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Enforcing PIF Requirements Outside the EU

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Abstract

EU funding to external partners, like that to Member States, comes with strict obligations designed to ensure the protection of the Union's financial interests, encapsulated in the "PIF conditionality" framework. This framework mandates compliance with reporting, and auditing obligations to prevent fraud and mismanagement, and can potentially lead to administrative and/or criminal proceedings.

Enforced by entities including the European Commission, OLAF, the European Public Prosecutor's Office (EPPO), Europol, and Eurojust, PIF conditionality aims to combat corruption, embezzlement, and other serious offences, including when committed outside the EU's territory. However, despite these measures, enforcement remains challenging, especially when addressing fraud outside the EU or within international organizations. This paper explores the PIF requirements for external funding, the roles of EU enforcement actors, and the limitations they face in addressing irregularities beyond EU borders. It highlights the complexities and obstacles encountered in the detection and prosecution of financial misconduct involving non-EU entities and international bodies.

Keywords:

Financial interests, OLAF, EPPO, Financial Regulation, PIF conditionality

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I. Introduction

“Funded by the European Union” or “with the support of the European Union”, the mention of these expressions figures among the mandatory requirements with which recipients of EU funds, be it national or local administrations, NGOs or private entities, must comply. They figure in the most random places, from hiking paths, highways or bridges to schools or hospitals, and they appear within Europe, but also all around the world.

The European Union has indeed developed a vast variety of funding programmes destined to its own territory but also destined to support activities outside its borders. Each multi-annual financial framework includes programmes that are aimed to the EU’s external partners, including for instance candidate countries for accession, neighbouring countries, or countries more distant geographically targeted by development cooperation measures, or countries receiving humanitarian assistance in the context of emergencies or conflicts. Compared to the money flows to the EU Member States, these forms of external financial assistance do not represent the majority of the EU funding. However, in an international context of scarce resources, the EU (and its Member States) figures among the top donors for many international organisations, or programmes providing direct financial assistance to NGOs, or *ad hoc* coalitions. As a way of example, the multi-annual financial framework for 2021 – 2027 budgeted an amount of EUR 110,6 billion for the programmes solely destined to external activities regrouped under the heading “Neighbourhood and the World”. In 2022 only, this heading represented EUR 14,5 billion, with 65 % of the sum spent through the Global Europe Fund, 17 % through humanitarian aid and 14,5 % through the pre-accession instrument.¹ Additionally, other programmes with a more thematic focus may also include external partners among their beneficiaries.

Given the amounts at stake, it is no surprise that EU funding destined for external partners is accompanied, like EU funding destined for Member States, by a series of obligations binding its recipients. These obligations are generally considered as forming part of the “PIF conditionality”,² which refers to the requirements attached to EU funds to ensure the protection of the EU’s financial interests, an objective enshrined in EU primary law (Article 325 TFEU) and translated into various secondary law instruments.³ Recipients of EU funds must comply with reporting and audit measures and may be subject to administrative inspections, and eventually criminal proceedings. The main objective of such PIF conditionality is to prevent any behaviour that endangers the use of EU money for its intended purpose and fraud that affects the Union’s financial interests. Such behaviours can consist of administrative mistakes in the management of funds, leading to correcting measures, or an exclusion from EU tenders for a limited time. They can also in more serious cases amount to criminal offences (corruption, embezzlement, etc.),⁴ sometimes committed by organised criminal groups. To combat such fraud, the EU has developed an ecosystem composed of specialised actors tasked with the enforcement of the EU rules on PIF conditionality (or merely assisting with such enforcement). Beyond the European Commission, the main actor in charge of disbursing EU funds, that set up specific services to implement and monitor the EU funding programmes (DG International Partnerships, DG Civil Protection and Humanitarian Aid Operations), we can list the following actors: the Anti-Fraud Office (OLAF) is tasked with administrative investigations into irregularities; the European Public Prosecutor’s Office (EPPO) is tasked with criminal investigations into PIF offences; and Europol and Eurojust, the EU agencies charged with supporting respectively police and judicial cooperation in criminal matters. Their contribution to the protection of the EU’s financial interests varies depending on whether it constitutes their sole mission, or only one of the policy objectives they pursue. They are all competent to intervene and assist when fraud is detected within an EU Member State, but they may also be involved in fraud cases detected outside the EU (either in a third country, or in an international organisation). Examples of such cases sporadically appear in their annual reports or in the media.⁵ They not only violate the EU

¹ ECA, Annual report on the EU budget, 2023.

² It is worth noting that the notion is different from the notion of spending conditionality, which refers to the fact that EU spending is conditioned to the pursuit of certain policy objectives (i.e. respect and promotion of the EU Charter of Fundamental Rights).

³ See *infra*.

⁴ A Directive known as the PIF Directive revised the minimum common definition of such offences. 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 [2017] OJ L198/29.

⁵ Follow the Money, ‘Fraud with development aid funds exposes the EU’s dependency on consulting firms’, 12 July 2023.

rules linked to the protection of the Union's financial interests, but also constitute violations of national legislations and international obligations, such as those enshrined in the United Convention against Corruption.

Their detection, investigation and prosecution encounter several enforcement challenges. The legal framework and actors established form together a highly sophisticated machine designed to operate within the EU, where it already encounters obstacles.⁶ This paper will thus aim to unveil how such machinery may be activated when behaviours affecting the EU's financial interests are detected in third countries or an international organisation.

To that end, the paper is divided into three main sections. It will first analyse the PIF requirements applicable to funds granted to external partners, and then turn to the competences of EU actors to monitor their implementation and investigate irregularities. It concludes by stressing the limits of their reach, due to enforcement challenges.

II. PIF requirements applicable to EU funds destined for external partners

Every euro disbursed comes with strings attached, meaning that PIF requirements are applicable, regardless of the programme through which they are disbursed, the quality of their recipient, or its location. Such a minimum but generalised layer of PIF conditionality derives from the adoption and application of transversal instruments that apply to all EU funding programmes. The main instrument in that regard is usually referred to as the Financial Regulation,⁷ which is revised and adopted at the beginning of each multi-annual framework. This instrument lays down the rules for the establishment and the implementation of the general budget of the EU and defines notably the rules applicable to the recipients of EU funding. It contains without surprise measures against fraud, such as the possibility to exclude beneficiaries convicted for fraud,⁸ to suspend, terminate or reduce the funds granted where an award procedure has been subject to irregularities or fraud.⁹ Of particular importance for the enforcement of PIF requirements, is the obligation for any person or entity receiving Union funds to "fully cooperate in the protection of the financial interests and the Union, and shall, *as a condition for receiving the funds (emphasis added)*, grant the necessary rights and access for the authorising officer responsible", for EPPO, OLAF, the ECA and where appropriate for the relevant national authorities.¹⁰ Equivalent rights and access shall - still in accordance with the text - be granted to any third parties involved in the implementation of Union funds. The latter is particularly important considering that the Financial Regulation also contains provisions authorising and regulating the indirect management of EU funds by international organisations (Article 156) and third countries (Article 158), as well as provisions defining the conditions under which the Union may develop trust funds for external actions (Articles 234 to 240), including PIF related conditions (Article 235 (3)).¹¹ These provisions are further complemented by additional measures foreseen in the Regulations establishing each individual funding program.

Before analysing the funds devoted to support activities carried out outside the EU's borders, it is worth analysing the rules contained in EU sectoral instruments. The EU has indeed developed several funds, known as the structural funds, to strengthen its economic, social and territorial cohesion, implemented or funded in shared management (only EU budget or contributions from the Member States).¹² Most of

⁶ See for instance Michele Simonato and Andon Tashukov, "Chapter 32: Protection of the financial interests of the EU" in Miroslava Scholten, *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023) 509 – 524.

⁷ Regulation (EU, Euratom) 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 [2018] OJ L193/1.

⁸ Financial Regulation, Article 136 (1) d) – when a final judgment has established that a person or entity is guilty of fraud, corruption, conduct related to a criminal organization, money laundering, terrorist offences, child labour and other offences concerning trafficking in human beings, or e) a person or entity has shown significant deficiencies in complying with main obligation in the implementation of a legal commitment financed by the budget.

⁹ Financial Regulation, Article 131.

¹⁰ Financial Regulation, Article 129 (1).

¹¹ The Commission's internal auditor, OLAF and the Court of Auditors shall exercise the same powers over Union trust funds as they do in respect of other actions carried out by the Commission.

¹² These funds are the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum,

these funds are intended to fund projects within the EU Member States, aiming at accompanying the green transition (Just Transition Fund) or correcting social and territorial inequalities (European Social Fund, European Regional Development Fund). Yet, some of those funds can serve to fund projects in or in relation to a third country, when this is necessary to achieve the policy objectives of each fund, and when such possibility is expressly provided in their respective Regulation. This is for instance the case for the funds with a strong link with the EU Area of Freedom, Security and Justice. The Internal Security Fund¹³ provides for the use of funds “to support actions in or in relation to third countries (...) in particular in order to contribute to combating and preventing crime, including drug trafficking and trafficking in human beings, and to contribute to combating cross-border criminal smuggling networks.”¹⁴ Similarly, the Asylum, Migration and Integration Fund foresees the use of funds for projects in third countries, such as facilities and services in third countries ensuring appropriate temporary accommodation and reception upon arrival of persons returned (Article 12), or information measures and campaigns in third countries aimed at raising awareness of the appropriate legal channels for immigration and the risks of illegal immigration (Article 13 (f)). The extraterritorial scope of these EU funds is interesting for this paper, as they are subject to the Common Provisions Regulation,¹⁵ which contains a few provisions regarding the prevention of fraud to be implemented by the Member States or the Commission,¹⁶ and the reporting and correction of irregularities that may amount to fraud, further increasing the level of PIF conditionality applicable.

Other funds dedicated solely to the external activities of the EU are being established, destined to finance projects and actions “in third countries or in relation to third countries”, and also contain additional measures. In the current MFF for 2021-2027, two main instruments are destined for such activities, which are divided according to their geographic and thematic focus but are complementary to each other.¹⁷

The first relevant instrument is the Instrument for Pre-Accession destined to provide assistance to the Western Balkans Countries in the preparation of their accession to the EU. This instrument was first established in 2007 (IPA 1)¹⁸ and remained since then the relevant framework for assistance with updates in 2014 (IPA 2)¹⁹ and 2021 (IPA 3).²⁰ The Regulations setting up the different generations of this instrument combine interestingly spending conditionality, i.e., obligations and objectives related to policy objectives like the promotion and respect for the rule of law,²¹ with PIF conditionality. The Regulation contains a provision for monitoring, audit, evaluation, and protection of the Union’s financial interests. It refers to the Financial Regulation mentioned above, but further details the obligations of IPA beneficiaries who shall report “any irregularities, including fraud, which have been the subject of a primary administrative or judicial finding, without delay, to the Commission and shall keep the Commission informed of the progress of any administrative and legal proceedings in relation to such irregularities” (Article 13). The reporting obligation for funds disbursed under the IPA does not include

Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

¹³ Regulation (EU) 2021/1149 of the European Parliament and of the Council of 7 July 2021 establishing the Internal Security Fund [2021] *OJ* L251/94.

¹⁴ Internal Security Fund Regulation, Preamble, para. 26.

¹⁵ Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] *OJ* L231/159.

¹⁶ Common Provisions Regulation, Article 69 (2) and (Article 70 (2)).

¹⁷ IPA III Regulation, preamble, para 2. “This instrument should also be complementary with the Neighbourhood, Development and International Cooperation Instrument – Global Europe (NDICI) established under Regulation (EU) 2021/947 of the European Parliament and of the Council.”

¹⁸ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA I) [2006] *OJ* L210/82.

¹⁹ 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) [2014] *OJ* L77/11.

²⁰ Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III) [2021] *OJ* L330/1.

²¹ Chloé Brière, “‘Treat your neighbour as yourself’ – Rule of law spending conditionality within and outside the EU” in L. M. Hinojosa-Martínez and C. Pérez-Bernárdez, *Enhancing the Rule of Law in the European Union’s External Action* (Elgar Edgar, 2023) 285 - 309.

a threshold and all irregularities must be reported.²² This contrasts with the reporting obligation prescribed for funds under shared management with the Member States, which applies only for irregularities above EUR 10,000. All irregularities detected in the implementation of the IPA are thus included in the annual reports on the protection of the EU's financial interests and the fight against fraud prepared by the European Commission. Besides these provisions, the IPA Regulation also provide for measures that seek to align to good practices in Member States and the PIF obligations binding upon them. Cooperation with key PIF actors – OLAF, the EPPO and the ECA – is stressed in the preamble,²³ and the IPA Regulation is complemented by other measures seeking to reinforce the protection of the Union's financial interests in the course of the accession negotiations, such as the obligation to transpose the PIF Directive in national legislations, to strengthen the national measures and actors against corruption, or the establishment of AFCOS (see below), as well as the measures included in the association and framework agreements, further defining the modalities of their cooperation with the EU.

The second instrument, known as the Global Europe Fund,²⁴ is solely dedicated to fund actions in support of the Union's external policy objectives enshrined in Article 21 TEU, and the Union's external action policies. The Regulation adopted in 2021 regroups several former sectorial instruments focussed on development cooperation, assistance for the Union's neighbourhood, the protection of human rights, or crisis response, conflict prevention and peacebuilding activities.²⁵ The disbursement of EU funding is however subject to a more refined framework. The Regulation serves as the basis for the establishment of geographic and thematic programmes, as well as rapid response actions. The implementation of financing can also be carried out through a variety of options:²⁶ funding can be implemented directly by the Commission, Union delegations or executive agencies, or indirectly through for instance third countries, the bodies they have designated, international organisations or their agencies.²⁷ The funds may also be provided through contributions “to international, regional or national funds, such as those established or managed by the EIB, by Member States, by partner countries and regions, by international organizations or other donors”.²⁸ In such a complex framework, for which the Global Europe Regulation only constitutes a legal basis for enacting more specific instruments, the PIF requirements are relatively minimal. The text refers to the Financial Regulation, and in particular the obligations for beneficiaries to grant the necessary rights and access to the Commission, OLAF and the ECA to conduct their activities.²⁹ Like in the IPA, key PIF actors, such as OLAF and the EPPO, are mentioned, but there is no reference nor comparison with the obligations binding upon Member States. The emphasis is rather placed on the international fight against tax fraud, tax evasion, fraud, corruption, and money laundering,³⁰ with some provisions hinting at corruption spending conditionality.³¹

The efforts of rationalization and streamlining EU external funding initiated in 2021 have been put to the test with the large-scale invasion of Ukraine by Russia in February 2022. The return of war in Europe has led to various evolutions in EU external policies,³² and more particularly in the enlargement policy with the opening of negotiations of accession with Ukraine and Moldova and the recognition of the status of candidate country to Georgia. In that context, the future accession of Ukraine and the transfer of EU funds to the country deserves to be briefly analyzed due to the amounts concerned (up to EUR 50

²² European Commission, 35th Annual Report on the protection of the European Union's financial interests and the fight against fraud – 2023, COM(2024) 318 final, 23, FN 68, or on the Commission's website https://antifraud-knowledge-centre.ec.europa.eu/guidance-legislation/faq_en.

²³ IPA III Regulation, Preamble, para. 48.

²⁴ Regulation (EU) 2021/947 of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe [2021] OJ L209/1.

²⁵ For the list of instruments and the rationale, see European Commission, Proposal for a Regulation establishing the Neighbourhood, Development and International Cooperation Instrument, COM(2018) 460 final, 2.

²⁶ Global Europe Regulation, Article 26.

²⁷ The list is provided in Article 62 (1) of the Financial Regulation, and further details are provided in Article 28 of the Global Europe Regulation, referring to international organisations and to all other legal entities, including civil society organisations.

²⁸ Global Europe Regulation, Article 26 (2).

²⁹ Global Europe Regulation, Preamble, para. 79.

³⁰ Global Europe Regulation, Preamble, para. 80.

³¹ Global Europe Regulation, Article 13 (2) b under thematic programmes the framework for cooperation based on the partner's capacity and commitment to promote shared values, principles and interests, including (...) fight against corruption. See also Global Europe Regulation, Article 19 (2) c) Union support under geographic programmes in the Neighbourhood area would take into account the partner country's commitment to and progress in building deep and sustainable democracy, the rule of law, good governance, human rights, and the fight against corruption.

³² See for instance the evolution in the field of EU sanctions.

billion) and the sources of funding mobilized. The Ukraine Facility established in 2024 is a unique instrument,³³ combining grants and loans to the Ukrainian State, a specific Ukraine Investment Framework, and technical assistance measures akin to the support normally available under the Instrument for Pre-Accession. The country is thus subjected to strict PIF requirements, going far beyond the general statements about its full cooperation with OLAF and the EPPO and the necessity to report irregularities.³⁴ The Financial Regulation and the obligations it sets out there in obviously apply, confirming once more that this instrument establishes a minimum layer of PIF requirements. However, additional provisions are included. The Regulation foresees the conclusion of a Framework Agreement containing “specific arrangements for the management, control, supervision, monitoring, evaluation, reporting and audit of funds under the Facility, (...) as well as to prevent, detect, investigate and correct irregularities, fraud, corruption or any other illegal activity affecting the financial interests of the Union and conflicts of interest, including the effective investigation and prosecution of offences affecting the funds provided under the Facility.”³⁵ The Framework Agreement shall, in particular, provide for the “obligation for persons or entities implementing Union funds under the Facility to notify the Audit Board, the Commission, OLAF and, where applicable, the EPPO, without delay, of suspected or actual cases of irregularities, fraud, corruption and conflicts of interest and other illegal activities affecting the funds provided under the Facility and their follow-up”.³⁶ It is to be complemented by financing agreements setting out the responsibilities and obligations of Ukraine in the implementation of Union funds (Article 10), and loan agreements. An additional provision is devoted to the protection of the Union’s financial interests (Article 35). The latter contains advanced measures detailing what ought to be included in the aforementioned agreements, such as measures to treat mutual legal assistance requests by the EPPO and Member States’ competent authorities concerning PIF criminal offences without delay (Art. 35 (2) c)); to expressly authorize the Commission, OLAF and the ECA to exert their rights as provided for in the Financial Regulation;³⁷ or to ensure that the competent Ukrainian authorities report to the EPPO any criminal conduct affecting the funds provided under the Facility that might fall within its competence (Art. 35 (2) g)). Such provisions are relatively close to those binding on the EU Member States, especially those relating to the reporting of information to the EPPO,³⁸ and illustrate how accession candidates are subjected to a regime largely aligned to the one binding EU Member States.

As an intermediary conclusion, we can draw the picture of a funding landscape in the EU’ external actions as fragmented as in the EU’s internal actions, with a multiplicity of instruments and forms of financial contributions and supports to activities in and in relation to third countries. For all these forms of support and assistance, a minimum layer of PIF requirements, provided in the Financial Regulation, applies, and is complemented by more specific provisions inserted in each Regulation establishing an EU fund, as well as eventually in agreements concluded with the external partners. A special regime can be identified for candidate countries (including Ukraine) that are subject to obligations much closer to those binding on the EU member states.

III. The enforcement ecosystem: the EU actors going abroad

The protection of the Union’s financial interests forms an integral part of the design and implementation of the Union’s external activities. The instruments analysed in the previous section highlight the importance of the PIF obligations and they single out a few actors that are particularly relevant for the enforcement of such PIF standards. The interplay between the budgetary instruments regulating the use of EU funds, those establishing funding programmes, and those defining the role and mandate of EU actors leads to the development of an ecosystem, in which the enforcement of PIF requirements should be facilitated. The next section will attempt to draw and categorise the different actors involved.

³³ Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, *OJ L*2024/792.

³⁴ Ukraine Facility Regulation, Preamble, para. 95 to 101.

³⁵ Ukraine Facility Regulation, Article 9 (1).

³⁶ Ukraine Facility Regulation, Article 9 (4) f).

³⁷ The text here refers to the principle of proportionality

³⁸ Comparison with Article 24 of the EPPO Regulation providing the reporting obligation binding on all EU IBOAs and national authorities,

The first actor to be addressed is most probably the European Commission, that is tasked with the implementation of the EU budget under Article 317 TFEU. The different instruments establishing EU funds place the executive institution at a central place: the Commission can directly implement EU funds (those under direct management) and thus be in the first place to ensure that PIF requirements are respected by the funds' beneficiaries. The Commission also plays a part in the implementation of the funds under shared management, in close cooperation with the EU Member States, international organisations or third countries entrusted with their implementation. It is tasked to verify the eligibility of the implementing partners, disburse the funds, and monitor potential irregularities in their implementation, notably through the management of databases (Irregularity Reporting Mechanism or the Early Detection and Exclusion System). The Commission may also propose (and in some cases autonomously decide) to suspend or terminate the provision of funding. It must also realise audits of EU funded projects and cooperates with the European Court of Auditors in the preparation of in-depth audit reports. In monitoring the implementation of EU projects in third countries, the Commission may rely on the EU delegations, who can include staff solely devoted to such PIF-related tasks. However, while the vast majority of such irregularities are non-fraudulent, and may be remedied through correction measures, some of them reach a threshold of seriousness or are marked by fraudulent intent. In such circumstances, other actors may step in.

The two other actors that may be called to step in are those with a clear and ambitious mandate in the protection of the Union's financial interests, namely OLAF and the EPPO. Without retracing their history or the evolution of their basic instruments, the analysis will focus on their capacity to act outside the EU's borders.

The Anti-Fraud Office (OLAF) is competent to "conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union".³⁹ Its administrative investigations are understood as any inspection, check or other measure undertaken with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation.⁴⁰ OLAF's material competence is to conduct such investigations when the EU budget is allegedly affected by illegal activities, in particular EU expenditures and most of its revenues (e.g. customs duties, agricultural duties, etc.).⁴¹ The investigative powers of OLAF are particularly extended. They are mainly defined in Regulation 883/2013, read together with other instruments, and particularly with Regulations 2185/96⁴² and 2988/95.⁴³ Its powers include the possibility to conduct on-the-spot checks and inspections, which can be conducted in the EU institutions, bodies, agencies and offices (internal investigations),⁴⁴ or in the premises of economic operators in the Member States, and eventually in third countries and in premises of international organisations (external investigations).⁴⁵ As for the latter, Regulation 883/2013 acknowledges since 2013 the importance of external investigations carried out in third countries and international organisations, notably those receiving external aid "given the scale of Union funds allocated to the external-aid sector".⁴⁶ The Office should be able to seek practical assistance from the competent authorities without creating any additional legal obligations.⁴⁷ Such necessity translated into the insertion of a specific provision granting the Office the possibility to agree on administrative arrangements, known as Administrative Cooperation Arrangements (ACAs), signed between OLAF and the competent authorities in third countries and international organisations.⁴⁸ These arrangements may

³⁹ Regulation (EU, Euratom) No 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L248/1, Art. 1 (4).

⁴⁰ Regulation 883/2013, Art. 2 (4).

⁴¹ Miroslava Scholten and Michele Simonato, "EU Report", in Michiel Luchtman and John A.E Vervaele (eds), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, April 2017, p.14.

⁴² 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 [1996] OJ L 292/2.

⁴³ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests [1995] OJ L 312/1.

⁴⁴ Regulation 883/2013, Art. 4.

⁴⁵ Regulation 883/2013, Art. 3.

⁴⁶ Regulation 883/2013, Preamble, para 36.

⁴⁷ Ibid.

⁴⁸ Regulation 883/2013, Art. 14.

concern the “exchange of operational, strategic or technical information, including, on request, progress reports”. As pinpointed by OLAF officials, 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”.⁴⁹ OLAF has been particularly active in signing such administrative cooperation arrangements and may coordinate with the Commission and the EEAS before agreeing to such arrangements. The Office had, as of July 2024,⁵⁰ signed ACAs with 38 authorities of third States, (including sometimes with different authorities in the same third State),⁵¹ and 15 international organizations (among which UN-affiliated organizations often involved in joint projects with the EU and/or identified as privileged partners that may receive funding under indirect management).⁵² OLAF can also benefit from a specific regime with regard to the investigations to be conducted in candidate countries. The EU concluded Financial Framework Partnership Agreements signed with the recipient countries, initially those located in the Western Balkans, now extended to new candidate countries. These agreements include additional provisions related to the protection of the Union’s financial interests, such as the obligation to set up an Anti-Fraud Coordination Service (AFCOS) mirroring the obligation binding on the EU Member States by virtue of Regulation 883/2013.⁵³ The Framework Agreement on EU financing signed with Ukraine in May 2024⁵⁴ is likely to provide similar arrangements.⁵⁵ The country (Ministry of Finance) has also signed an Association Agreement that allows Ukraine to participate in the Union’s Anti-Fraud Programme, implemented by OLAF, thus being the first non-EU / candidate country to join the programme.⁵⁶ Thanks to these additional measures, OLAF’s annual reports regularly include information about its investigations in third countries linked to the use of EU funds.⁵⁷

The European Public Prosecutor’s Office (EPPO) is responsible for “investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, the criminal offences affecting the financial interests of the Union”.⁵⁸ The EPPO conducts criminal investigations, i.e. investigations whose final purpose is to determine the presence of a criminal offence, and the innocence or guilt of a person, and prepare cases to be presented before national judges in the participating Member States. The scope of its competence is crucial to ascertain whether the EPPO may be a relevant actor in the enforcement of PIF requirements abroad. Its material competence is provided for via a reference to the PIF Directive,⁵⁹ which defines minimum rules on the offences affecting the Union’s financial interests. The EPPO’s material competence also includes offences regarding participation in a criminal organisation whose activity is focused on committing any of the offences referred to in the PIF Directive, and any other criminal offence which is inextricably linked to criminal conduct falling in the scope of offences defined in the PIF Directive.⁶⁰ Such offences can be committed abroad and are often also criminalised in the application of the international commitments of the countries and the international organisations

⁴⁹ Claire Scharf-Kröner and Jennifer Seyderhelm, OLAF Investigations Outside the European Union”, 2019 *EUCRIM* 3, 213.

⁵⁰ OLAF, State of Play – July 2024 Administrative Cooperation Arrangements (ACAs) with partner authorities in non-EU countries and territories and counterpart administrative investigative services of International Organisations.

⁵¹ OLAF has for instance signed ACAs with 4 different authorities in Ukraine.

⁵² https://commission.europa.eu/funding-tenders/find-funding/funding-management-mode_en

⁵³ Claire Scharf-Kröner and Jennifer Seyderhelm, OLAF Investigations Outside the European Union”, 2019 *EUCRIM* 3, 209 – 218.

⁵⁴ Ministry of Economy of Ukraine, Press release “Ukraine and the EU signed a Framework Agreement for financing under the Ukraine Facility”, 24 May 2024.

⁵⁵ Full text of the agreement not available at the time of writing in September 2024.

⁵⁶ The programme funds measures aiming at enhancing the national capacity to protect the Union’s budget, such as the purchase of specialised anti-fraud equipment/tools and specific trainings. OLAF, Press release “Ukraine formalises participation in the Union Anti-Fraud Programme”, 21 March 2024.

⁵⁷ See for instance, OLAF, 2023 Annual report, Investigative activities, International investigations, https://ec.europa.eu/olaf-report/2023/investigative-activities/protecting-eu-funds/international-investigations_en.html, or OLAF, 2022 Annual Report, https://ec.europa.eu/olaf-report/2022/investigative-activities/protecting-eu-funds/international-investigations_en.html. For the last two years, the focus has been placed on countries participating in EU enlargement or neighborhood policies (Albania, North Macedonia and Ukraine in 2023, Georgia in 2022), but in previous years (2019, 2020), the cases were more geographically diverse (Africa, Syria, Jordan).

⁵⁸ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office [2017] OJ L283/1, Art. 4 (1).

⁵⁹ PIF Directive, supra note 4.

⁶⁰ Art. 22 EPPO Regulation. Its competence is shared with national authorities, and is subordinated to seriousness thresholds, e.g. the importance of the damage or the sanctions concerned and specific rules apply to VAT-related fraud (Art. 25 (2) and Art. 25 (3) a) and b)). On this issue, see Anne Weyembergh and Chloé Brière, *Towards an EPPO*, study realised for the LIBE Committee, 2016, PE 571.399, p. 25.

receiving and managing EU funds. However, determining the EPPO's territorial competence is another matter. The EPPO itself has prepared a summary highlighting the circumstances in which it may claim competence for investigating an offence committed in a third country.⁶¹ First, it can be competent when the offences are committed in whole or in part within the territory of one or several participating Member States. This usually refers to cases in which any constituent element of the criminal offence has taken place in Belgium or in Luxembourg, and this is for instance met when a false document is submitted, leading to the authorisation of the disbursement of funds in the third country. Secondly, the EPPO can claim competence when the offences are committed anywhere outside the territory of a participating State by a national of a Member State participating in the EPPO or by an EU official. Given such a broad definition of the EPPO's competence, it is no surprise that the EPPO Regulation provides for the EPPO's capacity to establish and maintain cooperative relations with the authorities of third countries and international organizations,⁶² and provides that EPPO participating States may notify the EPPO as a competent authority for the implementation of multilateral agreements on legal assistance in criminal matters.⁶³ Since the beginning of its operations, the EPPO has signed working arrangements with national authorities located in candidate countries: the National Anti-Corruption Bureau and Prosecutor General's Office of Ukraine; the Albanian Special Anti-Corruption Structure and the Prosecutor's Offices of Bosnia and Herzegovina, Georgia, Albania, Moldova, Montenegro, and North Macedonia; the United States Department of Justice and Department of Homeland Security, and the Anti-Corruption Commission Seychelles.⁶⁴ The EPPO's annual reports do refer to cases involving third countries, and mobilizing the provisions on such cooperation. The Goliath case, an example of VAT carousel fraud, in which the suspects established companies in Germany and other EU Member States, as well as in non-EU countries, to trade the goods through a fraudulent chain of missing traders, led to the arrest of a suspect of Danish nationality in Kenya, and his extradition.⁶⁵ Reports or press releases do not (yet) refer to cases involving offences relating to EU funds committed in a third country or by an international organization, and refer rather to customs or VAT-related offences.

Last, the two agencies, Europol and Eurojust, may also indirectly support to the enforcement of PIF requirements. Both agencies do not have operational powers, as their role is rather to act as facilitators for the exchange of information (Europol), the coordination of investigations (Europol & Eurojust) and solving obstacles in judicial cooperation (Eurojust). Their mandates are relatively broad and cover a variety of crime areas, among which the protection of the Union's financial interests. Both agencies have developed the external dimension of their operations and signed strategic and operational cooperation agreements, as well as working arrangements with third countries and international organisations. Their contribution to the enforcement of PIF requirements, and in particular the enforcement outside the EU's borders, may be more limited, but they can nevertheless participate in it. Europol can for instance rely on its extensive network of partners and its capacity to receive information from third parties to transfer information to OLAF and the EPPO about potential cases and thus assist in the detection of cases. Eurojust is also able to provide assistance in complex PIF cases that may involve the EPPO, EPPO participating State(s), non-participating State(s) and/or third countries.⁶⁶

The respective mandates of these actors involved in the detection, investigation and prosecution of behaviours affecting the Union's financial interests open new and expand existing avenues for increased interagency cooperation. However, there are limits to their actions, which have been pinpointed

⁶¹ EPPO, summary available at: <https://www.eppo.europa.eu/sites/default/files/2023-11/EPPO%27s%20jurisdiction%20-%20EU%20funds%20to%20third%20countries.pdf>

⁶² EPPO Regulation, Preamble, para. 108, and Articles 99 and 104.

⁶³ EPPO Regulation, Article 104 (4) and (5). See for more details, Nicholas Franssen, *Judicial Cooperation Between the EPPO and Third Countries, Chances and Challenges*, 2019 EUCRIM 3, 198 – 205.

⁶⁴ EPPO, Annual Report 2023, 108. And EPPO's website : <https://www.eppo.europa.eu/en/about/international-cooperation#cooperation-between-the-eppo-and-non-eu-states-third-countries> .

⁶⁵ EPPO, Press release "Investigation Goliath: EPPO arrests ringleader of €85 million VAT fraud in Kenya", 10 June 2024, <https://www.eppo.europa.eu/en/media/news/investigation-goliath-eppo-arrests-ringleader-eu85-million-vat-fraud-kenya>

⁶⁶ As an example, see Eurojust, Casework report on Corruption for 2016-2021, 13, referring to a large corruption investigation into international bribery and a tender financed with EU funds, involving four Member States and one third state, initiated following an OLAF report. Eurojust was asked to facilitate the execution of mutual legal assistance measures, as well as organising a coordination meeting, with the participation of OLAF, with the aim (achieved) to trigger an autonomous investigation in the third state represented by the liaison prosecutor.

regarding their activities within the EU⁶⁷ and are further amplified when they must investigate outside the EU's territory. For instance, OLAF investigations remain partially dependent on the cooperation of national authorities and international organisations, notably to organise the practical on-the-spot work and coordinate potential investigative acts.⁶⁸ The follow-up of its reports, transmitted to national authorities of third countries as information notes,⁶⁹ may vary considerably from one country to another. As for the EPPO, it is a new type of actor within the EU and is "an unidentified legal entity" in the field of cooperation in criminal matters as traditionally envisaged in international criminal law. Its modalities of cooperation with third countries are marked by a clear variable geometry, depending on the EPPO's capacity to join multilateral or bilateral agreements, and the willingness of the participating EU Member States to notify the EPPO as a competent authority. Such variable geometry is further amplified, as European delegated prosecutors can rely on their status as national prosecutors in their cooperation with third countries, mobilizing the agreements concluded by their respective Member States.

IV. Limits and benefits of such enforcement of PIF requirements

To conclude our analysis, a tentative sketch of the enforcement of PIF conditionality outside the EU will be drawn. Sources are limited to trace the enforcement of such requirements in third countries and international organisations. However, hints of difficulties can be identified. At the implementation stage, the European Court of Auditors notably considered that the "Commission does not examine potentially systemic irregular expenditure for external actions in the same way it does for internal policies": as the hired auditors are subject to lower requirements and the Commission does not carry out additional checks of its own.⁷⁰ Agreements with partners may further restrict the scope of controls. Under the Financial and Administrative Framework Agreement concluded with the United Nations, the auditors can only check a limited sample of expenditure to check the eligibility of an operation managed with EU funds.⁷¹ The same report further highlighted how enforcement challenges increased the frequency at which the Commission waived the debts of debtors located outside the EU. The report gives an example of the Commission waiving the debts of three NGOs that did not comply with the requirements but refused to reimburse the funds. The lack of recognition in their country of enforcement judgements rendered by European courts meant that legal expenses would be high, and the chances of success of any legal action were low.⁷²

Further illustrations of enforcement challenges can be found in the annual reports of OLAF, which occasionally lead to successful outcomes, but may also draw the light on the limits of its powers. The EU frequently contracts out the implementation of EU funding schemes and may grant important amounts to beneficiaries then tasked to operate tender procedures to local actors. Such schemes can favour irregularities and lead to instances of corruption, but while OLAF can investigate such irregularities, it cannot bring cases before the judges of third countries, or force national authorities to follow up on its findings. As a way of example, the 2019 OLAF report includes cases concerning the suspicion of corruption in the use of funds granted to a Syrian NGO to provide emergency assistance to civilians, or funds granted to a Jordanian project supposedly to retribute election observers. OLAF could only present recommendations to recover the parts of the amounts granted, but there is no information on the follow-up given to such recommendations, and in one case, the individuals identified remained at large.⁷³ Partial information on the outcomes of OLAF investigations and information notes can be traced through complaints addressed to the European Ombudsman, challenging for instance the authority to which OLAF transmitted the result of its investigations.⁷⁴

⁶⁷ See for instance Michele Simonato and Andon Tashukov, "Chapter 32: Protection of the financial interests of the EU" in Miroslava Scholten, *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023) 515 – 519.

⁶⁸ Scharf-Kröner and Seyderhelm, *supra* note 53, 212.

⁶⁹ OLAF reports do not in third countries benefit from the regime foreseen in Regulation 883/2013 securing their recognition as admissible evidence in national proceedings (strictly enumerated) – Article 11 (2).

⁷⁰ ECA, Special Report 07/2024, The Commission's systems for recovering irregular EU expenditure, Potential to recover more and faster, 18.

⁷¹ *Ibid.*

⁷² ECA, Special Report 07/2024, 27.

⁷³ OLAF, The OLAF report 2019, 14 & 18.

⁷⁴ Decision of the European Ombudsman of 13 March 2014 closing own-initiative inquiry OI/8/2010/(VIK)CK concerning the European Anti-Fraud Office (OLAF).

Addressing such deficiencies and difficulties in the enforcement of PIF requirements is not only necessary from the perspective of the European Union as a donor and provider of funds, but it is also interesting from a broader multilateral perspective, considering how the PIF requirements linked to EU funds partially overlap with international obligations enshrined in multilateral agreements. It is for instance the case of the United Nations Convention on Corruption,⁷⁵ to which the EU is a party,⁷⁶ together with 140 other countries. The EU's anti-corruption efforts, recently reinforced with the proposal of new EU instruments,⁷⁷ are clearly embedded in international efforts. The EPPO is recognised as a competent authority under the UNCAC and has joined the Global Operational Network of Anti-Corruption Law Enforcement Authorities,⁷⁸ while the OECD, GRECO and UNODC are part of the EU Network against Corruption. Further research is required to ascertain to what extent synergies among donors' requirements, and reporting and auditing practices, may help to foster a stronger enforcement of these norms.

⁷⁵ United Nations, *Treaty Series*, vol. 2349, 41; Doc. A/58/422.

⁷⁶ The declaration of competence attached to the Convention has been updated in 2022 and explicitly refers to OLAF and the EPPO to claim an exclusive competence in matters falling in their respective mandates.

⁷⁷ Joint Communication on the fight against corruption, JOIN(2023) 12 final; Proposal for a Directive on combating corruption, COM(2023) 234; and proposal to establish a new EU sanction regime for corruption.

⁷⁸ https://home-affairs.ec.europa.eu/news/eu-and-unodc-meet-2nd-anti-corruption-dialogue-2023-10-06_en