

OLAF Investigations Outside the European Union

Practical and Legal Aspects



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Article

Claire Scharf-Kröner, Jennifer Seyderhelm *

ABSTRACT

The European Anti-Fraud Office (OLAF) is an independent body that fights against illegal activities affecting the Union's financial interests. It carries out investigations of an administrative nature, both within the European Union and beyond its borders.

This article outlines the legal framework within which OLAF conducts investigations in non-EU countries on the expenditure side of the EU budget. It describes OLAF's competence to act outside the EU, as defined in the EU's legislative framework and mirrored in international agreements. The discussion includes an analysis of the unique tools OLAF has to act, based on the contractual obligations of the economic operator, elements of which were clarified in two recent judgments of the European General Court. In addition, practical aspects of investigations in non-EU countries are highlighted, focussing in particular on pre-accession and European Neighbourhood countries. The article concludes with an outlook on how the OLAF's particular expertise could further enhance protection of the Union's financial interests, in collaboration with the European Public Prosecutor's Office (EPPO).

AUTHORS

Claire Scharf-Kröner

Head of Unit

European Commission European Anti-Fraud Office (OLAF)

Jennifer Seyderhelm

Legal trainee at the Higher Regional Court in Frankfurt am Main (from August to October 2019 legal trainee at the European Anti-Fraud Office (OLAF))

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I. Introduction

OLAF was set up in 1999 by Commission Decision 1999/352/EC¹ to protect the EU's financial interests. OLAF is an EU body mandated to investigate fraud to the detriment of the EU budget, corruption, and serious misconduct within the European institutions, bodies, offices, and agencies.² Moreover, OLAF is in charge of developing an anti-fraud policy for the European Commission.³

OLAF investigates allegations relating both to the entire expenditure side of the EU budget and to part of the revenue side, e.g., customs duties. OLAF also investigates serious misconduct and fraud by EU personnel, including members of institutions, which may not have financial implications but can cause serious damage to the reputation of the EU.

OLAF conducts administrative investigations and it neither has powers of law enforcement nor is it in charge of national prosecution. OLAF summarises the results of its investigations in so-called Final Reports and, where appropriate, issues financial, judicial, disciplinary and/or administrative recommendations to the competent authorities.

At first sight, one might assume that OLAF's activities are limited to the territory of the EU. However, this would hardly allow for adequate protection of European financial interests. The EU spends substantive amounts of the EU budget outside its territory: the current multiannual financial framework (2014– 2020) foresees expenditure of up to €66.3 billion⁴ in "Global Europe," which covers all external (or foreign policy) actions carried out by the EU, including humanitarian aid and development cooperation. The Commission proposal for the upcoming multiannual financial framework (2021–2027) foresees increasing this budget up to €108 billion⁵ in the sector "Neighbourhood and the World." In addition, the European Development Fund (EDF), which is not part of the EU budget so far,⁶ is part of the EU's financial interests. From 2014 to 2020, the financial resources of the EDF amounted to €30.5 billion.⁷ Lastly, the European Investment Bank (EIB) has large investments outside the EU.⁸ These expenditures and investments need to be protected against fraud and other illegal activities; an important part of OLAF's work is therefore to investigate related allegations outside the EU.

II. EU Legislation Provides for OLAF's Competence to Act Outside the EU

A first condition for OLAF to investigate allegations of fraud and illegal activities outside the EU is the EU's external competence to protect its financial interests. Pursuant to Art. 310(6) and Art. 325 TFEU, the competence to counter illegal activities affecting the EU's financial interests is *shared between the Member States and the Union*.

Art. 325 TFEU does not contain a specific reference to the responsibilities for external actions in relation to protection of EU financial interests. According to Art. 325(1) TFEU, the measures adopted are intended to "act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies." The provision contains a clear reference to the *effet utile* of the protection to be afforded and, as confirmed by the Court of Justice of the European Union, a material EU competence may implicitly carry an external aspect.⁹

The European legislator has recognised this external competence in several legislative acts. These provide for OLAF's specific powers to carry out investigative actions in non-EU countries.

Council Regulation No 2185/96¹⁰ concerning on-the-spot checks and inspections carried out by the Commission already clarified in its Art. 1(2), that the Regulation shall apply to “*all areas of the Communities' activity*” [emphasis added]. Yet, Art. 2 seems to limit its scope only to actions within the EU, as it refers to the detection of irregularities that “may involve economic operators acting in several Member States” or to “where [...] the situation in a Member State requires on-the-spot-checks” or even to on-the-spot checks carried out “at the requests of the Member State concerned.” Nonetheless, despite this enumeration limited to situations occurring within the EU, Art. 8(5) of the Regulation clearly refers to the possibility “where on-the-spot checks or inspections are performed outside Community territory,” pointing to the conditions according to which such reports shall be prepared.

Further clarification of the external competence of the EU, and specifically for OLAF to act outside EU territory, is provided by Regulation No 883/2013.¹¹ The Regulation codifies the notion of EU financial interests, as interpreted by the CJEU,¹² in Art. 2(1): it includes *all* revenues and expenditures covered by the EU budget and other budgets administrated or monitored by institutions and bodies. In its 36th recital, the Regulation recognises the necessity for OLAF to be capable to engage in relations with competent authorities of third countries, in particular in the area of external aid.

More specifically, the Regulation clarifies in Art. 3(1) that OLAF is mandated to carry out “on-the-spot checks and inspections [...] in third countries and on the premises of international organisations.” Art. 14(1) formally introduces OLAF’s right to conclude administrative arrangements with third countries and international organisations. Such arrangements may concern the exchange of operational, strategic, or technical information.

By carrying out on-the-spot checks in third countries under Art. 3(1) of Regulation No 883/2013, OLAF ultimately exercises “the Commission’s powers to carry out external investigations,” as is clarified in Art. 2(1) of Commission Decision 1999/352.¹³ Pursuant to Art. 2(1b) of the Decision, OLAF shall exercise these powers “as they are defined in the provisions established in the framework of the Treaties, and subject to the limits and conditions laid down therein.”

To summarise, Art. 325 TFEU and the above-described Regulations and Decision set out the competence of the EU and task OLAF specifically with countering financial irregularities outside EU territory. However, the above-described set of rules only regulates the distribution of powers and competences *among the different EU actors*: firstly, between the Member States and the EU and, secondly, between the Commission and OLAF. Additional legal instruments are necessary to provide OLAF with the possibility to carry out investigative activities directly in the territory of a third country.

III. OLAF Investigative Powers in Non-EU Countries

In order to effectively investigate illegal activities or fraud outside the European Union, OLAF is required to carry out investigative activities in third countries. While the EU legislator clearly mandated OLAF to also protect the EU’s financial interests beyond EU borders, this as such does not provide OLAF with the power to carry out its tasks vis-à-vis the third country or vis-à-vis the economic operator¹⁴.

As will be detailed below, OLAF relies on **international agreements**, by which the country concerned consents to OLAF’s powers being exercised on its territory. In the absence of such an agreement, the third country may provide its consent to OLAF’s investigative activities de facto, when the competent authority agrees to OLAF’s actions in a specific case.¹⁵

OLAF’s cooperation with the third country’s national authorities can play an important role, particularly in cases when the economic operator does not cooperate. As they act under their respective national laws,

national authorities can use enforcement powers, e.g., request a search warrant, if the relevant conditions are fulfilled.

In order to allow OLAF to carry out its investigative tasks to also protect the external relations aspect of the EU budget effectively, Arts. 129(1), (2) and 220(5c) of the Financial Regulation¹⁶ foresee that any person or entity receiving Union funds must agree to include OLAF's competence to conduct investigations in any financing agreement. Pursuant to Art. 129(2) "[a]ny person or entity receiving Union funds under direct and indirect management shall agree in writing to grant the necessary rights as referred to in paragraph 1 and shall ensure that any third parties involved in the implementation of Union funds grant equivalent rights." The financing agreements concluded with the entity receiving EU funds directly refer to OLAF's competence based on Regulation No.s 883/2013 and 2185/96 and thus provide OLAF with the possibility to rely on the **contractual obligations** of the economic operator.

1. OLAF rights of investigation as set out in international agreements

When the EU concludes international agreements with third countries, specific clauses are included to carry out technical and financial review measures, including the collection of documents and data during an on-the-spot check. Different models exist, depending on the country or modality of financing. The EU has concluded Partnership and Cooperation Agreements (PCAs) with some countries, which provide OLAF with the powers to carry out investigative activities in that country.¹⁷ The situation for pre-accession and neighbouring countries is discussed in further detail below.

a) Pre-accession countries

There are currently seven countries (referred to as pre-accession or enlargement countries) that the EU supports, with the aim of eventual EU membership. The Commission concluded a bilateral **Stabilisation and Association Agreement** with each of them, which constitutes the framework of relations between the EU and the country concerned.

The EU supports the "enlargement countries" financially, based on Regulation No 1085/2006,¹⁸ establishing an Instrument for Pre-accession Assistance (IPA Regulation), in line with the general policy framework for accession and taking due account of the Commission's annual enlargement package.¹⁹ For the period 2007-2013 IPA I had a budget of €11.5 billion; its successor IPA II has a budget of €11.7 billion for the period 2014-2020.²⁰

According to Art. 17 of the IPA Regulation, the Commission and the beneficiary countries are to conclude **Framework Agreements** on implementation of the assistance. According to Art. 18, any agreements resulting from the IPA Regulation shall contain provisions ensuring the protection of the Community's financial interests – in particular, with respect to fraud, corruption, and any other irregularities in accordance with the applicable Regulations,²¹ thus explicitly confirming OLAF's right to access information and to conduct on-the-spot checks. In line with this legal obligation, all pre-accession countries concluded a framework agreement²² with the Commission for implementation of Union financial assistance under the IPA.

For instance, pursuant to Art. 50(5) of the Framework Agreement with Montenegro,²³ OLAF may "conduct documentary and on-the-spot checks and inspections in accordance with Regulation (EC, Euratom) No 883/2013 and Regulation (EC, Euratom) No 2185/1996." The agreement also covers subcontracts: according to Art. 50(6) "controls and audits [...] are applicable to all recipients and subcontractors who have received IPA II assistance." Identical provisions are included in the framework agreements of the other pre-accession countries.

For pre-accession countries, the IPA Framework Agreement constitutes the legal basis (in the form of an international agreement concluded by the Commission with the beneficiary country) by which the IPA countries recognise OLAF's powers as set out in Regulation No 883/2013 and Regulation No 2185/1996. IPA II funded activities can be implemented and managed in different ways²⁴ in accordance with the Financial Regulation. The most common forms are direct management²⁵ (implementation of the budget is carried out directly by the Commission until the relevant national authorities are accredited to manage the funds²⁶) and indirect management²⁷ (budget implementation tasks are delegated to and carried out by entities entrusted by the Commission, notably the national authorities).

Specific projects and activities funded under IPA II are governed by **individual Financing Agreements**, which are concluded under provisions of the general IPA agreement and contain an "OLAF clause." Art. 50(1) of the IPA II Framework Agreement with Montenegro²⁸ specifies the following: "All Financing Agreements as well as all resulting programmes, actions and subsequent contracts shall be subject to supervision, control and audit by the Commission, including the European Anti-Fraud Office (OLAF), and audits by the European Court of Auditors."

b) Neighbourhood countries

The EU Neighbourhood Policy (ENP) extends to the EU's southern and eastern neighbours, aiming at ensuring stabilisation, security, and prosperity of the countries that are geographically close to the EU, notably Algeria, Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Tunisia, Libya, Syria, Belarus, and Ukraine.²⁹

The EU has been successively signing **Association Agreements** with countries under the ENP. Since 2008, OLAF has developed anti-fraud cooperation clauses to be used in agreements like Association Agreements, Partnership and Cooperation Agreements, and other such agreements between the EU, its Member States, and third countries. The clauses have become more sophisticated over time; the more recent³⁰ Association Agreements systematically include specific provisions on OLAF competences, including powers to conduct on-the-spot checks and the possibility to exchange case-related information.

For example, the Association Agreement between the EU and Georgia³¹ codifies as follows in its Art. 398(1): "Within the framework of this Agreement, OLAF shall be authorised to carry out on-the-spot checks and inspections in order to protect the EU's financial interests in accordance with the provisions of Council Regulation (EC, Euratom) 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." When the economic operator does not agree to OLAF conducting on-the-spot checks or inspections, Art. 398(5) of the Association Agreement stipulates that "the Georgian authorities, acting in accordance with national legislation, shall give OLAF such assistance, as it needs to allow it to discharge its duty in carrying out an on-the-spot check or inspection."

Similar provisions have been included in the other, newer Association Agreements. As for the pre-accession countries, the Association Agreements in question refer to the OLAF powers set out in Regulation No 883/2013 and Regulation No 2185/1996.

2. OLAF rights of investigation on a contractual basis

Irrespective of the country in which OLAF conducts its investigative actions, any financing provided by the EU is set out in a specific financing contract that governs the relations between the authority managing EU funds and the beneficiary. According to Art. 129 of the Financial Regulation, any person or entity receiving Union funds is *obliged to cooperate* in protecting the financial interests of the EU and is also required to grant

OLAF the necessary rights and accesses required, including the right to carry out investigations and to carry out on-the-spot checks and inspections.

Therefore, any such contract concluded with an entity receiving EU funds within or outside the EU includes an anti-fraud clause, which refers directly to Regulations No 883/2013 and No 2185/96. The contractual obligations to cooperate provide OLAF with an additional, important basis to act vis-à-vis the entities concerned, as will be further analysed in Section IV.4 below.

IV. Practical Aspects of Investigations in Non-EU Countries

If OLAF needs to conduct investigative activities in a third country, it contacts the national authority beforehand, in order to organise and structure the practical on-the-spot work. If possible according to the national laws of the country concerned, OLAF closely cooperates with the competent national investigation service, which may include coordinated investigation activities under the respective legal bases. This avoids unnecessary duplication of investigative steps or one body unintentionally putting at risk the results of another's investigation.

1. Cooperation with pre-accession countries

A specific service for taking up contact with the competent national authority has been established in pre-accession countries. In line with the obligation for EU Member States (Art. 3(4) of Regulation No 883/2013), pre-accession countries need to set up an Anti-Fraud Coordination Service (AFCOS). For instance, the above-mentioned Framework Agreement with Montenegro³² contains in Art. 50(2) the provision that the "IPA II beneficiary shall designate a service (an Anti-fraud coordination service), to facilitate effective cooperation and exchange of information, including information of an operational nature, with OLAF [...]" The aim of this provision is to have a national anti-fraud body in the country concerned to support OLAF during its operational measures in the country. Notably, it shall "support cooperation between national administrations, prosecution authorities and OLAF, share information on irregularities and suspect of fraud cases with national administrations and OLAF and ensure the fulfilment of all the obligations under Regulation (EC, Euratom) No 883/2013 of the European Parliament and of the Council, Council Regulation (Euratom, EC) No 2988/1995¹⁹ and Council Regulation (EC, Euratom) No 2185/1996²⁰." It depends on the national administrative structure of the country as to where it places its AFCOS. It could, for example, be part of the Ministry of Finance, the Ministry of Interior, or the police service.

2. Cooperation with neighbourhood countries

There is no corresponding obligation for neighbourhood countries to set up an AFCOS service. However, where anti-fraud provisions are contained in the Association Agreement, good practice has been established, meaning that the country nominates a contact point to facilitate the cooperation. In countries that do not have a contact point, it can be more challenging and sometimes time-consuming for OLAF to identify the competent authority with whom it can cooperate in the country concerned.

Particularly in cases in which no contact point has been determined, but also more generally, OLAF can conclude Administrative Cooperation Arrangements (ACAs) with any relevant competent national authority (e.g., the police, the Ministry of Finance, or an anti-corruption body) according to Art. 14(1) of Regulation No 883/2013. Even though an ACA is not legally binding, it often helps overcome practical challenges by setting up contact persons and by providing ways of exchanging information and other important modalities

of cooperation.³³ Therefore, it can be useful to conclude different ACAs with different bodies in the same country. An overview of ACAs signed by OLAF is available on OLAF's website.³⁴

3. Cooperation with international organisations

A significant portion of funding provided by the EU in third countries is channelled to recipients by international organisations (indirect management). The EU has concluded so-called **Framework Agreements** with some major international organisations. For example, the Framework Agreement between the EU and the World Bank Group stipulates the following in its Art. 18(2):³⁵ "In order to protect the EU's financial interests against fraud, corruption, and any other illegal activities affecting these interests, the following principles shall apply: a) INT [Integrity Vice Presidency of the World Bank group entity] and OLAF shall support one another in operational activities, including investigations and on-the-spot checks; and b) when appropriate, and at the request of either OLAF or INT, they may agree to set up joint or parallel investigations."

In addition, the investigative cooperation between OLAF and the respective international organisation is set out directly in the **financing contracts**, so-called **contribution agreements**. When the European Commission makes a financial contribution to an operation, programme, or project administered by an international organisation, the respective contribution agreement is complemented with a standardised annex, which refers to OLAF's competence to investigate. According to Art. 17(2) of the Annex II – General Conditions for Contribution Agreements – "[t]he Organisation agrees that OLAF may carry out investigations, including on-the-spot checks and inspections, in accordance with the provisions laid down by EU law for the protection of the financial interests of the EU against fraud, corruption and any other illegal activity." A very similar standard clause was contained in the predecessor template ("Pillar Assessed Grant or Delegation Agreement" – PaGoDA), which was applicable until the new Financial Regulation entered into force on 2 August 2018.

Investigations into funds channelled by international organisations may be particularly complex, in particular in cases of "multi-donor" funding, where a number of donors contribute to the same activities. In these cases, it can be challenging to establish the share of EU contribution and to which extent it is affected by the alleged fraud or irregularities. The area of budget support, which is a tool allowing the EU to finance partner countries' development strategies, can also be challenging to investigate. Budget support involves the direct transfer of EU funds to a partner country's budget; assessment of the use of the funds and the benchmarks by which to measure potential irregularities are both less clear. OLAF's longstanding experience in the field of external aid as well as its established working relationships with its partners also very often enable it to resolve these complex cases.

4. Relations with the economic operator

As discussed in Section III above, OLAF has the competence – according to both Regulation No 883/2013 and Regulation No 2185/96 – to conduct on-the-spot-checks in third countries to investigate allegations of fraud and irregularities affecting the EU budget. This competence is reflected in the international agreements, concluded between the EU and the country in question, vis-à-vis the third country.

The relations between the competent authority managing EU funds (e.g., the European Commission/the EU Delegation in direct management mode or the IPA II beneficiary in indirect management mode) and the economic operator are also *directly regulated* by a specific financing agreement covering the funded programme or activity. Under its contractual obligations, the operator has the obligation to cooperate with OLAF and to provide it with all documents, including digital data.

According to current practice of the Commission, the following clause is usually part of the respective contract: "The European Anti-Fraud Office (OLAF) has the same rights as the Commission, particularly the right of access, for the purpose of checks and investigations. Under Council Regulation (Euratom, EC) No 2185/96 and Regulation (EU, Euratom) No 883/2013 OLAF may also carry out on the spot checks and inspections in accordance with the procedures laid down by Union law for the protection of the financial interests of the Union against fraud and other irregularities." The contractual obligations of an economic operator based in a third country, and the consequence of potential non-compliance with these contractual obligations, are equivalent to those of an economic operator based within the EU.

If the economic operator refuses to cooperate, the negotiation skills of the investigators are crucial in order to move the case forward. Initial resistance, for instance against providing OLAF with the required project documentation, may be overcome if clear and thorough explanations are provided to the entity concerned about its obligations to cooperate with OLAF in addition to which consequences non-cooperation may have.

Non-compliance with its duty to cooperate may lead to termination of the contract and reimbursement of the EU funds by the economic operator. Based on OLAF's investigations, the authorising officer can also disclose information to the Early Detection and Exclusion System³⁶ (EDES). The purpose of EDES is to protect the EU's financial interests by excluding economic operators from participation in EU budget.³⁷ Criteria that can lead to an exclusion are listed in Art. 136(1) of the Financial Regulation and include fraud, corruption, and bankruptcy. Pursuant to Art. 136(1e)(iii), OLAF's discovery of "significant deficiencies in complying with main obligations in the implementation of a legal commitment financed by the budget" can lead to exclusion "from participating in award procedures governed by this Regulation or from being selected for implementing Union funds" by the authorising officer. Unreliable entities can be published online on the website of the European Commission.³⁸

The obligations of economic operators vis-à-vis OLAF were recently clarified in important court decisions. In its *Sigma Orionis* judgment,³⁹ the European General Court confirmed that the operator acted in breach of its contractual obligations when it did not cooperate with OLAF; the Court also held that Regulation No 2185/96 did not provide the operator with the right to oppose OLAF's operations;⁴⁰ hence, it could not claim that it should have been informed by OLAF of such a (non-existing) right to resist.⁴¹ In *Vialto*,⁴² the General Court held that OLAF is allowed to have access to all information and documents pertaining to the scope of its investigations during the on-the-spot-check and to make copies of all documents necessary for it to carry out the control in question⁴³ and for which has a margin of appreciation.⁴⁴ The Court also confirmed that the right to collect documents under Art. 7(1) of Regulation No 2185/96 comprises the carrying out of a forensic acquisition⁴⁵ as well as the operator, having refused to provide OLAF with the requested digital information, had correctly been excluded from the consortium for violation of its contractual duty to cooperate with OLAF.⁴⁶

Invoking the contractual obligation of the operator to cooperate with OLAF is thus, in practice, a very powerful and effective tool for OLAF's investigations, both within the EU and beyond its borders.

5. Conclusion of OLAF investigations

OLAF summarises its investigation findings in a Final Report,⁴⁷ which can be complemented by judicial financial and administrative recommendations. OLAF forwards the report to the competent national authority of the EU Member States, in accordance with Art. 11 of Regulation No 883/2013.

For non-EU countries, there is no equivalent provision in Regulation No 883/2013. Art. 11 also cannot be used *per analogiam*, since the relations between OLAF and the Member States are governed by different principles than those between OLAF and third countries or international organisations. Within the EU, the

principle of sincere cooperation under Art. 4(3) TEU prevails, while external relations are governed by the principle of reciprocity.

In practical terms, OLAF provides non-EU countries with the results of OLAF's investigation via a so-called Information Note. For instance, if the OLAF investigation reveals evidence of a likely violation of criminal law by a national of the country concerned, OLAF will transmit an Information Note to the national prosecutor responsible. In principle, the Information Note contains all parts of the underlying Final Report pertinent for that authority or organisation.

If the OLAF investigation concerns Union expenditures managed in third countries or by international organisations, and if no administrative arrangement is in place between OLAF and the authority of the third country in question, OLAF informs the European External Action Service (EEAS) prior to sending the Information Note to the third country's authority, to allow for coordination with the EEAS if required. This practice allows OLAF to balance the necessity to cooperate with its partners in a spirit of reciprocity and ensures effective protection of the EU's financial interests in respect of the applicable EU legal framework.

V. Outlook: Future Cooperation between the EPPO and OLAF in Third Countries

The European Public Prosecutor's Office (EPPO) was established by Regulation No 2017/1939.⁴⁸ Its mission is to create an independent and decentralised prosecution office within the European Union with the competence to investigate, prosecute, and bring to judgment criminal offences against the financial interests of the EU (e.g., fraud, corruption, or serious cross-border VAT fraud), as defined in the Directive on the fight against fraud to the Union's financial interests by means of criminal law (so-called PIF Directive⁴⁹), cf. Arts. 4 and 22 of Regulation No 2017/1939. According to Art. 120, the EPPO shall take up its investigation and prosecution tasks at the earliest three years after entry into force of the Regulation, i.e., no earlier than end of November 2020.

The EPPO and OLAF are two different partners – each with a different structure, different tools, and different expertise. Both strive for the same goal: the protection of the financial interests of the EU. It was therefore fully intended by the EU legislator that the EPPO and OLAF work hand in hand, create synergies, and avoid overlaps.

The EPPO and OLAF are to establish and maintain a *close cooperation*, aimed at ensuring the *complementarity* of their respective mandates and *avoiding duplication*. OLAF should not, in principle, open any administrative investigations parallel to an investigation being conducted into the same facts by the EPPO. This should, however, be without prejudice to the power of OLAF to start an administrative investigation on its own initiative, in close consultation with the EPPO.⁵⁰

This complementarity principle also applies to external aid cases, which raises the question of how the close cooperation between OLAF and the EPPO should be. Considering OLAF's longstanding knowledge and experience concerning how to conduct investigations and connect to cooperation partners worldwide, it would be useful if the EPPO makes maximum and effective use thereof, in line with the legal framework.

We will first assess below the areas outside of the EPPO's competence, in which OLAF continues to act based on its own mandate, unaffected by the establishment of the EPPO. Second, we will identify the areas in which we believe that collaboration of the two bodies would be of added value, providing for a most effective and efficient protection of the EU's financial interests.

1. OLAF investigations without potential overlap with the EPPO

According to Art. 23 of Regulation No 2017/1939, EPPO is competent for dealing with criminal offenses that were (a) “committed in whole or in part within the territory of one or several [participating⁵¹] Member States,” which excludes the six non-participating Member States UK,⁵² Ireland, Denmark, Hungary, Poland, and Sweden; or (b) “committed by a national of a [participating] Member State provided that the Member State has jurisdiction for such offences when committed outside its territory.” An example for case b) is, if a German citizen commits fraud at the expense of EU funds outside the EU, falling under Section 7(2) No. 1 of the German Criminal Code.⁵³ Similar rules apply for offenses committed outside the territory of participating Member State by a person subject to EU Staff Regulations (Art. 23(c) of Regulation No 2017/1939).

Based on the above, the EPPO is only competent when the criminal offense has been committed either in a participating Member State or by a national of such Member State. This, in turn, means that OLAF investigations concerning *non-participating countries and their nationals* will remain under the remit of OLAF and will be conducted independently from the EPPO. OLAF is hence expected to continue its activities, possibly even gaining further impact in this field in the future.⁵⁴

In addition to those investigations with no links to EU territory, OLAF is the only EU body competent to investigate *non-fraudulent irregularities*,⁵⁵ such as the conflict of interest of a fund manager, rendering the investment ineligible for funding. It should be noted that 90% of the irregularities detected and followed up by the Member States as reported to the Commission in 2018 were of an administrative nature, whereas only 10% were reported as having a criminal nature (fraud).⁵⁶ Regardless of the EPPO, OLAF will thus continue its work on non-fraudulent irregularities – a principle valid both within and outside the EU.

2. OLAF’s added value to EPPO investigations

In areas falling under the EPPO’s competence to prosecute and investigate, it can decide to cooperate with OLAF in order to achieve an optimally effective protection of the EU budget. Art. 101(3) of Regulation No 2017/1939 provides that, in the course of an investigation by the EPPO, the EPPO *can request OLAF to support or complement* its activity, notably by conducting administrative investigations. According to Art. 101(4), the EPPO may, in cases *in which the EPPO decided not to open* an investigation or to dismiss a case, *provide relevant information to OLAF* with a view towards enabling OLAF to consider appropriate administrative action.

Based on many years of OLAF’s experience investigating allegations concerning EU expenditure in external relations in third countries, we would argue that a good case can be made for the EPPO to take advantage of OLAF’s expertise to the benefit of an efficient protection of the EU budget.

Investigating allegations of illegal activities affecting external EU expenditure typically requires investigative activities outside the EU, often in several countries at the same time. This involves liaising with a number of international partners, including competent national authorities, international organisations, national and international donors. Especially in the field of multi-donor funding, complex financing schemes often need to be investigated. OLAF, as part of the European Commission, and having firmly established working relationships with the Directorates-General responsible for the relevant spending schemes, has developed expertise in this area. Furthermore, OLAF has established relations with the main actors in the countries concerned and with other donors and international organisations managing the funds in question. It can thus easily ensure coordination between the different actors involved.

As analysed in Section III above, OLAF’s investigative activities rely on different bases. On the one hand, they can be directly anchored in international agreements concluded with the country, such as Framework Agree-

ments for pre-accession countries or Association Agreements for countries in the European Neighbourhood Area. As discussed in Section IV above, such investigative activities in third countries are conducted in cooperation with the competent authority of the country concerned. On the other hand, OLAF can also rely on the contractual arrangements concluded with the beneficiary, which contain the latter's obligation to provide OLAF with access to information and to allow OLAF to collect documents and other data. This means OLAF can act flexibly, depending on the facts of the case and on the country concerned, whereas the EPPO will have to rely on international instruments of mutual legal assistance to collect evidence located outside the EU.

The practicalities of cooperation between the two bodies still remain to be defined. The EPPO and OLAF are expected to conclude working agreements, as foreseen in the Proposal for Amendment of Regulation No 883/2013⁵⁷ (currently in Art. 12(g)).

V. Conclusion

OLAF relies on a large array of tools in its investigations outside the EU's borders. For pre-accession countries, the legal framework has already been harmonised to a large extent. The anti-fraud provisions in the International Framework Agreements, in combination with each country's obligation to set up an AFCOS to coordinate its anti-fraud activities, provide for a clear *modus operandi* when OLAF conducts its investigations. For neighbourhood and other third countries, the situation is more diverse, with the more recent international agreements providing for a legal situation aligned to that in pre-accession countries. OLAF's broad network of cooperation partners worldwide helps to facilitate collaboration and to protect EU funds effectively. The contractual obligations of the entity receiving Union funds to cooperate with OLAF provide for additional and very effective tools, as confirmed in the recent jurisprudence of the European General Court.

With the establishment of EPPO, a new player has emerged. We conclude that it would be in the best interests of a most effective protection of the European budget if the EPPO builds on the existing expertise of OLAF – not only for areas outside of EPPOs competence, but also where EPPO is materially competent, but can choose to rely on OLAF for complementary administrative investigations, for instance to ensure an effective financial recovery, to take precautionary measures or to ensure effective administrative sanctions. In this way, both bodies can combine their respective strengths and fight against any misuse of the EU budget – also beyond the EU's borders.

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1. Commission Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office (OLAF), *O.J.* L 136, 31.05.1999, 20.↵
 2. Art. 1 of the Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), *O.J.* L 248, 18.9.2013, 1; Art. 2 of Commission Decision 1999/352/EC, ECSC, Euratom, *op. cit.* (n. 1).↵
 3. <https://ec.europa.eu/anti-fraud/policy/preventing-fraud_en> accessed 16 October 2019. See also the article by C. Makri and O. Marin, "The Commission's New Anti-Fraud Strategy – Enhanced Action to Protect the EU Budget", <https://doi.org/10.30709/eucrim-2019-014>.↵
 4. This corresponds with 6% of the EU Budget, see EU Budget 2017 Financial Report, 11, 52.↵
 5. Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM/2018/322 final – 2018/0132 (APP).↵
 6. See on the proposed future integration of the EDF in the EU Budget: M. Parry and M. Sapala, European Parliamentary Research Service, 2021 – 2027 multiannual financial framework and new own resources, July 2018, 2, 28, <http://www.epgencms.europarl.europa.eu/cmsdata/upload/db93fa39-84ce-44fe-b4fa-4c6824185e13/2021-2027_Multiannual_financial_framework_and_new_own_resources_-_Analysis_of_the_Commission%27s_proposal_pdf> accessed 23 October 2019.↵
 7. A. D'Alfonso, European Parliamentary Research Service, European Development Fund, November 2014, 5, <<https://www.europarl.europa.eu/EPRS/EPRS-IDA-542140-European-Development-Fund-FINAL.pdf>> accessed 28 November 2019.↵
 8. In 2018, €9 billion of approved EIB lending were spent for 101 new projects outside the European Union, see here: EIB Annual Report 2018, The EIB outside the European Union, 24.09.2019, 8.↵
 9. CJEU, 31 March 1971, case C-22/70, *Commission v Council*, paras. 7, 15, 17, 18, 19, 28 and CJEU, 4 September 2014, case C-114/12, *European Commission v Council of the European Union*, para. 73.↵

10. Council Regulation (EURATOM, EC) No 2185/96 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, *O.J. L* 292, 15.11.1996, 2.↵
11. Regulation (EU, EURATOM) No 883/2013, *op. cit.* (n. 2).↵
12. CJEU, 10 July 2003, case C-11/00, *Commission v ECB*, para. 89 and CJEU, 10 July 2003, case C-15/00 *Commission v EIB*, para. 120.↵
13. Commission Decision 1999/352/EC, ECSC, Euratom, *op. cit.* (n. 1).↵
14. The term "economic operator" is clarified in Art. 5 of Regulation (EURATOM, EC) No 2185/96, *op. cit.* (n. 10), with reference to Art. 7 of Council Regulation (EC, EURATOM) No 2988/95 on the protection of the European Communities financial interests as "the natural or legal persons and the other entities on which national law confers legal capacity who have committed the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed".↵
15. As explicitly recognised by the European Ombudsman in its decision of 13 March 2014, closing inquiry OF/8/2010(VIK)CK, para. 64: "nothing prevents OLAF from conducting an inspection on the basis of a de facto agreement, in this case, the consent given by the competent authorities of Country X.", <<https://www.ombudsman.europa.eu/en/decision/en/53814>> accessed 22 October 2019.↵
16. Regulation (EU, Euratom) No 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, *O.J. L* 193, 30.07.2018.↵
17. See e.g. Art. 51(7) of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, on the one part, and the Islamic Republic of Afghanistan, on the other part, *O.J. L* 67, 14.03.2017, 3: "In accordance with Union legislation, and exclusively in order to protect the Union's financial interests, the European Anti-Fraud Office shall be authorised, on request, to carry out on-the-spot checks and inspections in Afghanistan. These shall be prepared and conducted in close cooperation with the competent Afghan authorities. The Afghan authorities shall provide the European Anti-Fraud Office with any assistance it needs to allow it to discharge its duties."↵
18. Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), *O.J. L* 210, 31.07.2006, 82. Current beneficiaries are: Albania, Bosnia and Herzegovina, Kosovo under UN Security Council Resolution 1244/99, Montenegro, North Macedonia, Serbia, and Turkey.↵
19. See Art. 1 and Art. 4 of Council Regulation (EC) No 1085/2006, *op. cit.* (n. 18).↵
20. <https://ec.europa.eu/neighbourhood-enlargement/instruments/overview_en> accessed 28 November 2019.↵
21. Explicit reference is made to Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, *O.J. L* 312, 23.12.1995, 1; Council Regulation (EC, Euratom) No 2185/96, *op. cit.* (n. 10) and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [in the meantime replaced by Regulation (EC, Euratom) No 883/2013, *op. cit.* (n. 2)].↵
22. <https://ec.europa.eu/regional_policy/en/funding/ipa/framework/> last accessed 16 October 2019.↵
23. Framework Agreement between Montenegro represented by the Government of Montenegro and the European Commission on the Arrangements for Implementation of Union financial Assistance to Montenegro under the Instrument for Pre-accession Assistance (IPA II).↵
24. Pursuant to Art. 7(1) of the Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II), *O.J. L* 77, 15.3.2014, 11: "Union assistance under this Regulation shall be implemented directly, indirectly or in shared management".↵
25. Art. 62(1a) Regulation (EU, Euratom) No 2018/1046, *op. cit.* (n. 16).↵
26. Art. 2(2c) of the Regulation (EU) No 231/2014, *op. cit.* (n. 24): "[...] progress in Union-related institutional reform, including transition to indirect management of the assistance provided under this Regulation".↵
27. Art. 62(1c) Regulation (EU, Euratom) No 2018/1046, *op. cit.* (n. 16).↵
28. Framework Agreement between Montenegro and the European Commission, *op. cit.* (n. 23).↵
29. <https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview_en> accessed 16 October 2019.↵
30. In 2014, Association Agreements were concluded with Ukraine, Georgia, and the Republic of Moldova.↵
31. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Georgia, on the other part, *O.J. L* 261, 30.8.2014, 4.↵
32. Framework Agreement between Montenegro and the European Commission, *op. cit.* (n. 23).↵
33. For example, the Cooperation Agreement between OLAF and the Kosovo Police provides in 3.2: "When cooperating on a specific case, the Partners will provide each other with any relevant information, including personal data, in order to achieve the purpose of this Arrangement."↵
34. List (status: January 2019) of ACAs signed by OLAF can be found at <https://ec.europa.eu/anti-fraud/investigations/cooperation-with-investigative-partners_en> accessed 16 October 2019.↵
35. Framework Agreement between the European Commission on behalf of The European Union and the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Cooperation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), 15.08.2014.↵
36. <https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview_en> accessed 16 October 2019.↵
37. See Art. 135(1) of Regulation (EU, Euratom) No 2018/1046, *op. cit.* (n. 16): "In order to protect the financial interests of the Union, the Commission shall set up and operate an early-detection and exclusion system."↵
38. <https://ec.europa.eu/budget/edes/index_en.cfm> last accessed 16 October 2019.↵
39. General Court, 3 May 2018, case T-48/16, *Sigma Orionis SA v Commission*. ↵
40. General Court, *Sigma Orionis*, *op. cit.* (n. 39), para 95.↵
41. General Court, *Sigma Orionis*, *op. cit.* (n. 39), para 110.↵
42. General Court, 26 June 2019, case T-617/17 – *Vialto Consulting Kft. contre Commission européenne* [under appeal].↵
43. General Court, *Vialto*, *op. cit.* (n. 42), para. 66.↵
44. General Court, *Vialto*, *op. cit.* (n. 42), para. 68.↵

45. General Court, *Vialto*, *op. cit.* (n. 42), para. 73.↵
46. General Court, *Vialto*, *op. cit.* (n. 42), para. 93 et seq.↵
47. Art. 11 of Regulation (EU, Euratom) No 883/2013, *op. cit.* (n. 2).↵
48. Council Regulation (EU) No 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO), *O.J. L* 283, 31.10.2017, 1.↵
49. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J. L* 198, 28.7.2017, 29.↵
50. Art. 101(1), (2) and Recital 103 of Regulation (EU) No 2017/1939, *op. cit.* (n. 48).↵
51. According to Art. 2(1) of the Regulation (EU) No 2017/1939, *op. cit.* (n. 48), Member State means, unless otherwise indicated, a Member State which participates in the establishment of the EPPO.↵
52. On 29 March 2017, the UK decided to withdraw from the Union in accordance with Article 50 of the EU Constitution.↵
53. Section 7(2) No. 1 of the German Criminal Code: "German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender [...] was German at the time of the offence or became German after the commission [...]"↵
54. See also C. Di Francesco Maesa, "Repercussions of the Establishment of the EPPO via Enhanced Cooperation", (2017) *eucrim*, 156, 157.↵
55. Non-fraudulent irregularities do not constitute a criminal offense.↵
56. Report from the Commission to the European Parliament and the Council, 30th Annual Report on the Protection of the European Union's financial interests – Fight against fraud – 2018, 17.↵
57. Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM(2018) 338 final.↵

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