tax services,²⁷⁶ hence its application to the CSSF, the CAA, and the AEDT is excluded. Based on this text, cross-border requests for information exchanges must be motivated and used only for the purpose they have been transferred for. Information is shared electronically.²⁷⁷

The CNPD can offer mutual assistance, including by sharing information, among national data protection authorities.²⁷⁸ Requests for information, which must be reasoned, must be answered within one month and through electronic means.²⁷⁹ Grounds for refusal are limited to lack of competence or infringement to EU or national law for compliance with the request.

4.3. Admissibility of data collected from online service providers as evidence

There are no rules on admissibility of evidence dedicated to data collected from OSPs. In general, ‘to be admitted, evidence obtained in an administrative procedure should be useful to the discovery of the truth, gathered in a fair manner and debated in an adversarial manner’.²⁸⁰ There are rare rules specific to data transferred from other (national or foreign) proceedings. Overall, they are admissible if legally obtained and duly communicated.²⁸¹ Any information obtained by a tax authority can be used by another one after its transfer.²⁸²

²⁷³ Articles 66, 73 and 74 of the Competition Law, in relation with Articles 11 and 12 of Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁷⁴ Article 38.1 of the Digital Markets Act.

²⁷⁵ *Loi du 24 mai 2011 relative aux services dans le marché intérieur, transposing Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.*

²⁷⁶ Article 1.2.b and Article 1.3 of the Law on Services in the Internal Market.

²⁷⁷ Article 25 of the Law on Services in the Internal Market.

²⁷⁸ Article 8.9° of the Law organising the CNPD.

²⁷⁹ Article 61 of the GDPR.

²⁸⁰ K. Ligeti, S. Tosza, ‘Admissibility of Evidence, Transnational E-Evidence and Fair-Trial Rights in Luxembourg’, in: L. Bachmaier Winter, F. Salimi (eds.), *Admissibility of evidence in EU cross-border criminal proceedings: electronic evidence, efficiency and fair trial rights*, Hart Publishing, Hart studies in european criminal law, 1st ed., 2024, p. 98.

²⁸¹ *Ibid.* p. 94.

²⁸² Articles 3 and 6 of the Law on Inter-Administrative and Judicial Cooperation.

Generally, Luxembourg administrative and criminal proceedings are based on the principle of freedom of proof. In front of administrative courts, the evidence only needs to be brought to the case through a deposit at the tribunal's registry, and then be communicated to the parties, to respect the adversarial principle.²⁸³ The evidence must be licit, meaning that it should have been collected in accordance with legal provisions and the principles of the fair trial.

According to the Luxembourg case law, illicit evidence can be discarded only 'if certain formal conditions had to be met on penalty of nullity and the irregularity affected the credibility of the evidence', or in case of a violation of the right to a fair trial (especially of the adversarial principle).²⁸⁴ This case law was issued in the context of criminal proceedings, which provides for more formal conditions for applying its coercive measures.²⁸⁵ If it was to apply to administrative (or civil, in case of VAT) judicial proceedings, it would find very little application as very few formal conditions are prescribed under the penalty of nullity in those proceedings.²⁸⁶

Some sectoral laws provide additional information regarding admissibility of evidence. Admissible evidence in front of the Competition Authority encompasses all 'documents, oral statements, electronic messages, recordings and any other items containing information, regardless of form or medium'.²⁸⁷ Any information or document obtained by the AEDT may be

²⁸³ Article 8 of the Law on Proceedings before Administrative Courts (*Loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives*).

²⁸⁴ S. Menetrey, 'Preuve et droits fondamentaux en droits européen et luxembourgeois', in: Collectif (ed.), *Annales du droit luxembourgeois 2013*, Bruxelles, Bruylant, *Annales du droit luxembourgeois*, 2015, p. 33, analysing Cour de cassation, 22.11.2007, no. 57/2007. See also K. Ligeti, 'Luxembourg', in: F. Giuffrida, K. Ligeti (eds.), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings*, University of Luxembourg, 2019, p. 187.

²⁸⁵ In criminal proceedings, a nullity request must be filled in front of the pre-trial chamber of the district court within five days when obtaining knowledge about the act, Articles 48-2 (preliminary investigation) and 126 (instruction) of the Criminal Procedure Code. See V. Covolo, 'Luxembourg', in: S. Allegrezza, V. Covolo (eds.), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on judicial remedies*, Wolters Kluwer Italia, 2018, pp. 365-366.

²⁸⁶ The admissibility of evidence is mainly not addressed by the competent administrative authorities, and such a topic must be discussed in front of courts, whenever the decision is open for judicial review. Furthermore, due to the autonomy of criminal law, the inadmissibility of evidence in administrative proceedings does not impact the same assessment in criminal proceedings where the same evidence is used. Similarly, criminal proceedings and tax proceedings are independent regarding the assessment of the admissibility of evidence, Ligeti, (n. 282), p. 192.

²⁸⁷ Article 20.2 of the Competition Law.

invoked by the State for the recovery of any sum due under tax laws.²⁸⁸ Information obtained by the AEDT will not be controlled but will be admissible as evidence according to the records of its agents.²⁸⁹ Records of judicial police officers, customs officers, and law enforcement officers responsible for assisting with tax inspections are also admissible.²⁹⁰ However, oath cannot be used as proof under tax proceedings in front of the AEDT and administrative judges.²⁹¹

5. CONCLUSION

Powers to request data, meaning, electronic information, from OSPs in punitive administrative proceedings are limited to three sectoral frameworks enforced by the CSSF. These are also the only cases where an administrative authority must request a judicial authorisation. Nevertheless, administrative authorities generally have broad powers to request any information, including stored electronically, from any persons. The ECJ case law, in particular regarding enforcement of the legislation on financial markets and of data protection, supports extended interpretation of these texts. Despite the opportunities to gather useful information from OSPs for administrative proceedings, the interviews conducted with practitioners in Luxembourg highlighted that ADA and the CSSF usually do not have the necessity to do so. Investigative powers of the CNDP to obtain information from third parties, despite being not enforceable (see section 3.1.5), still face generally unquestioned compliance: ‘companies feel *de jure*, or at least *de facto*, obliged to cooperate, and are reluctant to seek redress’.²⁹² Finally, third parties, such as OSPs, can voluntarily provide information to national authorities such as the Competition Authority.²⁹³

It seems clear that the scope of these powers has not yet taken into account the opportunities (and challenges) brought by the possibility to acquire electronic evidence from OSPs.²⁹⁴ Furthermore, the new Constitution

²⁸⁸ Article 70.2 of the VAT Law, referring to Article 31 of the Law to Ensure the Fair and Accurate Collection of Registration and Inheritance Taxes (*Loi du 28 janvier 1948 tendant à assurer la juste et exacte perception des droits d'enregistrement et de succession*).

²⁸⁹ Article 68§1 of the VAT Law.

²⁹⁰ Article 68§3 of the VAT Law.

²⁹¹ Article 59.3 of the Law on Proceedings before Administrative Courts and article 68 of the VAT Law.

²⁹² J.-L. Putz, *Données personnelles et droit pénal*, Legitech, Bibliothèque de la Revue Pénale Luxembourgeoise, 2024, p. 25.

²⁹³ Article 27.1 of the Digital Markets Act.

²⁹⁴ See S. Tosza, ‘European Union · The E-Evidence Package is Adopted: End of a Saga or Beginning of a New One?’, *European Data Protection Law Review*, 2023, vol. 9, no. 2, pp. 163-172; S. Tosza, ‘Mutual Recognition By Private Actors In Criminal Justice? E-

requires taking into account the inviolability of communications, together with the Law on the Electronic Communications Sector. It is not clear whether the constitutional rights concern the protection of traffic data, while the sectoral law clearly indicates the will of the legislature to ensure judicial oversight of access to data, including traffic data. While electronic evidence could become an asset to investigate administrative infringements, no less than for criminal investigations, the legal framework is sparse and clearly lacks consistency.

Safeguards against investigatory powers of administrative authorities suffer from the same shortcomings. The general framework on administrative proceedings remains vague, framed into principles recognised and detailed by the case law. Although OSPs could face non-negligible sanctions when not answering properly to a request for data of an administrative authorities, there are few to no remedies dedicated to third parties. The consequences of such situation are exacerbated as a request for data is usually not interpreted as an administrative decision, and thus, no safeguards nor remedies are available.