Inspection and Evidence in European Cooperative Decision-Making Process

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A. Introduction

Chapter 3 of Book III of the ‘EU ReNEUAL Model Rules on Administrative Procedure’ (Model Rules) regulates direct gathering of information, in the course of an administrative decision-making procedure, taking place in the territory of a Member State or regarding a subject located in a particular Member State. The immediate collection of information is carried out either by a European authority or by a national authority not pertaining to the Member State in which the information is obtained. The subject of Chapter 3 (Articles III-10 to III-21 of Book III) is the immediate acquisition of information by an administrative authority in the territory of a Member State.

Such immediacy allows a distinction between the acquisition of information provided for in Chapter 3 from other information-gathering phenomena. This is the case of the collection of structured information or information available in shared data banks, which is a well-known phenomenon in the relevant sector-specific law, and now constitutes the subject of Book VI. This is also the case for the information transmitted between authorities. It also common in sector-specific law. In the Model Rules it is generically designated as ‘mutual assistance,’ and it is regulated in Book V thereof. The information transmitted may stem from a prior investigation or inspection conducted by a national authority.

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in its own territory, which can be carried out either on its own initiative, 4 by
authority of EU law, 5 or following the request submitted by an EU authority 6 or
by another Member State authority. 7 These inspections conducted by a national
authority in its own territory remain outside the scope of Chapter 3. Whereas
sector-specific law has traditionally regulated the acquisition of information in a
joint or complementary manner, one of the distinct features of the Model Rules
project is that it provides for a structural dissociation of the various ways of gather-
ing procedural information.

Nor does Chapter 3 directly address investigation or inspection authority
groups or networks. In sector-specific rules and in practice, there are investigation
groups or networks governed by ‘guidelines’ or homogeneous provisions
which lay down certain criteria regarding intervention and transfer of informa-
tion. These national authority groups or networks are sometimes coordinated
by a European agency, such as the European Medicines Agency. National
authorities take part in this agency’s governance. These groups and networks
act in accordance with investigation standards and patterns with a high degree
of technical homogenization. 8 Versus these structured forms of investigation

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4 For instance, the information gathered by the National competition authority is forwarded to the
other Member States authorities and to the Commission in accordance to Article 12 of Council Regulation
(EC) No 1/2001 of 16 December 2002 on the implementation of the rules on competition laid down in
Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

5 Regarding the agricultural market, see the mandatory inspections (to be carried out by the Member
States and whose reports are to be conveyed to the Commission) which are regulated in Articles 103,
106, and 107 as well as in the Annex V of Commission Implementing Regulation (EU) No 543/2011 of
7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in
respect of the fruit and vegetables and processed fruit and vegetables sectors (OJ L 137, 15.6.2011, p.1). As
to the food inspections, see also Article 3 of Regulation (EC) No 882/2004 of the European Parliament
and of the Council of 29 April 2004 on official controls performed to ensure the verification of compli-
cance with feed and food law, animal health and animal welfare rules (OJ L 165, 30.4.2004, p.1). Related
to the fisheries policy, see Article 17 (2) of Council Regulation (EC) No 1005/2008 of 29 September
2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregu-

6 That is the case of the requests of checks on-the-spot, according to Article 48 (6) of Regulation (EU)
No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing,
management and monitoring of the common agricultural policy and repealing Council Regulations

7 For example, Article 4 of Council Regulation (EC) No 515/97. Regarding the banking system see also
the capital adequacy of investment firms and credit institutions (recast) (OJ L 177, 30.6.2006, p. 201).
This type of European coordination agency is considered in E. Chiti, ‘European Agencies’ Rulemaking:

8 Related to the clinical trials and the ‘Good Clinical Practices (GCP) Inspection Services Group,’ see:
C. Göbel, D. Baier, B. Ruhfus and F. Hundt, 'GCP Inspections in Germany and in Europe following the
or inspection, Chapter 3 focuses on single case decision-making procedures, initiated and managed by an administrative authority in which other authorities (either domestic or EU authorities) may 'participate.'

Immediate search for information may take three basic forms: the simple request for information, an interview of people who are aware of certain facts, or an on-the-spot check. The collection of information, in any of its forms, normally affects the legal sphere of natural or legal persons who have the information inquired about. This can be either because the investigations themselves may restrict certain rights, or because the information obtained therefrom may be used in the decision-making procedure. This natural impact on the legal status of the subjects being investigated explains why Article III-17(1) of Book III provides for an explicit subjection of the inspection activities to the European Union Charter of Fundamental Rights and to the EU and national provisions on the protection of personal data. It also provides an explanation as to why Articles III-16 through III-19 set forth relevant limits and requirements in order to protect the subjects being inspected. Apart from the immediate effect on the rights and freedoms of the persons concerned, the immediate acquisition of information shows another relevant legal aspect: the relationship between the investigation authority and the authorities of the Member State where the person or the premises holding the information searched for are located. This Chapter focuses on this inter-administrative aspect of the immediate acquisition of information.

Strictly speaking, there are two forms of inter-administrative interaction: the first occurs when the investigation refers to individuals, and the latter takes place when the inquiries target a Member State. Although Chapter 3 (as in Book III in general) draws no structural distinction whatsoever between decision-making procedures concerning individuals and those referred to Member States, such a distinction makes perfect sense, and in fact it underlies several modulations expressly provided for in Articles III-11 to III-20. As has been stated, the gathering of information in the territory of a given Member State is governed on a twofold basis, namely the subjective perspective (protection of natural and legal persons' rights) and the inter-administrative perspective (prerogatives and limits of the investigation or inspection authority). However, this twofold regulatory dimension contained in Chapter 3 becomes blurred when the investigation or the inspection is projected onto a national authority. Firstly, this is due to the fact that certain safeguards and limits (Charter rights, for instance) only make sense when applied to individuals and not to public authorities. Secondly, it is because there are certain charges or limits stemming from the principle of

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9 The primary distinction between these two forms of investigation, in M. Rebollo Puig, 'La actividad inspectoría', in J. J. Díez Sánchez (ed). La función inspectoría (INAP 2013) 55-116, 60.


11 David (n 2) 247.
sincere cooperation, which do not apply to investigatory duties, such as the right of the national authority to participate in an EU authority’s inspection in its territory. Such right is excluded when the subject being inspected is the national authority itself (Article III-18(1)). This is also the case of the duty incumbent on EU authorities to inform the concerned Member State authorities in good time of an inspection to be conducted in the Member State’s territory. The relevant authority shall only be freed from this duty to inform when the inspected subject is the national authority itself (Article III-18(2)).

The highly complex interaction amongst authorities governed by Chapter 3 can be explained in the light of three fundamental statements:

a) In the first place, Article III-11(2) grants general investigatory powers to every administrative authority – both EU authorities and those Member State authorities which apply EU law – within the territory of the relevant Member States. This general principle of law does not prevent the most stringent forms of investigation, such as mandatory interviews and on-the-spot checks, from having to be expressly permitted by sector-specific provisions (Articles III-12(2) and III-16(1), respectively). Therefore, the general principle establishes that in order for EU law to be complied with, administrative authorities may carry out investigation or inspection activities either acting unilaterally, or participating in an information-gathering procedure conducted by another authority (below § 38). However, this legal principle, which can be induced from Chapter 3, shows two intensity levels. Its most intense wording targets the investigations of EU authorities. Its application is very strict in this regard, and except for what may be provided by sector-specific law, the EU is granted broad investigatory powers, based on Articles 337 and 352 TFEU. In a second tier, Chapter 3 also provides for horizontal investigations, i.e. the chance for a national authority to investigate in another Member State’s territory or to inquire about subjects based in its own territory. These transnational investigation possibilities are much narrower and depend on the prior agreement of the Member State concerned (host authority), or on the explicit provision of an EU legislative act.

b) Secondly, the general investigation or inspection duties, in the somewhat broad terms provided for in sector-specific law and the agreements between various authorities, lead to a general duty to tolerate the inspection conducted by an outside authority which is incumbent on the Member State concerned (host authority).

c) In the third place, once the investigatory powers to be exercised in the territory of a Member State have been established, along with the subsequent duty to tolerate or duty of submission to the investigations conducted by other authorities (either national or European) incumbent on the host authority, Chapter 3 sets forth many limits and instrumental duties aimed at channelling and balancing out ‘trans-territorial’ investigation and inspection duties. These limits are mostly duties or charges incumbent on the inspection authority, such as the duty to inform the Member State authorities before carrying out an inspec-

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tion, the duties to comply with the inspection instructions issued by the host Member State authority when the remaining authorities simply 'participate' in the domestic procedure, or the duties to inform the Member State authorities of the outcome of such inspections. Notwithstanding, there are also certain duties incumbent on national authorities so as to enable EU authorities to conduct the relevant inspection in their territory, such as the duty to provide judicial or police assistance to an outside inspection.

This interaction between the inspection authority and the authorities of the host Member State concerned can be broadly labelled as 'sincere cooperation' (Article III-18), which directly ties the various powers and cooperation duties to Article 4(3) TEU. Ultimately, every form of inter-administrative assistance can be traced back to the general duty of 'loyalty' set out in Article 4(3) TEU.\textsuperscript{13} Such 'sincere cooperation' regarding investigations and inspections crystallises in a set of powers, controls, and duties placed on the various authorities concerned in the information gathering process. This set of powers, controls, and duties is enshrined in Articles III-10 through III-20. However, given the existence of a general principle of 'sincere cooperation' in Article 4(3) TEU,\textsuperscript{14} in practice some other complementary cooperation duties could be pointed out,\textsuperscript{15} which are not expressly provided by Book III or by sector-specific law.

The fact that the duties of 'sincere cooperation' are expressly foreseen in Articles III-10 through III-20 does not imply that the authorities enabling the investigation or helping therein have an ancillary role, since the very provisions contained in Articles III-10 through III-20 – which set out cooperation duties – also confer on the host national authority a monitoring role, either direct or indirect, over the outside authority's activities. Such monitoring role is exercised over the activity of both EU authorities and Member State authorities. Hence, whilst Article III-18(5) sets out the duty, incumbent on national authorities, to assist the inspection authority (regardless if it is an EU authority or a Member State authority) such form of assistance is set up as a sort of control over the inspection in question. By means of such 'assistance,' control over the outside inspection is exercised, regardless of whether the inspection is conducted by an EU or a Member State inspection authority.

B. Reference Framework: the Administrative European Union

Investigation and inspection activities in the EU account for an administrative reality inherent to the European Union itself. This regulation

\textsuperscript{13} C. Harlow and R. Rawlings, \textit{Process and Procedure in EU Administration} (Hart Publishing 2014) 47.

\textsuperscript{14} Among others: Case C-14/83 Von Colson and Kamann [1984] ECR 1891, para. 12; Case C-230/81 Luxembourg v Parliament [1985] ECR 255, para. 38.

\textsuperscript{15} M. Klamert, \textit{The Principle of Loyalty in EC Law} (Oxford University Press 2014) 238.
began in the early years of the EEC. At first, legislation focused on the possible findings or inspections of the EU in the Member States, either checking on national administrations or investigating or inspecting private parties within a Member State. A good example of the former is provided by the Common Agricultural Policy (CAP),\(^{16}\) whereas a good example of the latter is displayed by secondary legislation on competition.\(^{17}\) From the very start, this legislation involved national authorities in the EU investigation activities in various ways and with varying degrees of intensity. These shared or joint activities could be designated as ‘shared administration’ or ‘mixed administration.’ The subsequent evolution of secondary law has furthered the complexity of the relevant connections and interactions among EU investigation and inspection bodies and national authorities. This is mainly because horizontal interaction has been added to the already existing vertical interaction, relating to which the notions of ‘shared administration’ or ‘mixed administration’ have been coined. Hence, and taking banking law as an example, a national authority can investigate facts and obtain information in another Member State’s territory with greater or lesser control or participation on the part of the Commission.\(^{18}\) Vertical and horizontal interactions, which may occur simultaneously, go beyond the historically narrower notion of ‘shared’ or ‘mixed’ administration. Thus, for a good part of the inspection activity carried out within the EU it would be more fit, from an epistemological perspective, to talk about a ‘European Administrative Union.’\(^{19}\) Along these lines, the codification of law on investigations and inspections in Chapter 3 of Book III would allow an ‘Administrative Union of Investigation and Inspection’ to be spoken of.

Reference made to an ‘Administrative Union of Investigation and Inspection’ is not only valuable from an epistemological or theoretical standpoint; there is a clear heuristic dimension to it. It offers a reference analytical framework which allows for solving the issues posed by investigations and inspections, such as the following: the procedural status of persons affected by procedures managed by ‘outside’ authorities (an EU authority or another national authority); or the very difficult distinction within a sole investigation procedure between national and EU activities, for the purpose of determining the rules applicable in each case, the national court competent for judicial review, where appropriate, and the possibility of holding liable for damages one national authority or another.

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\(^{19}\) E. Schmidt-Assmann, ‘Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts’, in Schmidt-Assmann and Schöndorf-Haublich (n 2) 1-24, 2.
The defining feature of the 'Administrative Union of Investigation and Inspection' is the close connection between the activities carried out by EU and national authorities participating or cooperating in the information-gathering process. Each authority's officials act in an integrated manner, not only connected or networked with other authorities (either domestic or European). For instance, there is a high degree of integration when, in statement-taking activities conducted by an EU authority there is some sort of participation by the Member State authority, by means of its own officials, where the investigated subject lives or is based. This integration accounts for more than mere assistance or cooperation. It may also be perceived when an EU authority requests from a national judicial authority a warrant for a coercive entry into the premises of the subject being inspected. From a formal perspective, such authorization issued by a judicial authority is a distinct legal act, which can be clearly differentiated from the inspection decision as well as from the request of entry issued by the EU authority. However, they are strongly integrated acts, which have the same meaning and the same purpose, and to that extent they should not be assessed in isolation.

According to this approach, the separation principle - which calls for an analytical distinction of each authority's actions, regardless if it is a national authority or an EU authority, as well as for the subsequent definition of the applicable rules and of the judicial authority competent for a potential judicial review - has logical gaps. This is due to the fact that it breaks down in a plurality of acts (each of them with its own regulatory framework and its own grounds for judicial review) what is actually a heavily integrated action. There is no doubt that the so-called separation principle fosters legal certainty, since it prevents both regulatory and control overlaps. By means of the breakdown of the investigation or inspection activities, each act or measure is reassigned to an authority, and thus to a legal and control framework, yet at the expense of deforming the integrated administrative reality inherent to the 'Administrative Union of Investigation and Inspection.' This work acknowledges from the outset the need to have regard to the separation principle or differentiation. However, certain complementary pathways are suggested herein. These proposed pathways are meant to allow for a comprehensive legal understanding of the investigation and inspection activities. This is done by admitting the existence of a plurality of rules (both national and EU rules) applicable to the set of integrated actions within investigation or inspection procedures as a whole; as well as by admitting the possibility that Member States are able to immediately assess the legality of inspections and investigations conducted by an EU authority in a Member State.

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Footnote:
These two forms of flexibilisation of the separation principle, for the purpose of adapting the legal analysis to the actual integrated inspections and investigations, may lead to overlaps of rules and controls. This is an unavoidable outcome, yet it puts forward what the aim of the theoretical focus should be: it should move towards the drafting and perfection of ‘nomodynamic criteria’ (realizations of the principle of primacy of EU law) as well as towards a fine distinction, within the legal controls exercised over integrated administrative action, between the validity assessment of a particular legal act (which obviously can only be on a judicial authority) and the verification of the compliance of a given act with the relevant rules, which may be in various judicial bodies at the same time (in the ECJ and the national courts, for instance).

C. Duties to Inform in Good Time

As has been pointed out before, notwithstanding the provisions of sector-specific legislation, Book III of the Model Rules provides for broad investigation and inspection powers of the administrative authorities applying EU law. In turn, within each national territory, Member States tolerate and facilitate such investigations or inspections. The actual scope of these broad powers and duties is defined by means of certain instrumental charges or duties expressly provided by Book III. These instrumental duties make up the ‘sincere cooperation’ system inherent to the ‘European Union of Investigation and Inspection.’ The first set of duties under examination herein consist in informing Member State authorities in good time of an inspection which is to take place in the territory of the Member State in question. This duty to inform prior to the inspection applies both in relation to a request for information addressed to a party located in a Member State (Article III-11(4) and (5), as much as anticipating an EU inspection in the territory of a Member State (Article III-18(2)).

I. By request or mandatory order for information and interview

Articles III-11 and III-12 provide for the request or mandatory decision addressed to a party to be interviewed or to provide all necessary information as a basic way of collecting information. The wording of these articles has been clearly inspired by competition law. Such a request has two legal effects. One for the party concerned, and another one between the EU and the relevant national authorities. As to the effects on the party, the request, as opposed to the mandatory decision, is not compulsory for its addressee. From the perspective of inter-administrative cooperation, Articles III-11 and III-12 impose cooperation charges or duties amongst the various authorities concerned. In this sense, Articles III-11 and III-12 draw a distinction between the

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request or mandatory order of an EU authority, and the request or order from a
Member State authority to another national authority. The duty of inter-adminis-
trative cooperation becomes more intense when the request comes from the
EU authority (Article III-11(4) and III-12(2)) than when it comes from a Member
State authority (Article III-11(5) and III-12(2)).

In the first case, pursuant to Article III-11(4), it is on the EU authority to
communicate its request or mandatory order, ‘without delay,’ to the competent
authority of the Member State in whose territory the seat of the party requested
is located, as well as to other national authorities ‘whose territory is affected.’
The explicit distinction between the State where the seat of the party is located
and the State whose territory is affected makes perfect sense, particularly for
undertakings with a legal seat in a Member State yet with economic activity and
employees or managers in other Member State(s). This duty to inform brings
with it a procedural duty of accuracy regarding which national authority is
competent for the request. Article III-11 identifies two kinds of request, namely,
the request to provide all necessary information and the request of interview.

a) As for the request or mandatory order of information, it can be considered
that the duty to inform incumbent on the EU authority is somewhat flexible. It
is enough for the EU authority to submit it following the request and ‘without
delay,’ since no national authority’s activity is dependent on the compliance with
the duty to inform.

b) A very different case is that of the request or mandatory order for an
interview. Regarding the mere request for an interview (i.e. not a compulsory
request), because a possible domestic action depends on the effective communi-
cation of the request (by the Member State where the interview is to be carried
out): it is a request that its officials assist the officials of the EU authority to
conduct the interview. Such assistance is only possible if the national authority
is aware of the request for an interview in good time. That is why an interpreta-
tion of Article III-11(4) in accordance with the principle of ‘sincere cooperation’
leads to conclude that the forwarding of the request to the national authority
must be dispatched simultaneously with that dispatched to the party concerned;
and the date set for the interview may not be immediate but sufficiently delayed
to allow a response from the national authority.

c) As for the requests of information or interview from a Member State
authority, Article III-11(5) also foresees the forwarding of a copy of the request
to the national authority of the country in which the addressee is located. As
with the situation described above, the forwarding of the copy could be flexible
when related to a request or duty to inform, as no relevant legal consequence
stems from such obligation. Conversely, the copy must be submitted far enough
in advance of the foreseen interview date, as the Member State has the power to
refuse it.
II. Duty to inform in good time of an inspection

Following the pattern of previous rules, Article III-18(2) imposes on the inspection EU authority the duty to inform the respective Member State authorities of the planned inspection to be conducted therein. This duty has an instrumental nature with respect to the general mandate enshrined in Article III-17(4), according to which public authorities shall ensure that similar inspections are not being conducted at the same time in respect of the same facts.23

III. Duty to assist incumbent on a Member State during inspections conducted by EU authorities

1. Introduction

The powers of inspection of the EU authorities, as well as the relevant duty to facilitate the inspection in one's own territory, call for additional limits and duties when the inspection has a coercive nature, i.e. it is against the inspected subject's will. Book III does not authorize EU authorities to forcibly enter any private premises. As a result, such an entry can only take place following the single case authorization of the relevant Member State. In this connection, Article III-18(5) and (6) provides for a duty of assistance incumbent on national authorities regarding the coercive investigation conducted by an EU authority. Such assistance may be of a police or a judicial nature, pursuant to the legislation of the Member State where the inspection is carried out.24 On the other hand, owing to its nature, the assistance by the national authority can only be provided by means of those actions which cannot be performed by the EU authority by itself. For instance, where the EU authority may impose penalty payments in order to overcome a given subject's reluctance towards being inspected, the said EU authority may not request assistance from a Member State.25 Although Article III-18(5) refers to legal assistance to be provided to the EU inspection authority by national authorities, the action of national authorities is neither strict nor merely cooperative, at the service of the EU authority. Through its assistance, the given Member State controls or monitors the EU

22 In this sense, Article 47 (2) of Regulation (EU) No 1306/2013 on the CAP.
23 The prohibition of parallel inspections can be previously found i.a. in Article 3 of Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).
24 Case C-94/00 Roquette Frères [2002] ECR I-9011, par. 34.
inspection authority’s activities, in order to safeguard the right to privacy among other rights to which the subjects being inspected in its territory are entitled.26

The regulation provided by Article III-18(5) and (6) is closely related to various sector-specific rules which had been previously enacted27 and particularly with current Article 20 of Regulation 1/2003. Competition law is the area of law which has had the greatest influence on the wording of Article III-18(5) and (6). Pursuant to Council Regulation 1/2003 and the all-important case-law stemming therefrom, the assistance of national authorities provided to outside inspections is founded on three rules:

a) In the first place, secondary legislation on competition authorises the Commission to conduct all necessary inspections of undertakings in Member States (Article 20(1) of Council Regulation 1/2003).

b) Secondly, there is a general principle of EU law according to which the inspections carried out by the Commission, when they are not allowed by the undertakings, should only be conducted following a judicial authorization issued by the concerned Member State, in order to avoid ‘arbitrary and disproportionate interventions by public authorities in the private sphere.’28

c) Thirdly, the potential judicial review performed by the competent national courts over the Commission’s inspections is fairly narrow. Its sole purpose is to verify that the Commission’s decision is authentic and that the coercive measures envisaged are neither arbitrary (not lacking in legal foundation) nor disproportionate to the subject-matter of the inspection (proportionality control). These limits, initially stated by the ECJ,29 are now expressly laid down in Article 20(8) of Council Regulation 1/2003. Accordingly, the EU inspection authority is not obliged to submit to the national judicial authority all of the information and evidence gathered by the time the inspection was ordered. It shall only make available to the competent national court enough information (even prepared on an ‘ad hoc’ basis) with which the relevant judicial authority can make sure on an adequate basis that the inspection measure is neither arbitrary nor disproportionate.30

The relevant case law on coercive inspections in the competition domain has had a decisive impact on the general regulation provided by Article III-18(5) and (6). As a result, in practice, even in the absence of a sector-specific law ruling on the application of the Model Rules to particular kinds of inspections, the substantive rules contained in Article III-18(5) and (6) shall be equally applicable, since they contain general principles of EU law.

27 See Article 9 of Council Regulation (EURATOM, EC) No 2185/96.
30 Hirsbrunner (n 29) 1179 § 5.
2. The scope of the duty of assistance: a plurality of regulatory standards

National judicial assistance provided to EU inspection authorities has often been included within the so-called ‘separation principle.’ Thus, regarding judicial assistance there are two clearly differentiated actions, each of them subject to totally or partially different regulatory standards and assigned to different authorities (national and European). Accordingly, the inspection decision lies within the EU authority, it is subject to EU law, and a possible review of legality lies with the Court of Justice (by no means shall this review lie in a national court). On the other hand, the warrant of search and seizure, as for the enforcement of an EU inspection decision, would fall within the national scope: connected with each Member State law and exclusively attributed to the national judicial authority. Notwithstanding, despite its apparent simplicity and attainability, the reality of judicial assistance provided to the inspection decided on by an EU authority is much more complex. This is due to the fact that strictly speaking, ‘judicial assistance’ brings with it a set of intermingled acts, which can hardly be taken account of through the notion of ‘separation.’ First we are confronted with the EU inspection decision; secondly we encounter the EU request of a warrant of entry, search and seizure; and thirdly we are faced with the national judicial decision. In this sequence, various European and domestic rules intermingle with varying intensities and different meanings.

In the first place, the inspection decision is fully subject to EU law. Thus, it is subject to both sector-specific rules and general mandates enshrined in Articles III-16 through III-20. Pursuant to Article 263 TFEU, it is on the Court of Justice to ensure compliance with the abovementioned rules. However, since the inspection decision is the legal act on which the subsequent (or simultaneous) request for judicial assistance as well as the very settlement of the request for judicial assistance are grounded (pursuant to Article III-18(6)), the powers of national courts for analysing or indirectly assessing the lawfulness of the inspection decision should not be denied. Since it is on the national judicial authority to ensure that the authorization of the inspection is authentic and that the coercive measures envisaged are neither arbitrary nor excessive (in accordance with Article III-18(6)) such task cannot be carried out without having regard to the content of the inspection decision (made by the EU authority) and its compliance with EU law. European case law on the right to inviolability of the home, both from the ECHR and the ECJ, has pointed out that the legal assessment of an inspection measure (which could violate fundamental rights)

31 David (n 2) 260.
34 Case T-285/11 REC Deutsche Bahn AG and Others v Commission, paras. 66 y 74.
depends to a great extent on how the judicial review over its enforcement is performed. An inspection measure which severely restricts the fundamental right to privacy may be admitted where its enforcement is strictly controlled ex ante by a judge. In turn, where there is no prior judicial control over the intervention measure, the judicial review of the inspection decision should necessarily be stricter. This approach, even though it has been elaborated for those cases in which the same Member State authorities make the decision ordering the inspection and authorise the implementation of the necessary measures for the enforcement thereof, can be generally applicable to the scope of the 'Administrative Union of Investigation and Inspection.' In addition, it may be asserted that the assessment of the legitimacy of an inspection decision is not foreign to the domestic court in charge of authorizing intervention measures (to enter premises, to take samples, copies, etc.) for the enforcement of the decision ordering the inspection. In fact, the very scope of the judicial review is dependent on the inspection decision to be enforced. The same conclusion can be drawn from the reference made to the EU case law when it states that in the context of judicial assistance provided to an EU inspection, the national court may refer a question for a preliminary ruling to the Court of Justice in relation to the EU provision on which the inspection decision is founded.\textsuperscript{35} This possibility would make no sense if in the judicial assistance procedure the judicial authority was not able to assess the adequacy of the inspection decision under EU law. Obviously this does not mean that judicial assistance gives national courts the opportunity to rule on (and let alone annul) an EU inspection decision.\textsuperscript{36} However, it is possible, in the terms of the \textit{Foto-Frost} doctrine,\textsuperscript{37} for judicial assessment of compliance of the inspection decision to be assessed, at least summarily, with the applicable law.

Secondly, the EU request for judicial assistance (addressed to a Member State) is subject to the requirements and limits provided by EU law. These requirements and limits might stem both from primary law (fundamental rights) and secondary legislation (sector-specific procedural rules and general standards provided for in Article III-18(5) and (6)). The request for a warrant conferring powers of entry, search and seizure, although lacking any binding force, necessarily has to comply with the applicable EU law provisions, both from a substantive and a formal perspective. In other words, the request cannot call for a judicial authorization without duly justifying its necessity, nor can a disproportionate or excessive judicial authorization be requested, having regard to the information available to the inspection authority. A different issue altogether is that such regulatory standards, which may be immediately projected onto the EU application for authorization, are subject to judicial review by the ECJ by way

\textsuperscript{35} Case T-289/11 \textit{Deutsche Bahn AG and Others v Commission}, para. 94.

\textsuperscript{36} In general terms, not directly referred to inspection procedures: M. Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' (2007) \textit{Die Öffentliche Verwaltung} 761 et seq., 769.

\textsuperscript{37} Case C-314/85 \textit{Foto Frost} [1987] ECR 4199.)
of the action for annulment (Article 263 TFEU). Even though it is true that the ECJ has admitted to actions brought against inspection measures enforcing the initial decision, where those measures 'produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position,'\(^{38}\) such 'binding effect' does not directly apply to the mere request for a warrant conferring powers of entry, search and seizure.

Finally, coercive assistance (warrant of entry, search and seizure) is subject to regulatory standards, both EU and domestic standards. Hence, the judicial authority competent to authorise the entry, search and seizure in a premise is bound by EU law (fundamental rights, sector-specific rules regulating each kind of inspection, and the general provisions contained in Article III-18(5) and (6)), as well as by the ECHR fundamental rights and national rules, mainly by national fundamental rights and the applicable procedural legislation. The foregoing prompts the following remarks:

a) In the first place, the national judicial authority is immediately subject to Articles III-16 through III-20, which lay down the general guidelines applicable to the warrant of entry into a home. In fact, the application of these provisions does not stem from a prior reference contained in a legislative text (EU sector-specific law) in the terms of Article III.1(2). This is due to the fact that what is actually regulated by Articles III-16 through III-20 is not national administrative authority action (which according to Article III.1(2) is not directly governed by the provisions of Book III unless expressly agreed by the Member State concerned or explicitly provided by EU sector-specific law), but rather EU inspections to which assistance is provided by the police or judicial authorities of the relevant Member State. Notwithstanding, and although it may seem contradictory at first, the immediate applicability of Articles III-16 through III-20 does not imply that EU authorities are already authorized, in virtue of such provisions, to apply for judicial authorization when so required by the relevant domestic law. This is because Article III-16, despite the fact that it has direct effect, requires that every power related to coercive inspections (such as entry into private premises) should be expressly foreseen in the applicable EU sector-specific law. Consequently, an EU authority will be able to apply for, and the national court to authorize, the warrant of entry, search and seizure regulated (with direct effect) by Article III-18(5) and (6) only if the said express legal authorisation exists. In this connection, the domestic court must ensure that a warrant of entry, search and seizure not only complies with the requirements set forth by Article III-18(5) and (6), but that it is also grounded on a particular sector-specific rule which entitles the EU authority to conduct the said entry, search and seizure. This might imply that, depending on the specific sector of activity within which the inspection is conducted, the authorizing powers of the national court will be more or less intense. For instance, the authorizing powers of the national court will be much more intense regarding competition inspections (pursuant to Article 20 of Regulation 1/2003) than in agricultural subsi-

\(^{38}\) Case C-85/87 Dow Bendix [1989] ECR 3137, para. 49.
dies, where only the Commission is granted (and thus the national court can only authorise) ‘access to the books and all other documents, including documents and metadata drawn up or received and recorded on an electronic mean relating to expenditure financed by the EAGF or the EAFRD,’ having regard to the following remark: ‘persons delegated by the Commission shall not take pa
inter alia, in home visits or the formal questioning of persons within the fram
work of the domestic legislation of the Member State concerned.’ In any event,
what is truly relevant for the domestic court are the EU legislative acts, not the
numerous sector-specific inspection protocols (‘guidelines’ and alike) that the
Commission (or any of its agencies or committees) has bound itself to apply.\(^{39}\) The foregoing does not detract from the fact that by means of such ‘protocols,’
the national judicial authority can assess on a more accurate basis, the arbitrar
or disproportionate nature of a given inspection intervention measure.

b) Since the national judicial authority is bound by EU sector-specific law, i
may authorize intrusions into privacy different from those expressly establishe
in Article III-16(2). Given the open-ended reference to sector-specific law made
by this provision, more intense entry, search and seizure, or intervention mea
sures than those provided for in Article III-16(2) are possible. This may be the
case of the entry into private homes of managers and other members of staff,
which accounts for a more intense measure than the mere entry into ‘premise
land, and means of transport’ (to which Article III-16(2)(a) refers) and which is
currently set out in EU competition law provisions.\(^{40}\) In that case, the national
judicial authority should authorize the intervention measure within the limits
posed by fundamental rights commented on below.

In accordance with the foregoing, a hypothetical national rule imposing
more severe limits or requirements on the warrant of entry, search and seizure
granted to an EU authority, more restrictive than those contained in Articles
III-16 through III-18 or in sector-specific legislation, would not be in complian
c with EU law. Consequently, those parts which are non-compliant would not ha
to be applied by national judicial authorities.

It seems like a possible piece of national legislation which did not provide
for any sort of judicial review before the coercive entry of a given authority
(either a domestic or an EU authority) would be in compliance with Article
III-18. In fact, Article III-18, following the pattern of previous sector-specific
law, does not necessarily provide for national judicial review prior to the entry
into business premises.\(^{41}\) It simply foresees the possibility that domestic legisla
tion could require such a judicial authorization. Notwithstanding the fore-

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\(^{39}\) References to these guidelines can be found in Case T-289/11 REC Deutsche Bahn AG and Others v
Commission, para. 83.

\(^{40}\) Article 21 of Regulation 1/2003. See Al Santamaría Dacal, ‘Poderes reforzados de la Comisión ‘versus
derechos de las empresas en los procedimientos de Derecho de la competencia: la búsqueda de un
necesario equilibrio’, in JE Soriano García (ed.), Procedimiento administrativo europeo, (Thomson-Reuters
Civitas 2012) 849 et seq., 868.

\(^{41}\) Deutsche Bahn AG, para. 94.
going, the requirement for a previous warrant of coercive entry, search and seizure accounts for a general principle of EU law, in spite of the fact that it is not expressly provided for in Article III-18(5). Therefore it is binding on any EU inspection authority. As a result, no national legislative act will be able to free the competent court from carrying out the said judicial review prior to the entry, search and seizure conducted by an EU authority. However, the required judicial review does not have to be identical to that provided for in Article III-18(6).

IV. How fundamental rights are binding on coercive Member State assistance

The way fundamental rights have a binding effect on inspections when a coercive entry into private premises is carried out is particularly complex. There are two fundamental rights examined herein: the right to home privacy and the fundamental right to an effective legal remedy.

1. The right to home privacy

The right to privacy at home has two or three applicable wordings. The first is that provided by Article 7 CFREU. The second is contained in Article 8 ECHR. The third wording is, where appropriate, that which stems from domestic constitutional law e.g. Article 18(2) of the Spanish Constitution, Article 13 of the German Grundgesetz or Article 14 of the Italian Constitution. It seems like the scope and intensity of the protection granted to the right to the inviolability of the home in its various European and national wordings should be similar, since the right to the inviolability of the home is part of the European constitutional tradition. However, this is not exactly the case. The ECJ has put forward a restricted understanding of the right to home privacy (taken as a general principle of EU law) when addressed to legal persons and not individuals. In turn, the right to the inviolability of the home has been more far-reaching in the case law of the ECHR. In this regard, although Article 52(3) CFREU and the ‘explanations’ to which Article 52(7) CFREU refers to clarify that Charter rights shall have the same ‘meaning and scope’ as ECHR rights, when the same right is recognised in both legal instruments, the truth is that the ECJ case law on the ‘general principle’ of inviolability of the home (which outlines the content of current Article 7 CFREU), differs in certain points from the case law delivered by the ECHR on Article 8 ECHR. In addition, it is definitely unclear that the ECJ has to adapt its jurisprudence to that of the ECHR on the basis of Article 52(3) CFREU. Finally, national constitutional case law does not show identical features either. The possible diversity within the content of the various fundamental rights to privacy, vis-à-vis invasions of home privacy, can make it hard on

43 Case C-94/00 Roquette Frères [2002] ECR 1-911, para. 29.
44 Société Colas Est and Others v. France, no 37971/97.
the courts (pursuant to Article III-18(6)) regarding the authorization of coercive inspections in business premises. We will now examine analytically how each fundamental right standard operates vis-à-vis the national authority applying for a warrant of entry, search and seizure and vis-à-vis the national judicial authority competent – in terms of Article III-18 – for authorizing such coercive entry into the relevant business premises:

In the first place, neither the application of the EU authority nor the subsequent Member State warrant of entry, search and seizure, as provided by Article III-18(5) and (6), are hampered by Article 7 CFREU. It must be clarified that to the extent that the domestic court applies EU law (Article III-18), it is bound by the fundamental right to the inviolability of the home (Article 7 CFREU) when it comes to issuing an authorization for a coercive entry. This fundamental right, as it is worded in the Charter, does not hinder the issuance of an authorization for a coercive entry by the national court as provided by Article III-18(6). In principle, it must be understood that Article 7 CFREU contains the ECJ case law delivered up until 2007, worded as a ‘general principle’ regarding the inviolability of the home. This case law, as was mentioned above, provides for a narrow legal understanding, because it does not require the EU inspection authority to provide the national judicial authority with the whole file (including the already existing evidence held by the EU authority) on which the need for conducting an inspection in situ is grounded.⁴⁵ As a result, from Article 7 CFREU’s perspective, the warrant of entry, search and seizure shall be issued pursuant to Article III-18(6), i.e. without having been provided with the file assembled by the EU authority.

In addition, it must be considered whether the EU authority interested in entering into private premises, on the one hand, and the national judicial authority competent to authorise such entry, search and seizure, on the other hand, are governed by the highest privacy protection standard in terms of Article 8 ECHR. This greater degree of protection is remarkable with regards to the ‘information providing reasonable grounds’ which has to be made available to the judicial authority by the inspection authority. At this moment, a distinction has to be drawn between the applicability of the right to home privacy to the EU authority requesting the entry, search and seizure, and to the national judicial authority competent to authorise it.

Regarding the EU authority, it is true that Article 52(3) CFREU establishes that the ‘meaning and scope’ of the fundamental right enshrined in Article 7 CFREU ‘shall be the same’ as that of the right to respect home privacy laid down in Article 8 ECHR. Notwithstanding the foregoing, this does not entail – as it does for EU inspection authorities – that Article 8 ECHR overrides Article 7 CFREU. This would result from Article 53 CFREU if the EU became a party to the ECHR. However, since the EU accession to the ECHR is still pending (and has now become probably impracticable after Opinion 2/2013 lodged by the Court of Justice), fundamental rights guaranteed by the ECHR only constitute

part of the 'general principles of the Union’s law' (Article 6(3) TEU), and are not immediately applicable individual rights. Although the ECJ has declared expressly and in the abstract that the scope of Article 7 CFREU coincides with the scope of Article 8 ECHR, it is ultimately on the ECJ to outline the interpretation of Article 7 CFREU on the basis of the 'general principle' of respect for privacy induced from Article 8 ECHR. When performing this interpretation, the ECJ may very well differ from the broader understanding offered by the ECHR. In this connection, the requirement for submission of the assembled file to the national judicial authority — so that such judicial authority can fully assess the opportunity of a coercive inspection — shall not be immediately demanded from the EU inspection authority when the latter calls on national judicial assistance. A different issue altogether is that the high standard of inviolability of the home embedded in the ECHR case law would have to be embraced by the Court of Justice within its interpretation of Article 7 CFREU. This outcome is hypothetically possible, especially if we take into account that a good part of the ECJ case law on the CFREU has chosen to award fundamental rights an intense and comprehensive recognition. However, this option, although it is possible, does not seem probable. This is due to the fact the current ECJ case law on inspections has led to a well-crafted balance between home privacy (which to this day has been understood as a general principle of law) and the effectiveness of EU law by means of inspection activities. This twofold stance of the ECJ, halfway between respect for fundamental rights and the indispensable effectiveness of EU law as a whole, differs from the ECHR approach. This may very well account for the existing case law divergences. In any event, having regard to the long-standing habit of the ECJ to assert the effectiveness of EU law, by means of the 'useful effect' interpretative standard, an interpretation of Article 7 CFREU which ends up balancing out the scope of Article 7 CFREU and Article 8 ECHR is far from foreseeable.

The situation faced by the national judicial authority which has to rule on the application for entry, search and seizure is completely different. It must be taken into account that national judicial assistance does not only account for instrumental activity for the EU inspection but also for Member State action. This implies that, in principle, the warrant of entry, search and seizure should be governed by the inviolability of the home standards applicable in each Member State. The first of these is in fact Article 8 ECHR, which through individual

46 Among others, Case C-617/10 Akerberg Fruesson (n.y.p), para. 44.
49 Case C-390/12 Pfäger (n.y.p), para. 30.
accession of each State applies immediately, as a fundamental right and not as a mere ‘general principle of law,’ in every EU Member State. In principle, since Article 52(3) CFREU directly chooses to apply the highest fundamental right standard, it must be considered that the national court must require the degree of information and accuracy resulting from the ECHR case law on Article 8 ECHR from the EU inspection authority. However, this demand, whilst it does not conflict with Article 7 CFREU (since Article 52(3) CFREU quells the regulatory quarrel), does conflict with Article III-18(6) which expressly prevents the national court from requesting from the EU authority the assembled file that allows for the on-the-spot check. That being the case, insofar as Article III-18 is fully lawful (since it is in compliance with its primary regulatory standard, i.e. Article 7 CFREU) it has to be fully effective over the national rule. The foregoing is due to the application of the principle of primacy of EU law, even over domestic constitutional law, in the terms of the Mellon doctrine. Consequently, although Article 8 ECHR, in its condition of effective rule within each Member State law calls for the national court to have the utmost information, which would provide grounds for the need for entry, search and seizure, the national judicial authority should not be able to require such information from the EU inspection authority, but only the most obtainable information to which Article III-18 refers. This conclusion brings up the issue, either in fact or at least in appearance, that it entails that the national court has to breach a legally binding international treaty (the ECHR). A possible solution to this conflict could stem from the very understanding of the fundamental right to home privacy (Article 8 ECHR) as a right restrictable ‘by law.’ In other words: Article 8 ECHR expressly acknowledges the possibility of having the law setting restrictions which are proportionate to the content of the relevant right. Since in relation to EU coercive inspections the said ‘law’ is an EU legislative act, it should be considered that the definitive or final content of the right to home privacy enshrined in Article 8 ECHR, which is binding on the national judicial authority, is in fact that stemming from Article III-18, and with such restricted scope, it has a binding effect on the national court which has to authorize the coercive inspection measure.

Something similar should be stated regarding the application for national judicial assistance, about a hypothetical national privacy standard resulting from national constitutions. In this case, and the Mellon doctrine should be brought

51 Case C-399/11 Mellon (n.y.p). paras. 58, 59, 63.
52 Niemietz v Germany, no. 13710/88, 16 December 1992, para.31; Bergh, no. 24817/08, 14 March 2013, para. 104.
53 The concept of “definitive scope” of a fundamental right after being delimited by the law: R. Alexy, Teoría de los derechos fundamentales (Centro de Estudios Constitucionales 1993) 272.
up again, it must be taken into consideration that the national judicial authority authorizing the coercive entry by the inspection authority should not add any further requirements to those provided for in Article III-18. If that were the case, such requirements would account for a denial of the primacy of EU law (Article III-18) over Member State law, having regard to the fact that the abovementioned Article III-18 is in compliance with Article 7 CFEU. In order to avoid an override of a domestic fundamental right, it could be understood that there is a scope for decision-making for the national judicial authority which would not be regulated in Article III-18, and thus not subject to the standards established in Article 7 CFEU, but rather to the protection standard of the national fundamental right. This could be realised in relation to the time extension of the coercive inspection measure, or in relation to the geographical determination of the premises to be inspected, but only to the extent that Article III-18 lacks specific rules, and such rules cannot be found in sector-specific secondary law. In such cases, more stringent national privacy standards (both statutory and those stemming from fundamental rights) than those resulting from Article 7 CFEU, could be deemed acceptable. However, this plausible argument is distorted because it departs from the premise of a false absence of regulation (in Article III-18 or in sector-specific legislation). It can be considered that when Article III-18(6) fails to establish any specific time or geographical limits on the warrant of entry, search and seizure, it is in fact granting the administrative authority some room so it can perform its own weighing on the basis of the needs of the particular case and pursuant to the principle of effectiveness of inspections. Accordingly, the lack of further remarks in Article III-18 would account for a ‘false gap’, so there would be no material scope for the application of domestic law.

2. Right to an effective remedy

Concerning the warrant of entry, search and seizure, in the context of an EU on-the-spot inspection, the question of an existing overlap of various rights to effective remedy standards might arise: under Article 6 ECHR, under the applicable national fundamental right, and under Article 47 CFEU. Furthermore, the right to an effective remedy enshrined in Article 47 CFEU applies insofar as Article III-18(6) directly provides that the warrant of coercive entry, search and seizure has to be authorized by a (national) court. Therefore, an EU law provision is the relevant rule which triggers the applicability of the rights of defence and the right to be heard to which the subject being inspected is entitled in the judicial proceedings for the warrant of entry, search and seizure. Given the possible simultaneous effectiveness of the three fundamental rights to an effective remedy, it is necessary to draw up certain criteria aimed at

54 This possible interpretation of Article 53 of the Charter in De Witte (n 50) 1534.

making the three standards compatible. To that end, the abovementioned criteria may be extended in relation to the right to home privacy.

In the first place, it may be considered that Article III-18(6) limits the possible judicial review over the coercive inspection when the former is requested, yet not at the time it is performed. In other words, Article III-18(6) does not expressly provide for the possibility that each specific coercive measure in the course of an inspection already authorized by the competent national court can be challenged before the national court itself. This regulation may raise compatibility concerns regarding the fundamental rights enshrined in Article 47 CFREU and in Article 6 ECHR.\(^5\)

a) It is true that the ECHR case law has declared that the judicial review of inspection measures has to be 'certain' as well as not conditioned by the content of the final inspection decision.\(^5\) Notwithstanding, it also has to be taken into account that the fundamental right to an effective remedy is an individual right subject to a statutory formulation, substantially open to legal provisions. To that extent, it could be considered that once an effective legal remedy against the EU inspection decision (before the ECJ), against its coercive enforcement (by means of a national warrant of search and entry), and against the final decision of the procedure during which the coercive inspection has been conducted (before the ECJ), has been guaranteed, an EU rule (such as Article III.18(6)) may exclude the individualized control over each inspection measure (to take samples or to obtain copies of documents) generally covered by the warrant of entry, search and seizure. On the other hand, it also has to be taken into account that EU case law understands the right to an effective legal remedy as a right to a particular outcome: a right to assert one’s rights before a court, by means of ex ante or ex post procedural instruments.\(^5\) It seems clear that such a protection can be attained through the ex ante and ex post controls allowed by Article III-18.

b) Concerning domestic law, which could allow for an individualised control over each single coercive measure in the form of statutory or fundamental rights (as happens in France, for instance),\(^5\) the abovementioned Mellonie doctrine should be applied again, and thus it shall be considered that the competent national judicial authority must not be able to carry out an analytical control of each single inspection measure covered by a warrant of entry, search and seizure, since such judicial review would be far beyond the judicial review provided for in Article III.18(6).

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\(^5\) Ildak v Turkey, no. 12865/02, 30 September 2008, para. 51. Regarding the judicial guarantee of privacy: Bernh, no. 24117/08, 14 March 2013, para. 172.

\(^5\) Article L-450-4 of French Commercial Code (Code de Commerce). According to this Article, the court can overlook at any time the enforcement of the warrant of entry, search and seizure: 'A tout moment, il peut décider la suspension ou l'arrêt de la visite.'
The restrictive approach on the grounds and information to be attached to the application for a warrant of entry, search and seizure by the EU inspection authority can be assessed on the basis of the right to an effective judicial review. In accordance with Article III-18(6), the administrative application for a warrant of entry, search and seizure must not be accompanied by the assembled file or the evidence held by the EU authority, but only a detailed explanation of the grounds for the need to enter into a private home. Such limitation in the information required does not allow for the national court to have full knowledge of the inspection activities, but only the assessment of to what extent the requested warrant of entry, search and seizure is duly justified. However, such limitation does not infringe the various fundamental right standards stemming from the right to an effective remedy. The truth is that both the ECHR and the ECJ have declared that the right to an effective remedy requires the judicial authority to have ‘full jurisdiction’ over the subject-matter.\(^6\) Notwithstanding, this assertion entails – in the context of the cited case law – that an appeal before a first instance or single-instance court, should not be limited to questions of law leaving aside the questions of fact. Nevertheless, this is very different from having the law define restrictively the judicial review standards. It must be recalled, and this applies both to Article 47 CFREU and Article 6 ECHR, that the right to an effective remedy has an instrumental nature with respect to a pre-existing individual right.\(^6\) In this case, the right to an effective legal remedy of the subject being inspected (in the context of the warrant of entry, search and seizure procedure initiated by an EU authority) is actually defined by Article III-18(6): it consists in the power to object to judicial searches and seizures which are not based on a previous EU decision, which are arbitrary or excessive. As for this right’s protection, the expedited judicial review accounts for an ‘effective remedy,’ managed in accordance with national procedural legislation, as provided by Article III-18(6). Aside from this, and in reference to current Article 47(1) CFREU, it must be recalled that the ECJ case law on the general principle of an effective legal remedy (currently contained in Article 47 CFREU), explicitly rejects that the assembled inspection file ought to be made available to the judicial authority. Finally, in those cases in which national law (either constitutional or statutory)\(^6\) calls for the court responsible for procedural safeguards to have full access to the inspection-related information, such demand would have been overridden by the express restriction provided for in Article III-18(6).


\(^{6}\) For instance, Article L. 450-5 (a) of the French ‘Code de Commerce,’ according to which: ‘Le juge doit vérifier que la demande d’autorisation qui lui est soumise est fondée ; cette demande doit comporter tous les éléments d’information en possession du demandeur de nature à justifier la visite.’
V. Liability arising from assistance activity

A common issue for the European Administrative Union and thus for the ‘Administrative Union of Investigation and Inspection,’ is the attribution of liability for damages. In other domains of the ‘Administrative Union,’ the strong functional integration amongst different authorities (domestic and EU authorities) within the same administrative procedure, makes it difficult to identify to which authority the harmful consequences arising from such joint action should be attributed. Within the particular domain of assistance provided to outside inspections (EU inspections or eventually inspections conducted by other national authorities), the starting point could be the separation principle. Accordingly, any harmful consequences arising from the order for an inspection and the subsequent conduction thereof should be attributed to the EU authority (or another Member State authority). In turn, regarding the host domestic authority, only those damages arising from the due assistance (particularly the judicial authorisation or police coercion) provided to an inspection which has not been sufficiently justified should be attributed thereto.\(^6^1\) However, given the abovementioned twofold legal significance of the judicial or administrative assistance, a joint and several liability for damages between the inspection administration and the authority providing the relevant assistance to the inspection administration is more suitable.\(^6^4\)

VI. Duties in the shared or joint inspections

Chapter 3 of Book III provides for various forms of participation of several authorities in the same inspection. It departs from the premise that a sole inspection conducted in a given Member State could be of interest to a number of authorities (both to the national authority itself and the EU, as well as to other Member State authorities). The technique for procedural ‘participation’ of various administrative authorities is already widespread in EU law.\(^6^5\)

Concerning the inspection, there are three forms of participation provided for in Book III: participation of national authorities in EU inspections (Article III-18(1)); participation of EU authorities in Member State inspections (Article III-19); and joint inspections of Member State authorities (Article III-20). Strictly speaking, in every case the subject-matter of regulation is the ‘participation’ of

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\(^{61}\) The restriction of the liability of the ‘requested authority’ for damages directly caused by its assistance activity follows previous sector specific rules, as for example Article 4 (2) of Council Regulation (EC) No 515/97 of 13 March 1997.

\(^{64}\) As a general possibility, though no immediately proposed for inspections, J. Hofmann, ‘Rechtschutz und Haftung im Europäischen Verwaltungsverbund’, in Schmidt-Assmann and Schöndorf-Haubold (n 2) 353-382, 377.

\(^{65}\) Schneider (n 20) 38; O. Mir Puigpelat, ‘La codificacion del procedimiento administrativo en la Unión Administrativa Europea’, in F. Velasco Caballero and J.-P. Schneider, La Unión Administrativa Europea (Marcial Pons 2008) 51-85, 62; Velasco (n 2) 457.
certain authorities in procedures managed by other authorities. Actually, ‘joint inspections’ in the strict sense of the term do not account for the subject-matter of regulation. In fact, the ‘joint inspections’ to which Article III-20 refers, are actually inspections to be conducted by a domestic authority with participation of other outside national authorities.

The general principle which can be deducted from Articles III-18 through to III-20 is the general capacity of every authority within the ‘European Administrative Union’ to participate in a particular inspection based on EU law. Alongside this general capacity comes the implicit duty to tolerate the participation or involvement of the other authorities. This duty is incumbent on the authority conducting the inspection. The general capacity to participate, and the corresponding general duty to tolerate the inspection-related involvement of another authority, are channelled by means of two instrumental duties. First, the duty to inform the remaining authorities (both domestic and European) of the intention of initiating an inspection procedure; and secondly, the duty incumbent upon the invited authority to submit to the leadership of the main inspection authority. These duties are present, with various wordings, within the three forms of inspection-related participation expressly regulated by Book III.

1. Participation of national authorities in EU inspections

For the case where the inspection is conducted by an EU authority, Article III-18(1) grants the host domestic authority the right to participate in the inspection. In addition, it implicitly lays down the corresponding duty, incumbent on the EU authority, to tolerate the presence of officials from the ‘hosting State.’ In order to enable the inspection-related involvement of the relevant Member State, Article III-18(2) imposes on the EU authority the instrumental duty to inform in advance and ‘in good time’ of the inspection activities. Having regard to the fact that the EU authority must tolerate the participation in the inspection of the relevant national authority, the core issue at stake is now to determine the legal significance of such ‘participation.’

The participation of the national authority has been previously regulated as a form of ‘assistance’ provided to the EU authority. As such ‘assistance,’ the involvement of the national authority takes place in a position of dependence or submission with respect to the EU authority. One could speak about a duty of submission of the national authority to the inspection guidelines issued by the EU authority. This submission duty does not imply that the domestic authority accounts for a mere instrument in the hands of the European authority. In fact, the assistance role played by the national authority gives rise to specific utilities for the Member State: the latter benefits from the information gathered by the EU authority in the inspection conducted thereby. In addition, this allows the relevant Member State to monitor the European inspection activities carried

67 David (n 2) 244.
out on its soil. Hence, what is actually important in order to talk about a duty of submission does not lie in the existence of domestic or foreign utilities attached to the inspection, but rather in who plays the functional leadership role in the inspection. There is no doubt that this task lies in the inspection EU authority, not in the participating Member State authority.

On the basis of the abovementioned duty of submission, and to the extent that every step of the procedure and inspection measure is agreed and led by the European authority, some consequences can be drawn from the legal framework of the inspection-related ‘participation.’

a) In the first place, in its dependent position the national authority can get involved in European inspection activities which, although having been authorized by EU sector-specific legislation, are not provided for in domestic legislation (for instance, the seal of premises). 68

b) Secondly, the position of submission of the national authority leads to the assertion that judicial review performed over the inspection activities (except for anything concerning coercive entry, search and seizure into private premises) can only be carried out by the ECJ, and that a hypothetical liability of the public authorities’ claim for damages has to be filed before the EU. 69 This includes domestic authority action when the latter has acted under the inspection leadership of the EU authority. It obviously does not include the potential national inspection measures which could have been developed de facto independently and in line with European activity.

A particular case of national participation, established in Article III-18(4), consists of the presence of officials from other national authorities, different from that of the hosting State, in the EU inspection. This is quite an exceptional case, and that is why it is strictly subject to the express agreement of the concerned Member State in whose territory the inspection is conducted. Strictly speaking, this does not account for participation of a national authority in an inspection carried out by the EU in another Member State, since the officials of the third Member State only play the role of ‘observers’ and where appropriate, they provide the EU authority with technical assistance. Accordingly, rather than with an example of participation, herein we are confronted with an organic borrowing, 70 pursuant to which the official from the third Member State acts as

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69 David (n 1) 259.

70 The theoretical features of the ‘borrowed bodies’ can be followed in German Law (Organleihen): H. Maurer, Allgemeines Verwaltungsrecht (14th ed., C. H. Beck 2002) 542; and specifically in the framework of the ‘European Administrative Union’ see L. Hastings, ‘Grenzüberschreitende Zusammenarbeit der Polizei- und Zollverwaltungen’, in Schmidt-Assmann and Schöndorf-Haubold (n 2) 127-152, 144.
the official of the EU authority. This explains the blunt terms used by Article III-18(4) when it establishes that ‘EU authorities remain responsible for any misconduct or damage caused by these officials and bodies in the course of an inspection.’

2. Participation of EU authorities in Member State inspections

A second possibility is that a national authority has initiated an inspection procedure (obviously in its territory), and an EU authority participates therein. Article III-19 provides for the participation of the EU authority as a potential capacity (since it needs prior agreement with the Member State in question or a special provision in sector-specific EU law). In principle, the participation of the EU authority could be labelled as a form of ‘assistance’ provided to the national authority. However, such participation does not only account for ‘assistance.’ It allows the EU to monitor the way in which the national authority carries out its inspection. It also allows for information gathering in order to make a decision of its own. From this perspective, and in line with the central idea of this work, the participation provided by Article III-19 is a form of gathering information (by an EU authority) taking advantage of an already underway national inspection procedure.

Since this participation of the EU authority is the way of gathering information on-the-spot, such participation is subject to certain precautions and limits from the Member State, which translates into duties incumbent on the EU authority.

a) Firstly, Article III-19 expressly declares that the EU authority participation shall take place ‘under the responsibility of officials of a Member State.’ This implies that it is on the national authority, at any event, to lead the inspection activities.

b) Secondly, the inspection powers of the EU authority are somewhat narrow. According to Article III-19, EU officials ‘may not, on their own initiative, use the powers of inspection conferred on national officials or be present at inspections based on national criminal law.’ In sum, the capacity of gathering information of an EU authority in the territory of a Member State is carried out in a position of dependence with respect to the national authority, taking advantage of an inspection already ordered and conducted by the national authority.

Given the position of submission of the EU authority to the national inspection authority, the effective remedy safeguards of the subjects being inspected shall be exercised before national courts. The potential liability claims shall be filed against the national authority, except in the extraordinary event (and actually foreign to Article III-19) that on a de facto basis, the EU authority had acted without regard to the national authority.

24 Referring to the sector-specific law foregoing to the ReNUAL MR scholars spoke of ‘begleitende Kontrolle’ (complementary control): David (n 2) 242.
The EU authority participation established by Article III-19 differs from another form of participation, which exists in sector-specific legislation, according to which the inspection of the national authority is carried out 'at the request of the Commission,' and the soliciting Commission can participate therein. Herein we are confronted rather with a case of 'mutual assistance' (regulated in Book V). In this case, the national authority is not managing a procedure which the EU authority joins: the domestic authority is assisting the EU authority (by performing certain inspections required by the EU authority) and when such inspections are being conducted, an agent or person delegated by the Commission can be present or take part therein.

3. Horizontal participation

Finally, the third participation possibility -which accounts for the subject-matter of Article III-20- is that several national authorities can participate in the inspection initiated and conducted by another national authority in its own territory. This provision does not address an existing phenomenon, in which a number of national authorities carry out a joint inspection coordinated by a European agency. These cases could be designated as EU inspections, since they are substantially led by an EU authority. According to this designation, and following the 'separation principle,' the right to an effective remedy and the non-contractual liability safeguard against these inspections coordinated by an EU authority are located in the EU.

Although the reference made to 'joint inspections' in Article III-20 could lead to an impression of an intense horizontality in the inspection procedure, in these inspections there is no actual equality amongst every national authority, since the prominence and the lead lie in the national authority (host authority). In this connection, it must be recalled that the inspection has an instrumental nature with respect to an administrative decision-making procedure (which is the subject-matter of Book III). This obviously gives special functional attention and importance to the national authority managing the procedure.

Strictly speaking, Article III-20(1) does not provide for a specific legal framework applicable to joint inspections. Actually, and according to the reference made by Article III-20(1) itself, the legal framework applicable to the joint inspection shall be established by means of an agreement between Member States or sector-specific legislation. Not even the straightforward reference to the fact that the national authority (the host authority) 'shall invite the inspection authority of each Member State' has actual legal significance apart from the corresponding agreement or sector-specific legislation. In order for this formal

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23 In this sense: Article 47(2) of Regulation (EU) No 1306/2013.
24 David (n 2) 259.
26 For example, Article 29(1) of Directive 2000/12/EC.
duty to ‘invite’ to the participatory procedure to account for a true duty, it can only stem from the formal identification on an ex ante basis (in an agreement or in a legislative act) of the cases in which an inspection can be considered to be of a supranational interest. Otherwise the ‘duty to invite’ would be at the ‘host authority’s’ discretion, and thus it could not be deemed a true duty.

Although it is included in the regulation of the joint inspection, the potential conferral of executive powers upon a national authority (by another national authority in its territory), foreseen in Article III-20(2) is beyond the notion of participation in a national inspection. Along with the participatory character come distinct features of the ‘organic borrowing’ (Organleihe). In other words, the inspection officials from the ‘invited authority’ act as host authority bodies.

VII. Duties to inform on an ‘ex post’ basis

Finally, the last sort of cooperative duties provided for in Book III consist in the administrative authority which has gathered the information informing the host authority (where the information has indeed been gathered) of the results. This duty to inform on an ‘ex post’ basis is not expressly provided by Book III for the requests of interviews, yet it is in fact foreseen for the on-the-spot checks (Article III-18(3)). Although in principle the duty to inform of the results of the inspection is favourable to the Member State in which the inspection is conducted – as a compensation measure for the general obligation to tolerate an outside inspection in its territory – the truth is that Article III.18(3) gives an additional or complementary sense to the report issued by the outside inspection authority.

Indeed, Article III. 18(3) requires that ‘in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned.’ This complementary duty is actually aimed at providing the final inspection report with probative value in potential administrative and judicial procedures (either subsequent or complementary) in the Member State. Obviously, there is only room for such probative value of the inspection reports, directly set out in Article III-18(3), in a subsequent national procedure (either judicial or administrative) where EU law is applied. For those cases, Article 18-III(3) does not confer a specific value to the inspection report, yet it attributes it the same value attributed to the equivalent report in accordance with domestic law. Hence, where national legislation on administrative procedure grants a specific probative value to inspection reports, that same value should be applied to the inspection report issued by the EU authority. Accordingly, Article III-18(3) does not award EU inspection reports a hypothetical ‘presumption of certainty’ if such value or quality does not result from domestic law.

76 A precedent of this law is Article 9.2 of Council Regulation (EURATOM, EC) No 2185/96.
77 As a precedent, see Article 9.1 of Council Regulation (EURATOM, EC) No 2185/96.
78 For example, in Spanish law, Article 137 of Law 30/1992 of 26 of November.