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## **Entscheidung in der Sache 723/2005/OV - Versäumnis, Zugang zu Dokumenten betreffend eine Untersuchung durch das OLAF bereitzustellen**

Entscheidung

**Fall 723/2005/OV - Geöffnet am 14/04/2005 - Entscheidung vom 18/12/2009**

**Fall 790/2005/OV - Geöffnet am 14/04/2005 - Entscheidung vom 18/12/2009**

Zwei belgische Unternehmen, von denen das eine Obst, vor allem Bananen, importiert, und das andere Dienstleistungen eines Zollvertreters erbringt, wurden im Jahre 2002 von den belgischen Zollbehörden beschuldigt, gefälschte spanische Zertifikate (so genannte „AGRIM“-Zertifikate) verwendet zu haben, um Bananen von bestimmten lateinamerikanischen Ländern zu einem günstigeren Zollsatz zu importieren. In den entsprechenden Berichten wurde festgestellt, dass die beiden Unternehmen sowie andere Unternehmen es auf diese Weise umgangen haben, Einfuhrsteuern in Höhe von mehr als 8 Millionen Euro zu zahlen. Die Untersuchung durch die belgischen Zollbehörden zu diesem Fall erfolgte auf Ersuchen des Europäischen Amtes für Betrugsbekämpfung (OLAF). Zur Vorbereitung ihrer Beschwerde ersuchten die beiden Unternehmen das OLAF gemäß Verordnung (EG) Nr. 1049/2001 über den Zugang der Öffentlichkeit zu Dokumenten, ihnen Zugang zu einer langen Liste von Dokumenten zu gewähren, die dessen Untersuchung zur vorstehend genannten Fälschung betrafen. Das OLAF gab einige der Dokumente heraus, verweigerte jedoch bei der Mehrheit der Dokumente den Zugang. Begründet wurde dies vor allem damit, dass die Freigabe der betreffenden Dokumente den Schutz der Untersuchung durch das OLAF sowie den Schutz von Gerichtsverfahren, die in einigen Mitgliedstaaten anhängig waren, untergraben würde.

In ihren identischen Beschwerden an den Bürgerbeauftragten behaupteten die beiden Unternehmen, dass das OLAF gegen die Verordnung (EG) Nr. 1049/2001 verstoßen habe, indem es: (i) seine Entscheidungen nicht begründet hat; (ii) sich weigerte, teilweisen Zugang zu bestimmten Dokumenten zu gewähren; (iii) die Existenz bestimmter Dokumente bzw. die Tatsache leugnete, dass diese in seinem Besitz waren; und (iv) darauf hinwies, dass bestimmte Anfragen in die Zuständigkeit der Europäischen Kommission fallen würden. In seiner



Stellungnahme erhielt das OLAF seinen vorherigen Standpunkt aufrecht.

Nach der Untersuchung der Akte des OLAF, gelangte der Bürgerbeauftragte zu dem Schluss, dass das OLAF sich mit seiner Weigerung, den Zugang zu einer ganzen Reihe von Dokumenten zu verweigern, nicht korrekt verhalten habe. Er unterbreitete daher den Vorschlag für eine einvernehmliche Lösung und bat das OLAF, seinen Standpunkt zu überdenken.

Das OLAF akzeptierte den Vorschlag für eine einvernehmliche Lösung. Es stellte fest, dass es nach Konsultierung zuständigen Rechtsbehörden der betroffenen Mitgliedstaaten, zu dem Schluss gekommen sei, dass die Freigabe der fraglichen Dokumente nicht den Schutz seiner eigenen Untersuchung bzw. den Schutz von Gerichtsverfahren in diesen Mitgliedstaaten untergraben würde. Infolgedessen übermittelte es den Beschwerdeführern insgesamt 168 Seiten der in Frage stehenden Dokumente. Die Beschwerdeführer bestätigten, dass eine einvernehmliche Lösung erzielt worden sei, und dankten dem Bürgerbeauftragten dafür, dass er dieses Ergebnis erreicht hat. Demzufolge schloss der Bürgerbeauftragte den Fall ab.

## THE BACKGROUND TO THE COMPLAINTS

1. The present two complaints concern applications for public access to documents, which were made on the basis of Regulation 1049/2001/EC [1] ('the Regulation'). The Articles of the Regulation which are relevant for the present complaint are listed below:

### *" Article 3 - Definitions*

*For the purpose of this Regulation: ...*

*(b) 'third party' shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.*

### *Article 4 - Exceptions*

*1. The institutions shall refuse access to a document where disclosure would undermine the protection of: ...*

*(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

*2. The institutions shall refuse access to a document where disclosure would undermine the protection of:*

*- commercial interests of a natural or legal person, including intellectual property,*



- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

*unless there is an overriding public interest in disclosure.*

*3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

*Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

*4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.*

*5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.*

*6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.*

#### *Article 6 - Applications:*

*1. Applications for access to a document shall be made in any written form, ... and in a sufficiently precise manner to enable the institution to identify the document ...*

*2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application ...*

#### *Article 7 - Processing of initial applications*

*1. ... the institution shall either grant access to the document requested and provide access ... or, in a written reply, state the reasons for the total or partial refusal ...*

#### *Article 8 - Processing of confirmatory applications*

*1. ... the institution shall either grant access to the document requested and provide access ... or, in a written reply, state the reasons for the total or partial refusal ... "*

*2. The complainants in the present case are two Belgian companies. The first one imports fruit,*



mainly bananas, and the second one provides services as a customs agent. Each of the companies is represented by a lawyer and both submitted identical complaints to the Ombudsman.

3. On 5 July 2002 and 28 November 2003, the Inspection Unit of the Administration for Customs and Excise in Antwerp, Belgium ('the Belgian Customs and Excise Administration') sent both of the complainants (and to other companies as well) a report (" *proces-verbaal* ") and an additional report (" *aanvullend proces-verbaal* ") holding them responsible for the use of false Spanish 'AGRIM' certificates [2] to import bananas from certain Latin American countries at a preferential tariff. These reports were sent in the framework of an inquiry that was initiated by the Belgian authorities into the use of allegedly false AGRIM certificates and based on a request made by the European Anti-Fraud Office (OLAF) in a fax dated 1 February 2002. The reports contained various elements which suggested that Spanish authorities had been involved in the issuing of the said certificates. The reports concluded that, by using the false certificates, the complainants and other companies involved had escaped paying import duties amounting to a total of EUR 8 707 820.07.

4. Due to the size of the above sum and in order to know the facts so as to prepare an appeal, the complainants both contacted the Director-General of OLAF by letter on 28 June 2004. On the basis of the Regulation, they requested access to all documents which had been drafted, investigated or received by OLAF concerning its inquiry into the aforementioned falsification. The complainants indicated that this inquiry had probably been initiated at the end of 1999 or at the beginning of 2000.

In their applications, the complainants requested access to the following documents in particular:

" 1) *The Decision by the Director of OLAF to start the said inquiry and, if applicable, the request on which that decision was based, and, particularly but not exclusively, the documents and information supplied to OLAF by the Spanish Ministry of Economic Affairs, reference to which is made in OLAF's letter of 1 February 2000 (ref. 000822) addressed to the [ Belgian ] National Investigation Directorate of the Customs and Excise Administration. These include:*

- *the identity of the Spanish dealer whose name was unlawfully used and who is said to have reported the irregular use of the nine AGRIM certificates;*
- *the ground on the basis of which the Spanish authorities concluded that the four AGRIM certificates that were the subject of the letter from the Spanish Ministry of Economic Affairs to OLAF of January 2000 were duplicates of the genuine AGRIM certificates, together with a copy of the alleged duplicates and a copy of the alleged genuine certificates;*

2) *The written mandate issued by the Director of OLAF to the OLAF officials, specifying the subject of the inquiry;*

3) *Each national search warrant issued in connection with this inquiry and every proof of*



*mandate in this framework;*

*4) All correspondence between OLAF and the Member States involved in the inquiry;*

*5) Documents, reports and information relating to OLAF's inquiry to the Member States and vice versa, including:*

*(i) The report of the working meeting of 16 February 2000 between Mr Yvo Hermans, Ms Yolande Van Mieghem, Mr Walter Voorhoof and Ms Miranda Vansevenant from the Customs and Excise and Mr Guy Jennes and Mr Pierpaolo Rossi from [ OLAF's ] services;*

*(ii) The report of the coordination meeting held in OLAF's premises on 26 September 2000 in the presence of Mr Peter Fabry, Ms Miranda Vansevenant and representatives from various Member States;*

*(iii) The report of the coordination meeting held in OLAF's premises on 8 March 2001 in the presence of Mr Jan De Vos, Mr Desomere and Ms Miranda Vansevenant and representatives of various Member States;*

*6) Each administrative report with findings established by OLAF or the national investigators including, but not exclusive to the following documents:*

*(i) each report drawn up by OLAF staff concerning the acts of investigation carried out in Portugal in January 2001 (cf. OLAF's letter of 30 January 2002, ref. 00919; the fax from OLAF of 9 January 2001, ref. 000082) and in Spain on 18 July 2000 (cf. OLAF's letter of 5 September 2000, ref. 6853);and*

*(ii) the report to which reference is made by Mr Guy Jennes in the testimony report concerning statements made by Mr Jennes to the Portuguese authorities on 12 December 2000;*

*7) All documents requested and obtained in the course of the on-the-spot inspections;*

*8) OLAF's final report, or if it exists, interim report, which recorded the facts, as well as the financial loss, the findings of the inquiry and, if applicable, the recommendations by the Director of OLAF regarding measures to be taken and all related documents;*

*9) The OLAF report and each document drawn up by OLAF, submitted during the proceedings before the Italian penal court and, if applicable, also during the ongoing criminal proceedings in Spain relating to the alleged false AGRIM certificates. In particular, all information or each document transmitted by OLAF to the Spanish authorities relating to the possible involvement in the issuing of false documents and the type of involvement;*

*10) Each document held by OLAF relating to the way in which the competent Spanish authorities issued the AGRIM certificates and any changes in time of this procedure for issuing AGRIM certificates in Spain;*



*11) Documents relating to the stamps used by the competent Spanish authorities in the period 1997-2000 for stamping AGRIM certificates for the import of bananas;*

*12) The document from which it appears that the stamps used by the relevant Spanish authorities were communicated to the European Commission;*

*13) Each document held by OLAF in relation to the theft of AGRIM certificates, which probably took place at the end of 1999 in the Spanish Ministry. In particular, documents which concern a possible investigation of the theft and the further follow-up that was given to this case;*

*14) Documents with statistical information about the import of bananas from Latin America in the period 1998-2000;*

*15) Lists with the registered traditional and non-traditional banana operators in the period 1998-2000;*

*16) The full bundle with reference AM 2000/36, supplement AM 2000/36 SOI and, if any, all other supplements;*

*17) All other documents concerning the administrative inquiry, among others:*

*(i) the conclusion which was finally reached in relation to AGRIM certificates presented in Belgium, whether they were duplicates of genuine AGRIM certificates or false certificates, and how the distinction is made between so-called duplicates and so-called false certificates;*

*(ii) the information and pieces of evidence on the basis of which OLAF concluded in its document AMA 36/2000 of 28 June 2000 that the stamps on the allegedly false Spanish AGRIM certificates differ in terms of the abbreviations from the stamps considered genuine;*

*(iii) the basis on which the Spanish authorities provided to OLAF the evidence that the 233 AGRIM-certificates mentioned in the letter of 21 August 2000 from the Spanish Ministry of Economic Affairs and the three certificates mentioned in OLAF's letter of 29 September 2000 (ref. 7636) were not issued by the competent Spanish authorities. This was in spite of the fact that Spanish officials were suspected of being involved in fraud and that genuine certificates may have been used;*

*(iv) the basis on which the Spanish authorities provided OLAF with evidence that the 39 AGRIM certificates mentioned in OLAF's letter of 12 February 2001 (ref. 001315) were false, whereas Spanish officials were suspected of joint responsibility for the fraud, and how the Spanish authorities distinguished between the 39 AGRIM certificates which are allegedly false and a certificate with number 365579715-3 which was allegedly never issued by the competent body in Spain [3] ".*

5. By letter of 18 August 2004, OLAF provided full access to the Decision of 20 October 2000



(document no. 8302) by the Director-General of OLAF to start the investigation and to the Background Note which was annexed to the Decision.

6. OLAF also provided partial access to its Mission Report of 5 June 2000 (document no. 004412) and to its Final Case Report of 13 May 2002 (document no. 04967). It refused access to certain parts of these documents on the basis of the exceptions in Article 4(1)(b) (the protection of privacy and the integrity of the individual), Article 4(2), first indent (the protection of commercial interests) and Article 4(3) (opinions for internal use) of the Regulation.

7. As regards request nos. 11, 12, 15, 17(i) last sentence ("*how the distinction is made between so-called duplicates and so-called false certificates*"), 17(iii), and 17(iv), OLAF indicated that the complainants would receive a separate reply from the European Commission's Directorate-General for Agriculture and Rural Development (DG AGRI), which was competent for such matters.

8. OLAF further indicated that the document covered by request no. 14 (import and export statistics) was available from the 'Comext' database operated by the Statistical Office of the European Communities (Eurostat) and provided the relevant internet link.

9. OLAF also replied that requests no. 4, 6 (first sentence) and 17 (first sentence) were not precise enough to identify the requested documents. It therefore requested additional information from the complainants.

10. As regards requests no. 1 (first and second indent), 3, 5, 6(i), 10 and 13, OLAF indicated that it did not possess any relevant documents.

11. As regards the documents which were the subject of requests no. 1, second part ("*the documents and information supplied to OLAF by the Spanish Ministry of Economic Affairs* ") and 16, OLAF refused access on the basis of Article 4(2), third indent, of the Regulation.

12. As regards the documents which were the subject of requests no. 6(ii), 9, and 17(i) and (ii), OLAF indicated that these documents formed part of the criminal investigation dossier in the Member States and could not be released on the basis of the exception in Article 4(2), second indent, of the Regulation.

13. On 6 September 2004, the complainants made a confirmatory application. In this letter, they, on the one hand, confirmed their request for access to the documents for which access had been refused and, on the other hand, made a new request for access to four further documents [4] :

" 1) A copy of the authentic official Spanish stamps used in Spain from 1997 until now, including the correct name of the departments responsible for issuing the AGRIM certificates during the relevant period;

2) Annexes no. 7922 of 9 October 2000 and no. 6724 of 31 August 2000 as well as the 'draft





*Decisions' to which reference is made [in the Background Note annexed to the Director-General of OLAF's Decision of 20 October 2000 opening the inquiry] [5] ;*

*3) All correspondence between OLAF and the Member States concerning the alleged false banana certificates as mentioned in document no. 04967 of 13 May 2002;*

*4) All interim reports which were made prior to the final report contained in document no 04967 of 13 May 2002 " [6] .*

14. On 1 October 2004, OLAF granted partial access to document no. 7922, which consisted of a three-page note from OLAF's Investigations and Operations Directorate to OLAF's Director-General. OLAF had blanked out certain parts of that document on the basis of Article 4(2), third indent, of the Regulation because the investigation by the national judicial authorities had not yet been completed. OLAF further refused full access to document no. 6724 on the basis of Article 4(3) of the Regulation because that document had been drawn up for internal use only.

15. On 19 October 2004, the complainants made a (second) confirmatory application concerning the documents covered by their request of 6 September 2004. With regard to document no. 7922, they argued that those parts of the document which were not disclosed should in fact be disclosed since there was an overriding public interest to do this, namely, the complainants' rights of defence in this case. With regard to document no. 6724, the complainants argued that the document should be disclosed because there was no evidence that this would seriously undermine the decision-making process. They also again referred to their rights of defence in this regard and confirmed their request for access to the "*draft Decisions*".

16. On 26 October 2004, OLAF replied to the first confirmatory application of 6 September 2004.

17. In reply to request no. 14 of the initial application, OLAF enclosed a diskette with statistics concerning the banana imports.

18. OLAF confirmed that, as had been indicated in its initial reply, the complainants would receive a separate reply from DG AGRI regarding their requests no. 11, 12, 15, 17(i) last sentence, 17(iii) and 17(iv).

19. As regards requests no. 1 (second indent) and 16, OLAF provided further information on how to distinguish genuine from false AGRIM certificates. It however confirmed its refusal to grant access to the certificates on the basis of Article 4(2), third indent, of the Regulation.

20. OLAF further stated that it was not in possession of documents other than those already provided with respect to requests no. 7 and 8, that is to say, OLAF's Mission Report and its Final Report. OLAF also replied that it was not in possession of any documents relevant for requests no. 1 (first and second indent), 3, 5, 6(i), 7, 10 and 13.





21. As regards the documents relevant for requests no. 1 (second indent), 6(ii), 9, 16 and 17(ii), OLAF confirmed that no access could be given on the basis of the exceptions foreseen in Article 4(2), second and third indents of the Regulation. OLAF stated that the complainants' rights of defence constituted a private interest and not an overriding public interest.

22. As regards the documents relevant for requests no. 4, 6 (first sentence) and 17 (first sentence), in relation to which the complainants had provided additional information, OLAF replied that these documents could not be released on the basis of Article 4(2), third indent of the Regulation, since they formed part of the investigation dossier in ongoing judicial proceedings in several Member States. Their disclosure at that time would have been harmful to those proceedings.

23. OLAF added that, in accordance with Article 4(6) of the Regulation, it had examined the possibility of granting partial access to the documents for which it denied full access. However, if it were to remove all parts of the documents which were covered by the exceptions, it would render the remaining fragments meaningless.

24. On 3 December 2004, OLAF replied to the second confirmatory application of 19 October 2004 and reiterated its earlier refusal of 1 October 2004. It stated that it was not in possession of the " *draft Decisions* " and further confirmed its initial refusal to grant access to parts of document no. 7922 and to the whole of document no. 6724. As regards document no. 7922, OLAF again explained that investigations by several national judicial authorities (Italian, Portuguese and Spanish) were still ongoing and that it had received letters from these authorities confirming that disclosure would be harmful to their investigations. As regards document no. 6724, OLAF explained that the information contained therein was covered by national provisions on the secrecy of judicial proceedings. It further clarified that the public interest of safeguarding the national authorities' capacity to correctly carry out their inspection tasks outweighed the public interest in granting access to the document concerned. The interest of the complainants in exercising their rights of defence was a private interest which should not be confused with a public interest.

25. OLAF again confirmed that granting partial access to the documents was not possible due to the fact that removing those parts of the documents which were covered by the exceptions would make the remaining parts meaningless.

26. OLAF finally rejected the complainants' requests for a non-confidential summary of the information containing the essential points, on the grounds that the Regulation does not impose any requirements on the institutions to create new documents containing summaries of other documents. The information requested was in any case covered by the requirements of confidentiality and professional secrecy.

## THE SUBJECT MATTER OF THE INQUIRY



### *The allegations*

27. On 23 and 24 February 2005, the complainants lodged two identical complaints with the Ombudsman. They alleged that OLAF's refusal to grant full access to the requested documents was an instance of maladministration and claimed access to these documents. More particularly, the complainants made the following six allegations:

1) OLAF infringed Article 4(6) of the Regulation (concerning partial access) and the principle of proportionality

28. OLAF granted partial access to documents no. 8302, 004412, 04967 and 7922. OLAF did not, however, grant partial access to all the other documents. In its letters of 26 October and 3 December 2004, OLAF refused partial access to a large number of documents because "*by deleting all the parts of the documents which fall under the exceptions, the other parts would become pointless, because the sections of the documents that would be released would not be of use to you*" [7]. In the event that the documents contained personal data that could not be released, the complainants had requested for a non-confidential summary of the information containing the essential points to be made available to them. According to them, OLAF's refusal to grant partial access was not made on a case by case basis, but was an automatic refusal which did not consider every single document individually, as required by the case-law of the Court of First Instance [8]. The complainants argued that OLAF should have carried out a specific assessment of the risk that disclosure of the documents to which access was sought could entail for the public interest.

2) OLAF's decisions refusing access were not or not sufficiently reasoned and therefore infringed Articles 7 and 8 of the Regulation which require that the reasons for refusing access should be stated :

29. According to the complainants, OLAF provided insufficient grounds to justify its refusal of full access to the documents mentioned in requests no. 1, 4, 6 (ii), 9, 16, 17(i) and (ii), and to documents no. 8302, 004412, 04967, 6724 and 7922. OLAF used several of the exceptions contained in Article 4 of the Regulation for various documents at the same time. It was therefore not possible to know which exception concerned which document. To illustrate this, the complainants pointed to OLAF's reply of 18 August 2004 to the initial application for access, in which OLAF refused to provide full access to documents no. 8302, 004412 and 04967 by referring to Articles 4(1)(b), 4(2) and 4(3) of the Regulation. According to the complainants, OLAF's refusal was not in conformity with the case-law, which requires that the institution shall, for *every* single document for which access is requested, consider on a case-by-case basis, whether access to the document concerned would undermine the protection of a public interest mentioned in Article 4 of the Regulation. The complainants further stated that no reasons were given to explain why there was a risk that disclosure would harm the public interest.

3) OLAF wrongly refused access by denying (a) the existence of certain documents, or (b) that they were in its possession



30. OLAF stated that it did not possess the documents mentioned in the complainants' requests no. 1, 3 [9] , 5, 6(i), 7, 8, 10 and 13 and the " *draft Decisions* " mentioned in the Background Note of document no. 8302 of 20 October 2000. However, they submitted that there was *prima facie* evidence that these documents did exist and that they were in OLAF's possession:

- *Request no. 1* : The Belgian Customs and Excise Administration's report summoning the complainants to pay the customs duties was based on information about allegedly falsified AGRIM certificates that was provided to it by OLAF. As a consequence, certain documents should exist which reply to the question whether those allegedly false certificates were indeed false and who brought those certificates into circulation. On the basis of information which the complainants had obtained, it appeared to them that there were certain suspect Spanish individuals and companies involved and that there were even rumours about the involvement of officials from the Spanish Ministry. Moreover, the complainants submitted that the Commission should also possess a copy of the imprint of the official Spanish stamp, given that Regulation 3719/88 [10] explicitly requires Member States to send to the Commission the official stamp imprint.

- *Request no. 5* : The Belgian Customs and Excise Administration's reports of 5 July 2002 and 28 November 2003 mentioned three meetings which took place with OLAF representatives at OLAF's premises. In the complainants' view, it was therefore highly unlikely that no documents concerning these meetings existed.

- *Request no. 6(i)* : The complainants stated that the file at their disposal clearly showed that OLAF collaborated with national investigators in the case and exchanged information with them. In their view, it was therefore highly unlikely that OLAF had made no reports about the inquiries in Portugal and Spain in which its officials participated. Moreover, since OLAF made a final report (document no. 04967 of 13 May 2002), interim reports should also logically exist.

- *Request no. 7* : OLAF granted access to its Mission Report (document no. 004412 of 5 June 2002), which is limited to the inquiry relating to the complainants. In the complainants' view, documents should therefore exist which were obtained during the investigations in Belgium and in other Member States.

- *Request no. 8* : The complainants argued that, since OLAF granted access to document no. 04967 (the Final Case Report) in reply to their request no. 8, interim reports drafted by OLAF should thus also exist and OLAF should have them in its possession.

- *Request no. 10* : In the complainants' view, it was very probable that OLAF checked the Spanish procedure for issuing AGRIM certificates for bananas in Spain. OLAF should therefore have documents relating to this in its possession. The complainants referred in this context to a report by the Spanish Ministry of Commerce, according to which a considerable number of blank certificates had been stolen at the end of 1999.

- *Request no. 13* : On the basis of an interim report made by the Portuguese investigators and dated 1 February 2001, the complainants felt that OLAF should possess further information



concerning the theft of AGRIM certificates within the Spanish Ministry of Commerce.

- "*draft Decisions*" : The last sentence of the Background Note of document no. 8302 of 20 October 2000 mentioned that " *a draft Decisions* [sic] *for the opening of investigation* " was attached. In the complainants' view, this provided *prima facie* evidence that OLAF was the author of the draft Decision and should be in the possession of this document.

4) OLAF infringed Articles 2(1) and 4(4) of the Regulation when it refused access to certain documents because they fell under the responsibility of DG AGRI:

31. The complainants pointed out that OLAF refused their requests for access no. 11, 12, 15, 17(i) last sentence, 17(iii) and 17(iv), by stating that the documents concerned fell under the "responsibility" or "competence" of DG AGRI, which would provide an answer to those requests. They added that it was not clear what OLAF meant when it stated that the documents fell under the responsibility or competence of DG AGRI. In the complainants' view, either OLAF did not possess the documents (which they doubted), or it possessed the documents but considered that it could not release them on the basis of the third-party documents' rule (Article 4(4) of the Regulation). If the documents were in OLAF's possession, it should have applied the rule foreseen in Article 4(4) of the Regulation concerning third-party documents, which provides that the institution shall consult the third party with a view to assessing whether one of the exceptions foreseen in paragraphs 1 or 2 of Article 4 is applicable.

5) OLAF infringed Article 4(2), third indent, of the Regulation by refusing to grant full access to certain documents

32. The complainants noted that OLAF refused to grant full access to the documents covered by requests no. 1, 6(ii), 9, 16 and 17(i) and 17(ii) and to the documents no. 7922 and 6724 on the basis of Article 4(2), third indent of the Regulation. This was because the inquiry by the national judicial authorities had not yet been completed.

33. The complainants referred to Article 4(2), third indent, of the Regulation, which states that "[t] he institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits. " They argued that this does not protect the investigation as such, but rather the purpose of it. They further submitted that this exception does not refer exclusively to 'national' investigations. In the present case, there were at least three categories of investigations: 1) the investigation carried out by OLAF, 2) the one carried out by the Belgian customs authorities and 3) the investigations carried out by authorities in other Member States, namely, Spain, Portugal and Italy. OLAF's refusal was based on the fact that the inquiries in the Member States were not yet completed. However, the inquiries carried out by OLAF and by the Belgian authorities concerning the complainants had been completed. According to the complainants, there was therefore no need anymore to protect these inquiries. If OLAF considered that the purpose of the inquiries in Spain, Portugal and Italy needed protecting, it should not have communicated the conclusions of these inquiries to the complainants and to the Belgian authorities in the first place. It should not have requested the Belgian authorities to start a procedure for the payment of customs duties with regard to the



complainants. By having done so, OLAF had, in the complainants' view, accepted that it was not necessary to protect the purpose of the inquiries as claimed.

34. The complainants further alleged that the refusal to grant access to these documents also infringed their rights of defence ( *audi alteram partem* ), since these documents were used as a justification by the Belgian authorities in their reports which asked the complainants to pay import duties. They also submitted that the public interest to have access to documents in order to guarantee the rights of defence outweighed the protection of the purpose of inspections, investigations and audits in the present case.

#### 6) OLAF infringed Article 4(3) of the Regulation by refusing access to certain documents

35. The complainants noted that OLAF refused full access to the document covered by their request no. 1 and to documents no. 8302, 004412, 04967 and 6724 on the grounds that certain parts of these documents contained " *opinions for internal use* " and fell under the exception of Article 4(3) of the Regulation. According to the complainants, there was no indication that, in the present case, disclosure of these documents would have *seriously* undermined the institution's decision-making process, especially in a situation where the decisions regarding the complainants had already been taken. The complainants further submitted that OLAF also failed to consider whether there was an overriding public interest, namely, to have access to the documents in order to guarantee the rights of defence of the complainants.

#### *The Ombudsman's approach*

36. The Ombudsman asked OLAF to submit an opinion on the complainant's allegations, which he reformulated as follows:

- OLAF infringed Article 4(6) of the Regulation (concerning partial access) and the principle of proportionality.
- (2) Some of OLAF's decisions were not or not sufficiently reasoned and therefore infringed Articles 7 and 8 of the Regulation which require stating the reasons for the refusal.
- OLAF wrongly refused access by denying that certain documents existed or were in its possession.
- OLAF infringed Article 2(1) and 4(4) of the Regulation when it refused access to certain documents because they fell under the " *competence* " or under the " *responsibility* " of DG AGRI.
- OLAF infringed Article 4(2), third indent, of the Regulation and the rights of the defence by refusing to grant full access to certain documents.
- OLAF infringed Article 4(3) of the Regulation by refusing access to certain documents.

## THE INQUIRY

37. On 14 April 2005, the Ombudsman sent the two complaints to the Director-General of OLAF for an opinion. On 2 August 2005, OLAF sent two identical opinions on the two complaints.



38. On 6 September 2005, the complainants agreed by telephone that their complaints could be dealt with jointly in the framework of one single inquiry. On 3 November 2005, the complainants sent their observations.

39. On 27 February 2007, the Ombudsman wrote to the Director-General of OLAF with a request to inspect OLAF's file concerning its investigation into the fraudulent importation of bananas using false AGRIM certificates. The Ombudsman informed the complainants accordingly on the same day.

40. By letter of 4 May 2007, OLAF reacted to the Ombudsman's request to inspect the file. It stated that it had to analyse whether "*duly substantiated grounds of secrecy*" [11] existed in the present case and that, due to the huge volume of documents contained in the case folders, this analysis would take more time than expected. In his reply of 1 June 2007, the Ombudsman provided some clarifications concerning the inspection procedure and asked OLAF to agree on a date for the inspection as soon as possible. On 3 July 2007, OLAF replied that it had established a comprehensive list of all documents of the case for the relevant time period (2000-2002). However, this list was confidential since it concerned OLAF's investigation and judicial follow-up proceedings in the Member States, including criminal proceedings pending before national courts. OLAF therefore invited the Ombudsman's representatives to consult the list in order to identify the specific documents which they wished to inspect.

41. The first part of the inspection was carried out on 18 July 2007. By e-mail of 19 July 2007, the Ombudsman's services sent a list indicating 18 documents which they wished to inspect. On 26 July and 5 September 2007, OLAF sent further letters concerning the inspection. The second part of the inspection was carried out on 25 September 2007.

42. On 15 October 2007, the Ombudsman sent a copy of the inspection report, together with a copy of non-confidential documents obtained during the inspection, to the complainants as well as to the Director-General of OLAF. In his letter to OLAF, the Ombudsman asked for clarifications concerning two faxes which had been sent by DG AGRI on 20 August and 2 September 2004 to a law firm other than the law firms representing the two complainants, a copy of which had been obtained during the inspection. On 15 October 2007, the Ombudsman also wrote to the President of the Commission with regard to the same issue. He asked to be informed how DG AGRI had dealt with those parts of the complainants' requests for which OLAF had declared they would receive a reply from DG AGRI.

43. On 29 October 2007, OLAF replied that it considered it was for the competent Commission services to provide the necessary clarifications. After having requested and obtained an extension of the deadline for its reply, the Commission sent its reply in English on 17 January 2008 and a translation into Dutch on 26 February 2008. On 4 March 2008, the Ombudsman sent OLAF's and the Commission's replies to the complainants for observations. On 15 April 2008, the complainants sent their observations on both the inspection report and the replies sent by OLAF and the Commission.

44. On 5 June 2009, the Ombudsman made a proposal for a friendly solution between the





complainants and OLAF. OLAF accepted the friendly solution proposal and sent its reply on 13 November 2009. The Ombudsman sent OLAF's reply to the complainants, who submitted their observations on 10 December 2009.

## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### Preliminary remarks concerning the scope of the inquiry

45. In their further observations of 15 April 2008, the complainants indicated that they also requested access to the list of 275 documents inspected by the Ombudsman's services on 18 July 2007 and to the 18 documents identified by the Ombudsman's services on the basis of that list. The Ombudsman would like to point out that the scope of the present inquiry is limited to the requests mentioned in the complaints, namely, the 17 requests set out in the application of 28 June 2004 and the four additional requests put forward in the confirmatory application of 6 September 2004. If the complainants wish to be given access to further documents, they would first need to make the appropriate prior administrative approaches to OLAF, that is to say, address an application for access to OLAF on the basis of the Regulation and if necessary make a confirmatory application, after which they would have the possibility to lodge a new complaint with the Ombudsman.

46. The Ombudsman would further like to point out that the present inquiry only concerns OLAF and not the Commission. The complainants did not submit a separate complaint against DG AGRI.

### A. The alleged infringements of the Regulation

#### *Arguments presented to the Ombudsman*

##### Arguments presented by the complainants

47. The complainants made the following six allegations: (1) OLAF infringed Article 4(6) of the Regulation (concerning partial access) and the principle of proportionality; (2) some of OLAF's decisions were not or not sufficiently reasoned and therefore infringed Articles 7 and 8 of the Regulation which require stating the reasons for the refusal; (3) OLAF wrongly refused access by denying that certain documents existed or were in its possession; (4) OLAF infringed Article 2(1) and 4(4) of the Regulation when it refused to give access to certain documents on the grounds that they fell under the "*competence*" or under the "*responsibility*" of DG AGRI; (5) OLAF infringed Article 4(2) of the Regulation and the rights of the defence by refusing to grant full access to certain documents; and finally, (6) OLAF infringed Article 4(3) of the Regulation by refusing access to certain documents.

##### Arguments presented by OLAF





1) As regards the alleged infringement of Article 4(6) of the Regulation concerning partial access and of the principle of proportionality

48. OLAF stated that it fully complied with its obligations under Article 4(6) of the Regulation by granting partial access to documents where possible. According to OLAF, it did carry out a specific assessment regarding each document requested. This was evident from the answers provided in the replies to both the initial and confirmatory applications. As a result of the assessment, partial access was granted to a number of documents covered by requests no. 1, 2, 7 and 8. OLAF pointed out that its assessment revealed that partial access to documents covered by the other requests was not possible, since removing all those parts of the documents which were covered by the exceptions would have rendered the documents meaningless. As regards the complainants' reference to Case T-188/98 *Kuijer v Commission*, according to which EU institutions are obliged to carry out a specific assessment of the risk that the disclosure of the documents to which access is sought could entail for the public interest, OLAF pointed out that this judgment was based on the Council's decision implementing the Code of Conduct concerning public access to documents, that is to say, the predecessor of Regulation 1049/2001. The Regulation provides however in Article 4(2) and (3) that access shall be refused where disclosure would undermine the protection of the various interests described therein " *unless there is an overriding public interest in disclosure* ". In OLAF's view, the *Kuijer* case-law provided no guidance for interpreting the " *overriding public interest* " criterion of the Regulation.

49. OLAF also referred to the judgment of the Court of First Instance in Case T-204/99, in which the Court stated that " [ t ]he Council and the Commission are in any event entitled to refuse partial access where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant " [12] .

50. In relation to the complainants' suggestion that a non-confidential summary containing the essential information should have been prepared concerning the documents to which access was denied, OLAF stated that, as already explained in its reply to the complainants' second request, it is under no obligation to create new documents in response to a request for access to documents. Moreover, creating such summaries for each of the documents concerned would constitute an undue administrative burden for OLAF and a violation of the principle of sound administration. In any event, the information requested was covered by the requirements of confidentiality and professional secrecy.

2) As regards the alleged infringement of Articles 7 and 8 of the Regulation because some of OLAF's decisions were not or not sufficiently reasoned

51. OLAF stated that it fully satisfied its obligation to provide a reasoned decision when refusing access. OLAF granted full access to document no. 8302. As regards the remaining documents, OLAF did, in fact, examine each of the documents concerned separately. OLAF provided the following reasons for refusing access:



- *Request no. 1* : Copies of the certificates were refused on the ground of the exception contained in Article 4(2), third indent, of the Regulation because they formed part of the investigation files of judicial authorities in several Member States. Disclosure of the documents would therefore be harmful to those investigations. In reply to the confirmatory application, an explanation was provided to the complainants as to how genuine and false certificates could be distinguished (see also the reasoning with respect to the complainants' arguments on the rights of defence below).

- *Request no. 4* : The initial reply to the complainants indicated that the request lacked precision. When more specific information was provided in the confirmatory application, access was refused on the basis of the exception in Article 4(2), third indent, of the Regulation. The confirmatory reply indicated that the documents requested formed part of the dossier in ongoing judicial proceedings in several Member States.

- *Requests no. 6(ii), 9 and 17(i)* : OLAF's initial reply indicated that the requested documents formed part of the file of the criminal investigation currently underway in several Member States and were thus covered by the exception in Article 4(2), third indent, of the Regulation. Moreover, the disclosure would prejudice national judicial proceedings.

- *Request no. 16* : OLAF's initial reply indicated that access was denied to documents AM 2000/36 and AM 2000/36 S01 on the basis of the exception in Article 4(2), third indent, of the Regulation, since these documents formed part of the investigation files of judicial authorities in several Member States. Their release could have harmed the investigation.

- *Request no. 17(ii)* : partial access was granted to OLAF's Mission Report in response to this request.

- *Document no. 004412* : partial access was granted to this document in response to request no. 7.

- *Document no. 04967* : partial access was granted in response to request no. 8.

- *Document no. 6724* : access was refused in response to the complainants' second request for access on the ground that this document was covered by the exception in Article 4(3) of the Regulation (opinions for internal use). In reply to the complainants' request for a non-confidential summary of the information containing the essential points, the confirmatory reply stated that the Regulation does not impose any requirement on the institutions to create new documents containing summaries of other documents. It further explained that the information requested was in any case covered by the requirements of confidentiality and professional secrecy and could therefore not be provided.

- *Document no. 7922* : Partial access was granted in response to the complainants' second request for access. Certain parts were blanked out on the basis of the exception in Article 4(2), third indent, of the Regulation. OLAF explained to the complainants that the document was a



briefing prepared for OLAF's Director-General on the outcome of two coordination meetings hosted by OLAF and concerned operational matters proposed by the judicial authorities of several Member States where judicial proceedings were still ongoing. Furthermore, the national judicial authorities concerned had submitted letters indicating that disclosure of the document would be harmful to those proceedings.

52. OLAF pointed out that, for all documents for which partial access had been granted, the basis for the removal of certain parts of the documents was specified in the initial reply by reference to the exceptions in Articles 4(1)(b) (privacy and data protection), 4(2), first indent (commercial interests), or 4(3), second sub-paragraph (opinions for internal use) of the Regulation.

53. As regards the complainants' argument that it was impossible to understand from OLAF's reply which exception concerned which document (with regard to document nos. 8302, 004412 and 04967), OLAF stated that full access was granted to document no. 8302 and that the three exceptions invoked were all applicable to the other two documents.

54. OLAF further stated that the Regulation differs from the Code of Conduct interpreted by the Court of First Instance in the *Kuijer* judgment and that, under the Regulation, there is no obligation to explain why disclosure would harm the public interest unless the refusal is based on the exception contained in Article 4(1)(a).

3) Concerning the allegation that OLAF wrongly refused access by denying that certain documents existed or were in its possession

55. OLAF maintained the statements in its replies that no documents existed. It argued that the so-called "*prima facie evidence*" that the documents existed and were in OLAF's possession was nothing more than speculation. It demonstrated the misuse by the complainants' lawyers - who are lawyers for the accused parties in national judicial proceedings concerning customs fraud - of the Regulation for the purpose of conducting a "*fishing expedition*".

56. As regards the "*draft Decisions*" to which the complainants referred, OLAF stated that this document was referred to in the Background Note attached to OLAF's decision opening the investigation. This note was originally forwarded internally to the Director-General as background information justifying the recommendation to open an investigation. It had been attached unsigned to the 'Opening of Investigations' decision and was subsequently signed by the Director-General. Thus, the "*draft Decisions*" became the final decision, that is, document no. 8302. This explains why there were no other "*draft Decisions*".

57. OLAF argued that the complainants had not put forth any evidence to refute its assertion that it was not in possession of the documents requested. In OLAF's view, it was evident that the complainants' belief that "*there must be*" certain documents, that "*OLAF must be in possession of*" these documents, that "*it seems highly likely*" that the documents exist, or that "*the applicant[ s ] consider it highly unlikely that there are no documents*", does not constitute *prima facie* evidence that the documents existed.



4) Concerning the alleged infringement of Articles 2(1) and 4(4) of the Regulation because OLAF refused to give access to certain documents on the basis that they would fall under the "competence" or the "responsibility" of DG AGRI

58. OLAF recalled the complainants' assertions that it either did not possess the documents or possessed them but could not release them on the basis of the third-party documents' rule. In this regard, OLAF stated that neither of these assertions was the reason for its refusal. When referring certain requests to DG AGRI, it acted in compliance with Articles 3 and 4 of Commission Decision 2001/937/EC, ECSC, Euratom [13], which implements the Regulation within the Commission. Article 3, which concerns the treatment of initial applications, specifies in the third paragraph that "*[ t ]he applicant shall be informed of the response to his application either by the Director-General or the head of department concerned, or by a Director designated for this purpose in the Secretariat-General or by a Director designated in the [sic] OLAF where the application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Commission Decision 1999/352/EC, ECSC, Euratom establishing OLAF, or by a member of staff they have designated for this purpose.*" Article 4, which concerns the treatment of confirmatory applications, specifies in the first paragraph that "*[ i ]n accordance with Article 14 of the Commission's Rules of Procedure, the power to take decisions on confirmatory applications is delegated to the Secretary-General. However, where the confirmatory application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352/EC, ECSC, Euratom, the decision-making power is delegated to the Director of OLAF.*"

59. Pursuant to these articles, the Commission's practice when responding to requests for access to documents is for each service concerned to send a separate letter regarding those parts of the request which fall under their respective responsibilities. For all services apart from OLAF, decisions on confirmatory applications are taken and sent by the Secretary-General on behalf of the Commission. For requests concerning OLAF's operational matters, OLAF's Director for investigations and operations replies to initial applications, and OLAF's Director-General takes decisions and sends replies to confirmatory applications on behalf of the Commission. In the present case, requests no. 11, 12, 15, 17(i) last sentence, 17(iii) and 17(iv) concerned documents falling within the responsibility of DG AGRI. OLAF was thus obliged, in accordance with Articles 3 and 4 of the Commission Decision, to forward these requests to DG AGRI, which it did.

5) Concerning the alleged infringement of Article 4(2) of the Regulation and the rights of the defence

60. OLAF submitted that it was fully justified to rely on the exception specified in Article 4(2), third indent, of the Regulation to refuse access to some documents in order to protect the purpose of ongoing investigations by national authorities. OLAF stressed that, according to the principle of mutual cooperation between Community institutions and the Member States, laid down in Article 10 of the EC Treaty, it was obliged to protect ongoing investigations in the Member States. OLAF pointed out that it had received letters from each of the national judicial authorities concerned indicating that disclosure of the documents would undermine the



protection of the purpose of their investigations. According to OLAF, the fact that it had forwarded information to the Belgian authorities enabling them to initiate recovery proceedings had no relevance for the issue of whether disclosure to the public under the Regulation would undermine judicial proceedings in other Member States.

61. As regards the alleged infringement of the rights of defence, OLAF recalled that, as already explained in the reply to the confirmatory applications concerning both the first and second requests, the *public's* right of access to documents under the Regulation must be distinguished from the right of access to the file of a *person concerned* in a matter. The former is a right of all citizens of the Union and of any natural or legal person residing or having a registered office in a Member State. It applies to documents of the institutions subject to the principles, conditions and limits defined in the Regulation. The latter is a right of an individual related to his situation as a person concerned in a specific national proceeding. OLAF noted that the complainants suggested that their rights of defence constituted an overriding public interest in granting access to the documents they had requested. In OLAF's view, however, the complainants' rights of defence were private interests rather than overriding public interests.

#### 6) Concerning the alleged infringement of Article 4(3) of the Regulation

62. OLAF submitted that it was fully justified to rely on the exception specified in Article 4(3) of the Regulation to refuse access to some documents in order to protect its decision-making process. OLAF gave the following reasons to support why the decision-making process could be undermined by the disclosure of certain documents, or parts thereof:

- document no. 004412: Partial access to OLAF's Mission Report was provided. The conclusions were removed because they contained opinions regarding operational matters. It would be harmful to disclose these opinions because judicial proceedings and other follow-ups were not yet completed;
- document no. 04967: Partial access was granted to OLAF's Final Case Report. The paragraph removed under heading 3, "*Investigation result*", contained operational conclusions on the investigation and opinions concerning cooperation with national judicial authorities. The last sentence under heading 4, "*Conclusions and recommendations*" contained opinions on the same subject. It would have been harmful to disclose these opinions because they concerned cooperation with national judicial authorities regarding their proceedings.

Further arguments presented by the complainants

63. In their observations, the complainants maintained their allegation that OLAF's refusal to grant full access to the documents requested constituted an instance of maladministration. They also maintained their claim that OLAF should grant full access to these documents. The complainants structured their observations in four points:

1) Request nos. 1, 4, 6(ii), 9, 16, 17 (i and ii) as well as documents no. 8302, 004412, 04967, 6724 and 7922



64. According to the complainants, OLAF failed to refute the allegations concerning infringements of the Regulation. They mentioned two main procedural infringements by OLAF with regard to the above requests:

(a) Failure to grant partial access to the documents requested and in particular (i) failure to carry out a specific assessment of the risk that partial disclosure of every document requested could entail for the public interest and (ii) failure to provide a non-confidential summary of the information requested.

(b) Failure to provide a reasoned decision when refusing access, in particular, failure to carry out a specific assessment and adequately to explain the risk that the disclosure of every document requested could entail for the public interest.

65. The complainants quoted paragraphs 69 and 70 from the judgment of the Court of First Instance in Case T-2/03 *Verein für Konsumenteninformation v. Commission* [14]. In that judgment, the Court stated that the examination to which the institution must proceed in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision. It also outlined that this examination must be carried out in respect of each document referred to in the request for access.

66. The complainants submitted that the legal standard set up in this judgment fully endorses and further develops the legal standard in the *Kuijer* Case. The fact that OLAF did not follow this legal standard in its examination of the requests resulted in the violation of their procedural rights as provided for in Articles 7, 8 and 4(6) of the Regulation. OLAF argued that it conducted a "specific assessment" or "separate examination" of the documents requested. In the complainants' view, however, this "examination" or "assessment" was not enough to satisfy the strict requirements regarding the examination of requests for public access as set out in the Community courts' case-law on the Regulation. With regard to each document requested, the complainants stressed that it was not apparent from OLAF's decision on the confirmatory application that:

(a) an examination was conducted as to whether access to the document would specifically and actually undermine either the protection of the purpose of investigations by national authorities or OLAF's decision-making process; and

(b) a previous assessment was carried out confirming that there was no overriding public interest in disclosure.

67. The complainants stated that OLAF was under an obligation to produce a non-confidential summary of the documents requested if such a possibility existed. In their view, this followed (a) from Article 2(1) of the Regulation which, as interpreted by the Community courts, gives effect to the principle of the widest possible access for citizens to information, and (b) from Article 6(3) of the Regulation which gives the institution concerned a possibility to consult with the requesting party with an aim to finding a fair solution where a request covers a very long document. The





complainants noted that they made such a proposal.

68. With regard to the undue administrative burden invoked by OLAF, the complainants argued that this statement was not supported by facts and thus remained a mere assertion and consequently utterly hypothetical. The complainants referred to the judgment of the Court of First Instance in *Verein für Konsumenteninformation* in which the Court explicitly stated in paragraph 113 that " [i]n so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, it is with the institution relying on an exception related to the unreasonableness of the task entailed by the request that the burden of proof of the scale of that task rests. " On that basis, the complainants argued that OLAF's failure to furnish a non-confidential summary of the documents constituted an additional violation of their right to public access and partial access. The complainants therefore requested the Ombudsman to find an instance of maladministration and return the file to OLAF with a recommendation that it re-consider its decision and either grant full or partial access or provide adequate explanations for the refusal.

2) The refusal to grant access to the requested documents cannot be justified by reference to the exceptions in Articles 4(2), third indent, and 4(3) of the Regulation

69. The complainants stated that the documents to which they requested access were not covered by the exceptions foreseen in Article 4(2), third indent, and 4(3) of the Regulation. As regards the first of these exceptions, the complainants pointed out that the investigation in Belgium had been completed. As a result, there was no longer any need to protect investigations by OLAF in Belgium that had already been completed. The complainants surmised that OLAF might fear that, after having seen the documents from OLAF and the Belgian authorities, the complainants would possibly interfere with investigations in other Member States. However, such fears were misplaced as no investigations against the complainants were being conducted in other Member States.

70. The complainants further argued that, if OLAF believed that there was a need to protect the ongoing investigations or judicial proceedings in Spain, Portugal and Italy, it should not have disclosed documents to the complainants and to the Belgian authorities in the first place. It should also not have requested the Belgian customs authorities to initiate post-clearance recovery proceedings regarding the complainants. In doing so, OLAF had, in the complainants' view, accepted that it was not necessary to protect the purpose of any of the investigations concerning them. Since OLAF had thus made a choice which took the requested documents out of the exception provided for in Article 4(2), third indent, of the Regulation, the complainants stated that OLAF should be held to its choice.

71. As regards the exception set out in Article 4(3) of the Regulation, the complainants argued that, under this provision, the disclosure of the document must seriously jeopardize the decision-making process of the institution concerned. In their view, there was no indication that this would have been the case here, especially in a situation where the relevant decisions had already been taken with regard to the complainants. According to the complainants, it appeared however from the references made by OLAF to the national judicial authorities that OLAF had





the decision-making process in the Member States, in mind and not its own. The complainants also argued that OLAF substantially modified its reasoning in its decisions by justifying the refusal, which had previously been based on Article 4(3), by reference to Article 4(2), third indent, of the Regulation. In doing so, OLAF in their view recognised that at the moment of the confirmatory applications, it had no reason to deny access to certain documents on the basis of Article 4(3) of the Regulation. The complainants submitted that, since this invalid justification was the only explanation given with regard to parts of documents no. 8302, 004412 and 04967, OLAF should have granted full access to them.

72. The complainants again argued that, even if it could be proven that Article 4(2), third indent, and Article 4(3) of the Regulation were to apply, there still was an overriding public interest in disclosure. According to the complainants, it was an overriding public interest for the rights of an individual vis-à-vis OLAF to be fully guaranteed and for OLAF not to abuse its rights. This overriding public interest required the documents considered to fall within the said exceptions to be disclosed. The complainants stated that OLAF's argument stating (a) that their rights of defence were private interests rather than overriding public interests, and (b) that the public's right of access must be distinguished from the right of access of an individual concerned, was not persuasive.

3) Requests no. 1, 3 [15] , 5, 6(i), 7, 8, 10, 13 and the "draft decisions": OLAF failed to refute *prima facie* evidence concerning the existence of certain documents

73. On the basis of the documents at their disposal, the complainants outlined that they had drawn conclusions as to the existence of further documents that should in their view be in OLAF's possession and provided *prima facie* evidence concerning their existence. They added that OLAF's statements that they misused the procedure and were involved in a " *fishing expedition* " were untrue and inappropriate. According to the complainants, the fact that one of the documents which OLAF had previously claimed did not exist (the " *draft Decisions* ") finally turned out to exist, demonstrated that they had legitimate concerns regarding the accuracy of OLAF's statements. The complainants stressed that they wished to obtain a copy of the original of this draft decision in the form in which it had been forwarded internally to the Director-General. As regards the other documents, OLAF had, in the complainants' view, failed to refute the evidence put forward by them to prove that the requested documents existed. The complainants noted that they failed to see how this evidence could be classed as mere speculation. They felt that the Ombudsman should therefore request OLAF to disclose the documents which were the subject of request nos. 1, 3, 5, 6(i), 7, 8, 10, 13 and the " *draft Decisions* ".

4) OLAF infringed Article 2(1) and 4(4) of the Regulation by forwarding certain requests to DG AGRI

74. The complainants argued that since OLAF characterised the requested documents as belonging to or falling under the responsibility of DG AGRI - a point which in their view was never supported by any facts - it should have applied Article 4(4) of the Regulation and consulted DG AGRI on the request. OLAF failed to do so and was thus in violation of the



Regulation, in particular Articles 2(1) and 4(4), since the consultation procedure was the only procedure foreseen in the Regulation to deal with third party documents. The complainants also pointed out that the Regulation does not foresee an exception which would make it possible to refer the request to the third party concerned. According to the complainants, OLAF's reference to Commission Decision 2001/937 was misplaced as this Decision could not modify or contradict the Regulation which had been adopted by the Council and Parliament.

#### *The inspection of the file and further inquiries*

75. On 18 July and 25 September 2007, the Ombudsman's representatives carried out an inspection of OLAF's file. On 18 July 2007, they were shown an Excel list which had been prepared by OLAF and which contained an overview of all the documents in OLAF's file until the date of the complainants' initial application for public access. On the basis of that list, which contained 275 items in total, the Ombudsman's representatives established a list of 18 documents which they wished to inspect. These documents, which were confidential, were inspected on 25 September 2007.

76. In letters of 15 October 2007 to both OLAF and the European Commission, the Ombudsman asked for additional clarifications. He noted that during the inspection his representatives were given access to e-mail correspondence between OLAF and DG AGRI concerning the question as to whether OLAF or DG AGRI should deal with certain parts of the requests for access. In that context, they were shown copies of two faxes allegedly sent by DG AGRI to the complainants on 20 August and 2 September 2004. It appeared however from a careful analysis of these two faxes and the transmission reports that they were not sent to the law firms representing the two complainants, but to another law ("the third law firm") firm which was explicitly mentioned in the fax of 2 September 2004. The Ombudsman therefore asked for clarifications on this issue. In his letter to the Commission, the Ombudsman also asked how DG AGRI had dealt with the access requests no. 11, 12, 15, 17(i), last sentence, 17(iii) and 17(iv), with regard to which OLAF, in its reply of 18 August 2004 to the complainants, had indicated that they would receive a reply from DG AGRI, which was competent for such matters.

#### *Further arguments presented to the Ombudsman after his inspection*

##### Further arguments presented by OLAF

77. In its reply of 29 October 2007, OLAF pointed out that, in its e-mail of 9 August 2004, it had sent to DG AGRI three separate but concordant requests for access to documents concerning OLAF's investigation into the fraudulent importation of bananas using false AGRIM certificates. Two of these requests were submitted by the two complainants, whilst the third request had been submitted by a third company, represented by the third law firm. OLAF therefore considered that it was for the competent Commission service to provide the necessary further clarifications.

##### Further arguments presented by the Commission



78. The Commission stated that DG AGRI had granted access to the requested documents. Therefore, the document concerning the list of banana operators was sent to the third law firm by fax on 20 August 2004. However, as some of the requested documents originated from the Spanish authorities, the Commission consulted these authorities, in accordance with Article 4(4) of the Regulation. When the Spanish authorities gave their agreement to grant access, DG AGRI sent the remaining documents to the third law firm by fax of 2 September 2004.

79. The Commission pointed out that although they had been submitted by three different law firms representing interested parties, all three requests for access (those by the complainants dated 28 June 2004 and the one by the third law firm dated 30 June 2004) addressed the same documents, including the most minute details. For this reason, and as was apparent from the cover notes of the faxes sent on 20 August and 2 September 2004 (which the Commission enclosed with its reply), the Commission handled these requests as one. The Commission explained that the documents were sent to the third law firm by fax. Due to an error, this communication was not sent to the two other interested parties, namely, the two complainants in the present case. The complainants were therefore not informed in due course about the positive outcome of the part of their requests, which was within DG AGRI's responsibility.

80. On 10 December 2007, as soon as DG AGRI became aware of the error, the Commission sent the requested documents to the complainants with an apology for the late communication. The Commission considered that this communication addressed the complainants' requests for access to documents which were in DG AGRI's possession.

Further arguments presented by the complainants

81. The complainants maintained their complaint that OLAF's refusal to grant full access to the requested documents constituted maladministration and was unlawful. They pointed out that the inspection report showed that the inspections of the file carried out by the Ombudsman were very laborious and did not obtain the expected result. In particular, the complainants noted that OLAF disposed of at least 275 related documents which were listed but that the Ombudsman's services (i) were refused access to the majority of those documents except for the 18 documents identified by them and (ii) were refused copies of any documents whatsoever.

82. As regards the 18 documents inspected by the Ombudsman's services, the complainants pointed out that the inspection report did not contain much more information than a reference to the fact that the Ombudsman's services had been granted access. The complainants stressed that the contents of these documents were thus still unknown to them and argued that this constituted a violation of their right of access. They submitted that they should at least have received a copy of the list so as to enable them to identify themselves the documents which they considered essential. In the complainants' view, OLAF's refusal to grant access moreover infringed their rights of defence.

83. For the above-mentioned reasons, the complainants firmly maintained their request for access to the complete file and insisted that they should receive copies of the relevant documents. In particular, they requested access to the list of 275 documents, including the 18



documents identified by the Ombudsman's services, in order to identify themselves the documents which were crucial in light of their rights of defence. They also asked to receive a copy of the crucial documents if they were to identify any.

84. The complainants regretted the mistake by DG AGRI not to send them the faxes of 20 August and 2 September 2004, but were nonetheless grateful to DG AGRI for sending them in December 2007. The complainants considered, however, that DG AGRI's actions in no way released OLAF from its obligation to grant access to all relevant documents.

*The Ombudsman's preliminary assessment leading to a friendly solution proposal*

*i) Preliminary remark concerning the structure of the Ombudsman's analysis of the allegations*

85. The Ombudsman noted that the present complaints were very voluminous and complex due, on the one hand, to the high number of documents to which the complainants requested access and, on the other hand, to the way in which the allegations were formulated with regard to these requests. The complainants' initial application for access of 28 June 2004 consisted of a list of 17 requests, of which requests no. 1, 5, 6 and 17 were further subdivided into sub-requests. The application alone covered three full pages. In their confirmatory application of 6 September 2004, the complainants moreover requested access to four additional documents [16]. It appeared therefore that the complainants requested access to 21 items (and sub-items) in total. Each of the complainants' six allegations concerned a different series of the above 21 requests made by the complainants. There also appeared to be an overlap between the allegations, because some of the requests were mentioned in more than one allegation.

86. Taking account of the above complexity and in order to reduce repetition as much as possible, the Ombudsman considered that the most appropriate and logical way to conduct the analysis of the allegations was to examine how OLAF dealt with each of the complainants' 17 requests and 4 additional requests set out in the initial application to OLAF of 28 June 2004 and in the confirmatory application of 6 September 2004. Therefore, in the paragraphs below, the Ombudsman analysed the complainants' allegations request by request. He first considered the applications for access which were dealt with by OLAF itself (*section I below*). In doing so, he followed the order of the complainants' initial application for access of 28 June 2004. The four new requests for access made in the confirmatory application of 6 September 2004 were dealt with under the relevant section of the initial application. The Ombudsman then dealt with those parts of the requests which OLAF considered should be dealt with by DG AGRI and which were the subject of the complainants' fourth allegation (*section II below*).

*ii) Preliminary remark concerning the ongoing inquiries in the Member States*

87. The Ombudsman pointed out that the present complaints concerned various requests for access to documents which concerned an inquiry that was carried out by OLAF in coordination with the judicial authorities in several Member States (Belgium, Spain, Portugal, Italy and Germany). In its Final Case Report of 13 May 2002, OLAF mentioned that criminal investigations were still ongoing in Italy, Spain and Portugal and that administrative inquiries



were also continuing in Belgium, Germany and the Netherlands. OLAF requested all the Member States to initiate recovery proceedings for their part. It appeared that the Belgian authorities' inquiry into the complainants had been completed by the time the requests for access to OLAF were made. However, and as pointed out in OLAF's reply of 3 December 2004 to the complainants' last confirmatory request, it appeared that the judicial inquiries in Italy, Portugal and Spain were still ongoing at that time. The Ombudsman understood that, when OLAF refused access on the grounds that inquiries were still ongoing in the Member States, it referred to judicial or criminal inquiries and not to administrative inquiries. Given that the present complaints concerned the decisions adopted by OLAF in reply to certain requests for access, the Ombudsman's examination needed to focus on the legal and factual situation that existed at the time of these decisions. Any changes that had occurred since were therefore not relevant for the assessment of the present case. However, the complainants were of course entitled to submit to OLAF a new request for access to documents if they considered that the changes that might have occurred resulted in the exceptions on which OLAF relied no longer being applicable.

**I) The applications for access dealt with by OLAF itself**

88. *"1) The Decision by the Director of OLAF to start the said inquiry, and, if applicable, the request on which that decision was based ...*

In its reply of 18 August 2004, OLAF granted full access to - and enclosed a copy of (a) Decision no. 8302 of 20 October 2000 by which the Director-General of OLAF decided to open an inquiry into the fraudulent importation of bananas with the use of false Spanish certificates, and (b) a Background Note from OLAF's Investigations and Operations Directorate in which the Operations Advisor proposed that an investigation be opened. Therefore, as regards the first part of the complainants' request no. 1, it appeared that the requested documents have been released. No instance of maladministration by OLAF was therefore found with regard to this part of the request.

89. - " ... and, particularly but not exclusively, the documents and information supplied to OLAF by the Spanish Ministry of Economic Affairs, reference to which is made in OLAF's letter of 1 February 2000 (ref. 000822) addressed to the [Belgian] National Investigation Directorate of the Customs and Excise Administration. These include ... :

The Ombudsman noted that this part of the complainants' request concerned documents originating from the Spanish authorities. The request therefore concerned " *third party documents* " for which Article 4(4) of the Regulation foresees that " *the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.* " The Ombudsman also recalled that Article 4(5) of the Regulation provides that "[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement. "

90. According to the current case-law, the examination required to process a request for access



to documents must be specific in the sense that the institution must assess: first, whether the document to which the request for access relates falls within the scope of one of the exceptions provided for in Article 4 of the Regulation; second, whether the disclosure of that document would specifically and actually undermine the protected interest, and third, if so, whether the need for protection applies to the whole of the document [17] . Under that case-law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain: first, whether the document requested does in fact fall within the sphere covered by the exception relied on; and second, whether the need for protection relating to that exception is genuine [18] .

91. The Ombudsman pointed out that for all applications for access made by the complainants, what needed to be examined were OLAF's decisions on the confirmatory applications and not its decisions on the initial applications [19] . The Ombudsman noted in this respect that, in their confirmatory applications of 6 September and 19 October 2004, the complainants clearly asked OLAF to reconsider its decisions concerning all requests for which access had been denied.

92. As regards the present request, it appeared that, in its decision on the initial application of 18 August 2004, OLAF refused access to the requested documents by referring to the exception foreseen in Article 4(2), third indent, of the Regulation concerning the protection of the purpose of inspections, investigations and audits. In its decision of 26 October 2004 on the complainant's confirmatory application of 6 September 2004 [20] , OLAF confirmed that it could not release the documents on the basis of that exception. It explained that the documents were part of the investigation files of judicial authorities in various Member States and that their release could damage these inquiries. In its opinion to the Ombudsman, OLAF indicated with regard to the exception of Article 4(2), third indent, of the Regulation, that it had "*received letters from each of the national judicial authorities concerned indicating that disclosure of the documents would undermine the protection of the purpose of their investigations.*"

93. The inspection carried out by the Ombudsman's services revealed that, as regards the documents received from the Spanish authorities, OLAF's file contained copies of two faxes sent on 16 August and 23 November 1999 by the Spanish Ministry of Economic Affairs to DG AGRI concerning falsified certificates. It was thus these two faxes which corresponded to the complainants' request for access and which thus had to be examined by the Ombudsman.

94. As regards the "*letters from each of the national judicial authorities concerned*", the inspection revealed that there were several documents in OLAF's file which showed that the Spanish, Italian and Portuguese judicial authorities had explicitly requested OLAF not to release the documents requested by the complainants. These included the two faxes of 11 and 12 October 2004 from the Italian judicial authorities to OLAF, two OLAF notes dated 11 and 12 October 2004 concerning contacts with both the Spanish and Italian judicial authorities and a letter of 15 October 2004 from the Portuguese judicial authorities to OLAF. The OLAF official present at the inspection stated that there was no correspondence available as regards the Belgian and German authorities.

95. According to the judgment of the Court of Justice in Case C-64/05 P ( *Sweden v.*





*Commission* ), if the Member State concerned objects to the disclosure of a document emanating from its authorities, it is obliged to state reasons for that objection with reference to the exceptions laid down in Article 4(1) to (3) of the Regulation. According to this judgment, the institution is itself obliged to give reasons for its decision refusing access. This means that, in its decision, the institution must, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right to access in Article 4(1) to (3) of the Regulation applies [21] .

96. In the present case, as regards the two faxes sent by the Spanish Ministry of Economic Affairs, it appeared that OLAF did not sufficiently reason its decision of 26 October 2004 to refuse the complainants' confirmatory application. It merely stated that the requested documents were part of the investigation files of the judicial authorities in various Member States and that their release could damage these inquiries. OLAF did not explain how disclosure of the documents would actually undermine the protection of the purpose of inspections, investigations and audits. In its opinion to the Ombudsman, OLAF stated that the letters it had received from each of the judicial authorities indicated that disclosure of the documents would undermine the protection of the purpose of their investigations. On the basis of the evidence made available to the Ombudsman, it was not clear whether the judicial authorities from the Member States concerned indeed wished to argue that no disclosure was possible in light of the exception foreseen in Article 4(2), third indent, of the Regulation. As regards the Spanish authorities, the inspection showed that there was no letter but only a note for the file of 11 October 2004 concerning telephone contacts between OLAF and the Spanish judiciary and prosecutor. This note did not contain an express reference to any of the exceptions foreseen in Article 4(1) to (3) of the Regulation. The same conclusion applied to the fax from the Italian judicial authorities and OLAF's note of 12 October 2004 on contacts with these authorities. As regards the letter from the Portuguese judicial authorities, it stated that the documents requested by the complainant could not be released due to the risk of jeopardising the secrecy of the judicial proceedings. The Ombudsman noted that 'the secrecy of judicial proceedings' is not mentioned as an interest to be protected in Article 4(2) of the Regulation. However, even on the assumption that the judicial authorities of the relevant Member States considered that the exception foreseen in Article 4(2), third indent, of the Regulation applied, it was clear that OLAF could not refuse to disclose the documents concerned by simply referring to the position adopted by the national authorities. As mentioned above, OLAF could not limit itself to merely noting the fact that these authorities had objected to disclosure. It instead had to set out the reasons relied on by these authorities. OLAF itself also had to show that one of the exceptions to the right to access in Article 4(1) to (3) of the Regulation applied. However, OLAF refrained from putting forward any such specific reasons. It therefore appeared from the above that OLAF failed to sufficiently establish that the exception foreseen in Article 4(2), third indent, of the Regulation applied in the present case.

97. As regards the issue of partial access, the Ombudsman noted that OLAF, in both its replies of 26 October and 3 December 2004 to the confirmatory applications, explained that it had "*examined the possibility, in accordance with Article 4(6) of Regulation 1049/2001, to grant partial access to the documents for which full access was refused. By deleting all the parts of the*





*documents which fall under the exceptions, the other parts would become pointless, because the parts of the documents that would be released would be of no use to you* " [22] . This was a general comment which seemed to be applicable to all documents for which access was refused by OLAF. OLAF did not explain document per document why no partial access could be granted. The Ombudsman pointed out that the Court of First Instance has held "*that the principle of sound administration requires that the duty to grant partial access should not result in an administrative burden which is disproportionate to the applicant's interest in obtaining that information. In light of this, it is clear that the Council and the Commission are in any event entitled to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant* [23] ." Although this case-law concerned the predecessor legislation of the Regulation, namely, Decision 93/731/EC of 20 December 1993 on public access to Council documents [24] and Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents [25] , there was nothing to suggest that it could not be transposed to the provision concerning partial access in the Regulation. It had to be recalled, in this regard, that the Regulation was meant to give the widest possible access to documents. It also had to be taken into account that it was the applicant who decided whether or not he had an interest in access to a document, even if it was only partial access. Seen from this perspective, the possibility to refuse partial access on the grounds that this would be meaningless for the applicant should be exceptional and reserved to cases where granting such partial access would result in a disproportionate administrative burden. In the present case, however, OLAF had not provided any elements to demonstrate that preparing the documents concerned for partial access would result in a disproportionate burden of work. It had to be recalled that the request for access to be discussed here only concerned two faxes from the Spanish Ministry of Economic Affairs. Even if one were to assume that OLAF was entitled to refuse access to the requested documents on the basis of Article 4(2), third indent, of the Regulation, there would thus be considerable doubt as to whether OLAF sufficiently explained why it could not grant partial access.

98. On the basis of the above considerations, the Ombudsman provisionally concluded that OLAF failed, with regard to the second part of request no. 1, to show that its decision to refuse full or partial access on the basis of the exception contained in Article 4(2), third indent, of the Regulation was well-founded. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below.

99. In view of the above conclusion, there was no need to analyse here the issue of the *overriding public interest* and the complainants' arguments in this respect. The Ombudsman dealt with this matter in paragraph 139 below.

100. - " ... the identity of the Spanish dealer whose name was unlawfully used and who is said to have reported the irregular use of the nine AGRIM certificates;

- the ground on the basis of which the Spanish authorities concluded that the four AGRIM certificates that were the subject of the letter from the Spanish Ministry of Economic Affairs to OLAF of January 2000 [26] were duplicates of the genuine AGRIM certificates, **together** with a



copy of the alleged duplicates and a copy of the alleged genuine certificates " (emphasis by the complainants in the original):

The Ombudsman noted that, given that they asked for " *the identity* " and " *the ground* ", the above two requests could easily have been interpreted as requests for information rather than for access to documents. The complainants had, however, included them in their requests for access to documents and OLAF was therefore entitled to treat them as such. In any event, it appeared that, in its decision of 26 October 2004, OLAF provided the complainants with further information concerning the certificates. More specifically, OLAF stated that it had received lists from the Spanish authorities with the numbers of all AGRIM import certificates which were issued in the years 1998, 1999 and part of the year 2000. OLAF further told the complainants that the Spanish authorities had informed it that they had never used the stamp with the abbreviation " *Ext.* " instead of " *Exterior* " and that OLAF had used this data to identify the false certificates and also communicated them to the competent authorities in the Member States in the framework of mutual assistance. OLAF went on to state that every possible false certificate it could obtain had been sent to the relevant Member State with a formal request to verify whether it had in fact been issued by that Member State.

101. In its decision of 26 October 2004 on the confirmatory application, OLAF confirmed its previous decision that it did not possess any relevant documents in relation to these requests [27] . OLAF therefore appeared to have intended to state that, as regards these sub-requests, it did not possess any documents other than those provided to DG AGRI by the Spanish authorities, namely, the two faxes of 16 August and 23 November 1999 mentioned above. In this regard, it is apparent from the case-law that, in accordance with the presumption of legality attached to Community acts, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that the document does not indeed exist. That, however, is a simple presumption that the applicant may rebut in any way by relevant and consistent evidence [28] . In the present case, the complainants had not put forward any elements to establish that other documents existed. Therefore, by stating that it did not possess any relevant document, OLAF did not appear to have acted wrongly. No instance of maladministration was therefore found with regard to this aspect of the request. As regards access to the above-mentioned two faxes, the Ombudsman referred to his analysis on the matter above.

102. As regards the part of the request for " a copy of the alleged duplicates and a copy of the alleged genuine certificates ", OLAF indicated, in its decision of 26 October 2004, that these certificates fell under the exception of Article 4(2), third indent, of the Regulation (concerning the protection of the purpose of inspections, investigations and audits). OLAF further explained in its decision that these documents were part of the investigation files of the judicial authorities in the various Member States and that their disclosure could harm the relevant inquiries.

103. The Ombudsman referred to his conclusion in paragraph 98 above, which was also applicable to the present part of the request. The Ombudsman therefore made a proposal for a friendly solution below.



104. " 2) The written mandate issued by the Director of OLAF to the OLAF officials, specifying the subject of the inquiry "

This request essentially repeated part of request no. 1. In its answer of 18 August 2004 to both requests no. 1 and 2, OLAF granted full access to Decision no. 8302 of 20 October 2000 and to the Background Note. The document to which request no. 2 referred was therefore disclosed by OLAF. No instance of maladministration was thus found with regard to this aspect of the request.

105. In their confirmatory application of 6 September 2004, with regard to their request no. 2, the complainants also requested access to three documents which were attached to the Background Note to Decision no. 8302 of 20 October 2000, namely, *1) document no. 7922 of 9 October 2000, 2) document no. 6724 of 31 August 2000, and 3) the "draft Decisions "*

106. Document no. 7922 of 9 October 2000

As regards document no. 7922 of 9 October 2000, it appeared that this was a note from OLAF's Investigations and Operations Directorate to OLAF's Director-General concerning actions that had been agreed in order to coordinate the inquiries being made by the judicial authorities in the Member States. In its reply of 1 October 2004, OLAF granted access to this document but stated that it had deleted parts of the document on the basis of Article 4(2), third indent, of the Regulation because the national judicial authorities' inquiry had not yet been completed. In its decision of 3 December 2004 following the complainants' confirmatory application of 19 October 2004, OLAF confirmed its refusal to grant access to the deleted parts on the basis of Article 4(2), third indent, of the Regulation. More specifically, it explained that the document was a briefing note to the Director-General on the results of two coordination meetings organised by OLAF, which covered operational questions that had been put forward by the judicial authorities of various Member States. OLAF further stated that inquiries by Italian, Portuguese and Spanish judicial authorities were still ongoing and that it had received letters from the national judicial authorities which confirmed that disclosure of the relevant part of the document could damage their national activities. OLAF also submitted that the complainants' (private) rights of defence did not constitute an overriding public interest.

107. On 25 September 2007, the Ombudsman's representatives inspected the parts of the document that had been blanked out. These parts indeed concerned operational questions that had been raised by the judicial authorities of different Member States as well as a third country (France, Italy, Monaco [29], Spain, and Portugal), and regarded judicial actions to be undertaken. The Ombudsman considered that OLAF, in its decision of 3 December 2004 refusing access to the deleted parts of document no. 7922, provided detailed explanations as to why it considered that no access could be given on the basis of Article 4(2), third indent of the Regulation. This was in contrast to the short reasoning it gave for its refusal to grant access to the two faxes of 16 August and 23 November 1999 from the Spanish Ministry of Economic Affairs (which were the subject of the second part of request no. 1). OLAF explained that document no. 7922 was a briefing note on the results of two coordination meetings and - more importantly - that the deleted parts concerned operational questions put forward by the judicial



authorities of various Member States. It also pointed out that judicial inquiries in several of these Member States were still ongoing. The inspection of 25 September 2007 by the Ombudsman's representatives showed that it would have been difficult for OLAF to provide an even more detailed explanation as to why no access could be granted without revealing the content of the parts that had been blanked out. On the basis of these considerations, the Ombudsman found that OLAF sufficiently reasoned its decision why the release of the relevant parts of the document could undermine the protection of the ongoing investigations. It therefore appeared that OLAF was entitled to invoke the exception of Article 4(2), third indent, of the Regulation. No instance of maladministration was therefore found with regard to this part of the request.

108. Document no. 6724 of 31 August 2000

As regards document no. 6724 of 31 August 2000, OLAF, in its reply of 1 October 2004, refused access to this document on the basis of Article 4(3) of the Regulation, stating that it was only for internal use. However, in its letter of 3 December 2004, following the complainants' confirmatory application of 19 October 2004, OLAF refused access on the basis of Article 4(2), third indent, of the Regulation which concerns the protection of the purpose of inspections, investigations and audits. OLAF explained that this document was a summary of two working documents which had been sent to the national judicial authorities. It contained information about operational matters which fell under national rules concerning the secrecy of judicial proceedings. OLAF also stated that the complainants' rights of defence did not constitute an overriding public interest.

109. Given that, in its reply of 3 December 2004 to the confirmatory application, OLAF refused access to the document on the basis of Article 4(2), third indent, of the Regulation and no longer on the basis of Article 4(3), the Ombudsman considered that only the former exception needed to be examined here.

110. The Ombudsman's representatives inspected the document on 25 September 2007. It appeared that it was an internal note for the attention of OLAF's Director-General summarising the state of OLAF's inquiries into the fraudulent importation of bananas and setting out the findings that had been reached by then. It contained five sections, namely, 1) Introduction, 2) Description of fraud, 3) Case assessment, 4) Conclusion and 5) Actions to be undertaken, as well as three annexes, entitled 'Financial impact of Fraud', 'Chronology of Events' and 'Spanish certificates'.

111. The Ombudsman considered that the reasoning used by OLAF in its decision of 3 December 2004 was not convincing. OLAF stated that the document contained "*information about operational questions*". It appeared, however, that this was only the case as regards the fifth section, which dealt with the actions to be undertaken, and possibly the fourth section. The Ombudsman was not convinced that this also applied to the other sections and to the annexes to the note. Furthermore, it had to be recalled that OLAF did grant access to the Final Case Report of 13 May 2002, which was drawn up nearly two years after its note no. 6724 of 31 August 2000 and which covered the same kind of information. It therefore appeared that at least sections 1) to 3) of the note could have been released without any potential risk to the



protection of the ongoing inquiries in the Member States.

112. As regards the issue of partial access, the Ombudsman noted that, in its reply of 3 December 2004 to the confirmatory application, OLAF stated that it had *"examined the possibility, in accordance with Article 4(6) of Regulation 1049/2001, to grant partial access to the documents for which full access was refused. By deleting all the parts of the documents which fall under the exceptions, the other parts would become pointless, because the parts of the documents that would be released would not be of use to you"*. As mentioned above, the Ombudsman considered that this reasoning should only be used if granting partial access would create a disproportionate administrative burden to the Community institution or body concerned (see paragraph 96 above). There was nothing to suggest that this would be the case here. Besides, the Ombudsman was not convinced that access to points 1) to 3) only of document no. 6724 would indeed be of no use to the complainants.

113. As regards the complainants' request to obtain a non-confidential summary of the information covered by the exceptions, the Ombudsman noted that, although Article 6(3) of the Regulation provides that the institution may confer with the applicant in order to find a fair solution, there is no obligation on the institutions to draft new documents containing the information detailed in the documents covered by the exceptions. OLAF's refusal to provide such a summary did not therefore constitute an instance of maladministration.

114. On the basis of the above considerations, the Ombudsman's provisional conclusion was that, by refusing full or at least partial access to document no. 6724 of 31 August 2000 on the basis of Article 4(2), third indent, of the Regulation, OLAF infringed that article. This could constitute an instance of maladministration and the Ombudsman therefore made a proposal for a friendly solution below.

115. The "draft Decisions"

As regards the *"draft Decisions"*, OLAF explained in its letter of 3 December 2004 that it did not possess such a document. The 'Background Note' that was made available to the complainants (see paragraph 88 above) stated at the end *"Find attached a draft Decisions [sic] for the opening of investigation"* and contained this draft decision to be signed by the Director-General of OLAF. OLAF clarified that, once signed by its Director-General, the draft decision became Decision no. 8302 of 20 October 2000 and there was no longer any other draft decision. The complainants were granted access to Decision no. 8302 of 20 October 2000 in reply to their request no. 1 of the initial application. The Ombudsman therefore concluded that the issue had been clarified by OLAF and that OLAF's position that it did not possess the draft decision appeared to be reasonable. No instance of maladministration was therefore found with regard to this aspect of the case.

116. "3) Each national search warrant issued in connection with this inquiry and every proof of mandate in this framework "

With regard to this request, OLAF indicated in its reply of 18 August 2004 that it did not possess



any relevant documents. The Ombudsman first noted that this request was very general, since it concerned " *each national search warrant* ". He also noted that, in their confirmatory application of 6 September 2004, the complainants did not comment on OLAF's reply that it did not possess any relevant documents. No such documents were mentioned in the list provided by OLAF at the inspection and the Ombudsman had no reason to believe that this list was not complete. He therefore considered that, in the absence of any evidence to the contrary, OLAF did not appear to have acted wrongly by replying to the complainants that it did not possess the requested documents. Consequently, no instance of maladministration was found with regard to this request.

117. " 4) All correspondence between OLAF and the Member States involved in the inquiry "

With regard to this request, OLAF indicated in its reply of 18 August 2004 that the complainants' request was not precise enough and invited them to provide more information concerning the requested documents.

118. The Regulation provides in Article 6(1) that an application for access shall be made " *in a sufficiently precise manner to enable the institution to identify the document* ". In the present case, the complainants' request was indeed very general (" *all correspondence* "). OLAF's reply that the request was not precise enough therefore appeared to be reasonable. No instance of maladministration was therefore found with regard to this part of the present case.

119. In their confirmatory application of 6 September 2004, the complainants provided further clarifications concerning the correspondence they wished to be given access to. They indicated that they meant all the correspondence that had been exchanged in the framework of the assistance given by OLAF to some Member States as mentioned in the Final Case Report of 13 May 2002. This Report mentioned on page 1 that "[t] *hroughout the inquiry OLAF's officials rendered a significant support, on request, to the judicial and administrative authorities concerned in Italy, in Portugal and in Belgium ...* " The complainants requested, in particular, access to six documents, which were mentioned on pages 3 and 4 of the Final Case Report, namely, documents no. 3891, 8851, 8898, 9202, 9419 and 9420. The complainants stated, however, that their request was not limited to the above documents and that they requested access " *to all correspondence between OLAF and the Member States concerning this matter* ".

120. In its decision of 26 October 2004 on the confirmatory application, OLAF refused access on the basis of Article 4(2), third indent, of the Regulation, on the grounds that the documents were part of the investigation files of the judicial authorities in several Member States and that their release could damage the inquiries.

121. At the inspection on 25 September 2007, the Ombudsman's representatives inspected the six specific documents which had been mentioned by the complainants. These documents, which were all letters sent by OLAF to the national authorities, were the following: 1) Document no. 3891 of 26 April 2001 was a letter sent by OLAF to the Belgian Customs and Excise Administration containing two annexes; 2) Document no. 8851 of 9 November 2000 was a letter sent by OLAF to the General Prosecutor in Lisbon. Enclosed with the document was a note





from OLAF dated 7 November 2000 [30] and five other annexes; 3) Document no. 8898 of 10 November 2000 was a letter sent by OLAF to the Head of the Fiscal Service of the Spanish Guardia Civil in Madrid. Enclosed to the document was a note from OLAF dated 7 November 2000 and five other annexes; 4) Document no. 9202 of 21 November 2000 was a letter sent by OLAF to a Spanish judge - enclosed with the document was a note from OLAF dated 7 November 2000 and five other annexes; 5) Document no. 9419 of 18 October 2001 was a letter sent by OLAF to the same judge with eight annexes; and 6) Document no. 9420 of 18 October 2001 was another letter sent by OLAF to the Head of the Fiscal Service of the Spanish Guardia Civil in Madrid. Enclosed with it were eight annexes. All these transmitted information relating to the inquiries into the falsified AGRIM certificates.

122. The Ombudsman noted that, in its decision of 26 October 2004 on the confirmatory application, OLAF merely stated that the documents were part of the investigation files of judicial authorities in several Member States and that their release could damage the inquiries. OLAF did not however explain how the release of these documents could specifically and actually damage the inquiries. As already explained above in the context of the examination of the second part of request no. 1, the Ombudsman considered that OLAF had thus not established that the relevant exception indeed applied.

123. With regard to the issue of partial access, and as already explained above in paragraph 97, OLAF's statement that "*by deleting all the parts of the documents which fall under the exceptions, the other parts would become pointless*" was a comment which applied to all documents for which full access was refused. However, OLAF failed to explain, specifically with regard to each of the above six documents (and the annexes), why it would not have been possible to grant at least partial access.

124. On the basis of the above considerations, the Ombudsman provisionally concluded that OLAF failed to establish that no full or partial access could be granted on the basis of the exception contained in Article 4(2), third indent, of the Regulation. This could constitute an instance of maladministration. The Ombudsman, therefore, made a proposal for a friendly solution below.

125. Apart from the six documents discussed above, the complainants maintained their request for access "*to all correspondence between OLAF and the Member States concerning this matter*". The Regulation provides in Article 6(1) that an application for access shall be made "*in a sufficiently precise manner to enable the institution to identify the document*". In the present case, the complainants' confirmatory request remained very general. No instance of maladministration was therefore found with regard to this aspect of the case.

126. " 5) Documents, reports and information relating to OLAF's inquiry to the Member States and vice versa, including :

(i) The report of the working meeting of 16 February 2000 between Mr Yvo Hermans, Ms Yolande Van Mieghem, Mr Walter Voorhoof and Ms Miranda Vansevenant from the Customs and Excise and Mr Guy Jennes and Mr Pierpaolo Rossi from [OLAF's ] services ;





(ii) The report of the coordination meeting held in OLAF's premises on 26 September 2000 in the presence of Mr Peter Fabry, Ms Miranda Vansevenant and representatives of various Member States ;

(iii) The report of the coordination meeting held in OLAF's premises on 8 March 2001 in the presence of Mr Jan De Vos, Mr Desomere and Ms Miranda Vansevenant and representatives from various Member States

In its reply of 18 August 2004, OLAF stated that it did not possess any relevant documents. In their confirmatory application of 6 September 2004, the complainants pointed out that it was unlikely that no documents had been established concerning the above meetings. The complainants referred in this context to the reports of the Belgian Customs and Excise Administration and pointed out that the reports explicitly referred to the meetings. In its reply of 26 October 2004, OLAF reiterated that it did not possess the requested documents.

127. The Ombudsman carefully checked the reports of the Belgian Customs and Excise Administration. It appeared that the report ("*proces-verbaal* ") of 5 July 2002 indeed referred, on pages 9, 34 and 48 respectively, to the working meeting of 16 February 2000 with two of OLAF's representatives, and to the coordination meetings in OLAF's premises on 26 September 2000 and on 8 March 2001. With regard to the last two meetings, OLAF's Final Case Report of 13 May 2002 also referred on page 4 to "*two informal ad hoc meetings hosted by OLAF in September 2000 and in March 2001* ". It was thus established that these meetings took place. However, the list presented by OLAF at the inspection did not refer to any reports relating to these meetings. As already stated above, the Ombudsman had no reason to believe that this list was incomplete. There was therefore no evidence to suggest that such reports existed. The reason for this could be, at least as regards the last two meetings, that they were informal and ad hoc. On the basis of the above considerations, the Ombudsman concluded that the complainants' allegation that OLAF wrongly refused access to the reports by denying their existence was not established. No instance of maladministration was therefore found with regard to this aspect of the case.

128. The complainants' request stated that they sought access to any documents covered by this request, including reports on the above-mentioned meetings. However, they did not provide any more specific indications as to what other documents were meant to be covered by this request. Given the lack of precision of this request, the Ombudsman considered that no further inquiries were justified in relation to access to any other documents that might be covered, or have been intended to be covered, by this request. In any event, it had to be noted that the issue of access to 'reports' drawn up by OLAF was the subject of request no. 6, which is examined immediately below.

129. " 6) Each administrative report with findings established by OLAF or the national investigators including, but not exclusively, the following documents... "

In its reply of 18 August 2004, OLAF stated that the first sentence of request no. 6 was not clear



enough to identify the documents. It therefore requested more information from the complainants. In their confirmatory application of 6 September 2004, the complainants stated that they did not dispose of any further references. The complainants stated that it appeared from the information at their disposal that OLAF collaborated with the national authorities in the matter and exchanged information. Therefore, documents relating to this issue must have been in OLAF's possession. The complainants therefore requested access in particular, but not exclusively, to the documents mentioned in points (i) and (ii) of their request no. 6 and to interim reports which they stated must logically have existed. The Ombudsman first dealt with points (i) and (ii) of the request before turning to the rest of request no. 6.

130. " (i) each report drawn up by OLAF staff concerning the acts of investigation carried out in Portugal in January 2001 (cf. OLAF's letter of 30 January 2002, ref. 00919; the fax from OLAF of 9 January 2001, ref. 000082) and in Spain on 18 July 2000 (cf. OLAF's letter of 5 September 2000, ref. 6853) ... "

OLAF stated in its reply of 18 August 2004 that it did not possess any relevant documents. In their confirmatory application of 6 September 2004, the complainants stated that it would be unusual if OLAF had not made any sort of report concerning the investigations in Portugal and Spain. In its reply of 26 October 2004 on the confirmatory application, OLAF confirmed that it did not possess any relevant documents.

131. The Ombudsman noted that the complainants' request concerned reports which had allegedly been drawn up by OLAF officials concerning acts of investigation in Portugal and Spain, reference to which was made in a letter from OLAF dated 5 September 2000 (concerning an investigation in Spain), a fax from OLAF dated 9 January 2001 and a letter from OLAF dated 30 January 2002 (both concerning an investigation in Portugal). The complainants found the information about these letters and the fax in the Belgian Customs and Excise Administration's report of 5 July 2002, which quotes entire sections of OLAF's correspondence with the national authorities. However, during the inspection of 18 July 2007, no reports concerning the investigations in Portugal in January 2001 and in Spain in July 2000 were found in the list of 275 documents provided by OLAF.

132. OLAF argued that it did not possess any relevant documents. This statement created a presumption that the documents did not exist, which was confirmed by the inspection since no such documents were found. Considering that OLAF established a Mission Report for its mission to Antwerp on 24 May 2000 (document no. 004412 of 5 June 2000) and that OLAF's list of 275 documents contained two reports on missions by OLAF to Germany in September and October 2001, it was questionable whether OLAF kept a proper record of its officials' activity concerning the missions to Portugal and Spain. However, the present case concerned the issue of access to documents and not the way in which OLAF recorded its activities.

133. On the basis of the above considerations, no instance of maladministration was found with regard to this part of the request.

134. " (ii) the report to which reference is made by Mr Guy Jennes in the testimony report



concerning statements made by Mr Jennes to the Portuguese authorities on 12 December 2000  
"

The Ombudsman noted that, in its reply of 18 August 2004, OLAF stated that this document was part of the criminal investigation file in Portugal and could not be released on the basis of Article 4(2), second and third indent, of the Regulation concerning the protection of court proceedings on the one hand and the protection of the purpose of inspections, investigations and audits on the other. In its reply, which also concerned requests no. 9 and 17(i) and (ii), OLAF explained that, by giving access to these documents, it would undermine the national judicial procedures because the documents formed part of the criminal investigation files and could only be released in the framework of the national criminal procedure. OLAF added that, once the documents have been transferred to the national authorities, it is bound by the national procedural rules. In their confirmatory application of 6 September 2004, the complainants stated that there was an overriding public interest in the disclosure of the document, namely, the rights of defence, and that the investigation in Belgium had been completed. In its decision of 26 October 2004, OLAF confirmed its refusal to grant access to the report. It argued that the complainants' rights of defence were a private and not an overriding public interest.

135. The Ombudsman noted that the report in question was mentioned on pages 23 and 25 of the Belgian Customs and Excise Administration's additional report of 28 November 2003. It appeared from this report that, in the framework of a testimony made before the Portuguese judicial police on 12 December 2000, Mr J. from OLAF referred to an OLAF report which he had drafted together with another OLAF official and which formed part of the reports drawn up by the Portuguese judicial police.

136. The Ombudsman noted that the document concerned by the present request was drawn up by OLAF but included in the criminal investigation files of the Portuguese judicial police. With regard to OLAF's argument that the requested documents could only be released in the framework of the national criminal procedures and that, once these documents have been transferred to the national authorities, OLAF is bound by the national procedural rules, the Ombudsman pointed out the following. Request no. 6 ii) asked for access to a document which was drawn up by OLAF and not by Member States. This request thus fell clearly within the scope of the Regulation. The complainants therefore correctly addressed their request for access to OLAF. Access to this document could thus only be refused if one of the exceptions set out in the Regulation were applicable. OLAF's reasoning according to which the requested documents could only be released in the framework of the national criminal procedures - which implied that access could only be granted by the national authorities - was therefore not substantiated.

137. As regards OLAF's reference to the exception concerning the protection of the purpose of inspections, investigations and audits in Article 4(2), third indent, of the Regulation, the Ombudsman noted that OLAF did not provide a specific explanation as to why this exception would be applicable. OLAF's reasoning to refuse access to the report seemed to be based rather on the exception concerning the protection of court proceedings in Article 4(2), second indent of the Regulation. In this regard, the Ombudsman recalled that the expression " *court*



*proceedings* " in that Article had been interpreted by the Court of First Instance as meaning that the protection of this public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings [31] .

138. On 25 September 2007, the Ombudsman's representatives inspected the said report drafted by Mr J. It appeared that this report was in fact a note for the file drafted in Spanish ( *nota de expediente* ) and was dated 7 November 2000. It appeared that this note was not drawn up specifically for the judicial inquiry in Portugal. It nevertheless appeared that it was included in the inquiry file by the Portuguese judicial authorities and that the inquiry by these authorities was still ongoing. However, in its decision of 18 August 2004, OLAF merely stated that the document formed part of the criminal investigation files and could only be released in the framework of the national criminal procedure. It did not explain how the release of this document could undermine the protection of the Portuguese court proceedings. In its reply of 26 October 2004 on the confirmatory application, OLAF provided no further explanations, but only dealt with the issue of the overriding public interest.

139. As regards the question of an *overriding public interest* in disclosure, the Ombudsman noted that, in its replies of 26 October and 3 December 2004 to the confirmatory applications, as well as in its opinion, OLAF had taken the view that the complainants' rights of defence constituted a private interest and not an overriding public interest. The Ombudsman accepted that the protection of a person's rights of defence was of fundamental importance in proceedings which can lead to the imposition of sanctions. This applied in particular to criminal proceedings. However, the protection of the right to be heard is then incumbent on the court or authority conducting these proceedings. It would be for the relevant court or authority to guarantee the rights of defence of the complainants and to make sure that both parties in the dispute have access to the same documents in the file. The present case concerned the handling of requests for access to documents. This implied that the interest which the complainants invoked was not a general, but rather a private, interest [32] . In the absence of any specific elements that would support the complainants' assertion, the Ombudsman considered that the complainants could not invoke their rights of defence in order to establish that there was an overriding public interest in disclosure of the relevant documents within the meaning of the Regulation.

140. On the basis of the above considerations, the Ombudsman provisionally concluded that OLAF failed, with regard to request no. 6 (ii), to show that its decision to refuse full or partial access on the basis of Articles 4(2), second and third indent, of the Regulation was well-founded. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below.

141. As regards the remainder of request no. 6, the Ombudsman pointed out that the complainants' request was rather general (" *each administrative report with findings established by OLAF or the national investigators ...* "). OLAF's reply inviting the complainants to submit further information, therefore, seemed to be reasonable. However, it appeared that apart from referring to points (i) and (ii) of request no. 6 which were dealt with above, the complainants did not provide further clarifications with regard to the first part of this request. The Ombudsman,



therefore, concluded that OLAF's reply that the request was not precise enough was reasonable. No instance of maladministration was therefore found with regard to this part of the request for access.

142. Although the complainants' requests no. 6 and 7 were closely linked to each other, they seemed to concern different documents. Request no. 6 appeared to concern documents which were drafted by OLAF or by national investigators, whereas request no. 7 appeared to concern documents which were obtained by OLAF in the framework of on-the-spot inspections in the Member States. It appeared, however, that OLAF gave access to its Mission Report (document no. 004412 of 5 June 2000) in the framework of its reply to request no. 7, despite the fact that this document would rather appear to fall under request no. 6. Consequently, the Ombudsman dealt with this Mission Report in the framework of the present section.

143. OLAF enclosed with its reply of 18 August 2004 a copy of the Mission Report of 5 June 2000, but stated that certain parts of this report had been blanked out. OLAF first explained that names of persons (except for Community officials) and of companies had been deleted on the basis of Article 4(1)(b) (protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data) and of Article 4(2), first indent, of the Regulation (protection of the commercial interests of natural or legal persons). In addition, another part (the conclusions on page 6 of the Mission Report) had been deleted on the basis of Article 4(3) of the Regulation (opinions for internal use). In its reply of 26 October 2004 on the confirmatory application, OLAF did not elaborate further on the above exceptions, but simply stated that it did not possess any other relevant documents in response to the complainants' request no. 7.

144. During their inspection of 25 September 2007, the Ombudsman's representatives inspected those parts of the Mission Report of 5 June 2000 which were blanked out by OLAF. It appeared that the deleted parts primarily contained the names of persons and of companies which were involved in the ongoing inquiries in the various Member States. Although OLAF, in its reply of 18 August 2004, did not provide any details to explain why it considered that the disclosure of these names would undermine the protection of the privacy and integrity of the individual and of commercial interests, the Ombudsman considered it clear that, in the context of ongoing judicial inquiries, the disclosure of these names would be likely to have negative consequences for the persons concerned. Indeed, by mentioning the names of individuals or companies involved in a fraud inquiry, the reputation of these individuals or companies and their commercial interests could be easily damaged. The Ombudsman, therefore, considered that OLAF was entitled to blank out these names on the basis of Article 4(1)(b) and Article 4(2), first indent, of the Regulation.

145. The Ombudsman's representatives also inspected the deleted part on page 6 of the Mission Report containing the conclusions. These conclusions referred to various actions that had to be undertaken by OLAF in several Member States (exchange of information with the judicial and police authorities, control missions).

146. The Ombudsman noted that, in its reply of 18 August 2004, OLAF had refused access to



this part of the Mission Report by simply referring to Article 4(3) of the Regulation, without any further reasoning and without even indicating which sub-paragraph of Article 4(3) it considered to be applicable. However, considering that OLAF had stated that the relevant part of the document contained "*opinions for internal use*", the Ombudsman assumed that OLAF had based itself on the second sub-paragraph of Article 4(3). Although OLAF did not explicitly confirm this in its decision on the confirmatory application, it appeared that, with regard to the deleted part on page 6 of the Mission Report, it confirmed its earlier decision based on Article 4(3). In its opinion on the complaints, OLAF explained that the conclusions were removed because they "*contained opinions regarding operational conclusions*" and that "*it would be harmful to disclose these opinions because judicial and other follow-up have not yet been completed.*" On the basis of the last section in this reasoning, it appeared that OLAF's argument pointed towards the exceptions foreseen in either Article 4(2), second indent, or Article 4(2), third indent, of the Regulation, rather than towards the exception of Article 4(3) of the Regulation. The Ombudsman could, however, only analyse the reasons invoked by OLAF in its decision on the confirmatory application, which, as mentioned above, was based on the exception foreseen in Article 4(3) of the Regulation.

147. Article 4(3), second paragraph provides that "*[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*"

148. In the present case, it appeared that OLAF's Decision no. 8302 of 20 October 2000 to open an inquiry was based on the Background Note which referred to Note no. 7922 of 9 October 2000 and to Note no. 6724 of 31 August 2000. Although the Mission Report of 5 June 2000 was not explicitly mentioned in the Decision or the Background Note, it appeared that it was part of the information on the basis of which OLAF decided to open an inquiry. The Ombudsman, therefore, concluded that the Mission Report could be considered as "*a document containing opinions for internal use as part of deliberations and preliminary consultations within [OLAF]*" concerning OLAF's Decision of 20 October 2000 to open an inquiry into the fraudulent importation of bananas.

149. However, it followed from the case-law of the Court of First Instance that an institution cannot rely on the second subparagraph of Article 4(3) when it argues only in a general and abstract way that the disclosure of the document would seriously undermine its decision-making process, without specifying how the disclosure would concretely and effectively undermine this process. In this regard, an institution can thus not rely on mere assertions (like for instance the risk of external pressure or the reluctance to express one's opinion), which are not supported by a properly reasoned argument. [33] In the present case, it indeed remained unclear, and OLAF did not provide specific explanations in this regard, how the release of the conclusions from the Mission Report of 5 June 2000 could have undermined OLAF's decision-making process in August 2004, when the request for access was refused. This was more than two years after the Final Case Report on the inquiry had been adopted on 13 May 2002.





150. On the basis of the above considerations, the Ombudsman's provisional conclusion was that, with regard to the conclusions of its Mission Report of 5 June 2000, OLAF had failed to show that its decision to refuse access to these conclusions on the basis of the exception contained in Article 4(3) of the Regulation was well-founded. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below.

151. The inspection also showed that OLAF drew up two further Mission Reports concerning missions in Bremerhaven and Hamburg, dated 13 September and 31 October 2001 respectively. Given that OLAF had granted (partial) access to the Mission report of 5 June 2000, it was difficult to understand why it had not examined whether access could also be given to the two Mission Reports concerning the missions in Germany. The Ombudsman therefore provisionally concluded that OLAF had failed to show that it properly dealt with the general aspect of request no. 6. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below.

152. " 7) All documents requested and obtained in the course of the on-the-spot inspections "

In its reply of 18 August 2004 to request no. 7, OLAF provided access to its Mission Report of 5 June 2000 (document no. 004412). For the reasons explained above, the Ombudsman already dealt with this part of the request in the framework of his analysis of request no. 6. As regards the present request, the Ombudsman considered that only documents that were "obtained" by OLAF in the course of the on-the-spot inspections needed to be considered here, namely, documents which were handed over to OLAF.

153. In its reply of 18 August 2004, OLAF indicated that it obtained no documents during the administrative controls in Antwerp. In their confirmatory application of 6 September 2004, the complainants, however, pointed out that the Mission Report was limited to inquiries carried out by one of the complainants and, therefore, requested access also to other documents obtained during on-the-spot inspections in Belgium and in other Member States. In its reply of 26 October 2004, OLAF stated that it did not possess any documents other than the Mission Report and the Final Case Report concerning the complainants' request no. 7. As already pointed out above in paragraph 150, there were two further Mission Reports concerning missions in Germany. OLAF's statement in its reply of 26 October 2004 was therefore not entirely correct. However, and as mentioned above, only documents handed over to OLAF had to be considered here.

154. The Ombudsman's representatives inspected OLAF's file in relation to its reply of 26 October 2004 outlining that it did not possess any other documents. The list of 275 documents provided by OLAF did not mention documents obtained by it during on-the-spot inspections. The Ombudsman, therefore, considered that OLAF's above statement in reply to the complainants' request no. 7 appeared to be correct. No instance of maladministration by OLAF was therefore found with regard to this aspect of the request.

155. " 8) OLAF's final report ... "

In its reply of 18 August 2004, OLAF granted access to the Final Case Report (document no.



04967 of 13 May 2002). OLAF stated, however, that it had blanked out a name in the Report on the basis of Article 4(2), first indent of the Regulation (protection of the commercial interests of natural or legal persons) and another part on the basis of Article 4(3) of the Regulation (opinions for internal use). It appeared that this part concerned the section under " 3. *Investigation result* " and point 4.2 under " 4. *Conclusions and recommendations* ". In its reply of 26 October 2004 to the confirmatory application, OLAF implicitly maintained its position.

156. During the inspection of 25 September 2007, the Ombudsman's representatives inspected the parts of the Final Case Report which had been blanked out by OLAF. It appeared that the deleted parts concerned the name of a company which had presented nine false Spanish certificates. Although OLAF did not explain in its reply of 18 August 2008 why disclosure of the said company's name would undermine the protection of its commercial interests, the Ombudsman considered that it was clear that, in the context of the ongoing judicial inquiries, disclosure of this name would be likely to have negative consequences for the company's commercial interests. The Ombudsman therefore considered that OLAF was entitled to blank out this name on the basis of Article 4(2), first indent, of the Regulation.

157. The Ombudsman's representatives also inspected the two other parts of the Final Case Report which had been deleted on pages 4 and 5. In substance, these parts concerned the coordination between the judicial authorities in the Member States involved in the inquiries and OLAF's monitoring of the criminal investigations.

158. In its opinion on the complaints, OLAF provided further explanations concerning the parts that had been deleted. It explained that the paragraph removed under " 3. *Investigation result* " concerned operational conclusions on the investigation and opinions concerning cooperation with national judicial authorities, and that point 4.2 under " 4. *Conclusions and recommendations* " contained opinions on the same subject. OLAF stated that it would be harmful to disclose these opinions because they concerned cooperation with national judicial authorities regarding their proceedings.

159. Considering that OLAF referred to " *opinions for internal use* ", it appeared that OLAF wished to rely on the second sub-paragraph of Article 4(3) of the Regulation. The Final Case Report was drafted by OLAF's Directorate for Investigations and Operations. It gives a chronology of the main investigative steps concerning the inquiry into the fraudulent importation of bananas into the Community with false AGRIM certificates. The Report mentioned on page 2 that " [ a ]s no further operational initiatives are required in this case it is proposed to transfer this file to Directorate A for administrative follow-up purposes. I suggest also to inform the Magistrate's Unit on the developments in this case, because, as criminal procedures are continuing in at least 3 Member States, it is not to exclude that one day some judicial authority might contact the Office to request support in order to facilitate the exchange of information from one Member State to another in judicial matters in this particular case. " The Report concluded in point 4(1) that " [ i ]t is advisable for Directorate A to follow up the recovery procedures in the Member States concerned. It is clear that these will be far from conclusion now as in several Member States the criminal investigations are still continuing. However, it is suggested at this stage already, to see with all the authorities concerned whether any



*conservatory measures, and if so, which, have been taken "*. It appeared from the above text that OLAF's Final Case Report of 13 May 2002 could be considered as "*a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution "*.

160. It therefore had to be examined whether access to the investigation result and to point 4.2 of the conclusions and recommendations of the Final Case Report could be refused by OLAF after it took its decision to close the file. In this context, the Ombudsman, therefore, had to analyse whether OLAF had sufficiently shown that disclosure of these parts of the Final Case Report could seriously undermine its decision-making process. The Ombudsman noted that the deleted parts of the Final Case Report concerned an evaluation of OLAF's collaboration with the judicial authorities in the Member States as regards the criminal investigations. It was, therefore, not excluded that disclosure of such information might have repercussions on OLAF's decision-making process. It was, however, recalled that, as already mentioned above, an institution cannot rely on the second subparagraph of Article 4(3) when it argues only in a general and abstract way that disclosure of the document would seriously undermine its decision-making process, without specifying how the disclosure would concretely and effectively undermine this process [34] . In the present case, OLAF had not provided specific explanations as to how the release of the investigation result and point 4.2 of the conclusions and the recommendations of the Final Case Report of 13 May 2002 could have undermined its decision-making process in August 2004, when the request for access was refused, more than two years after that Report had been adopted.

161. On the basis of the above considerations, the Ombudsman provisionally concluded that OLAF had failed, with regard to the deleted parts on page 4 and 5 of the Final Case Report of 13 May 2002, to show that its decision to refuse access on the basis of the exception contained in Article 4(3) of the Regulation was well-founded. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below.

162. " ... or, if it exists, interim report, which recorded the facts, as well as the financial loss, the findings of the inquiry and, if applicable, the recommendations by the Director of OLAF regarding measures to be taken and all related documents "

The Ombudsman noted that, in their confirmatory application of 6 September 2004 concerning their initial request no. 8, the complainants also requested access to all interim reports which preceded the Final Case Report. In its reply of 26 October 2004, OLAF stated that it did not possess any other relevant documents.

163. It appeared from the inspection carried out on 18 July 2007 by the Ombudsman's services that there were no interim reports among the 275 documents mentioned in the list provided by OLAF. The Ombudsman concluded that no evidence had been put forward by the complainants to suggest that such interim reports had been established by OLAF. On the basis of the inspection findings, the Ombudsman considered that OLAF's rejection of the complainants' request on the ground that it did not possess any other relevant documents did not constitute an instance of maladministration.



164. " 9) The OLAF report and each document drawn up by OLAF, submitted during the proceedings before the Italian penal court, and if applicable, also during the ongoing criminal proceedings in Spain relating to the issue of the alleged false AGRIM certificates. In particular, all information or each document transmitted by OLAF to the Spanish authorities relating to the possible involvement in the issuing of false documents and the type of involvement ";

In its reply of 18 August 2004, OLAF refused access to the above documents, stating that they were part of criminal investigation files in Italy and Spain. OLAF explained that these documents fell under the exceptions foreseen in Article 4(2), second (the protection of court proceedings and legal advice) and third indent (the protection of the purpose of inspections, investigations and audits), of the Regulation. It stated that, by releasing those documents, it would undermine the national judicial procedures because the documents were part of the criminal investigation files and could only be released in the framework of national criminal procedures. OLAF also added that, once these documents have been transferred to the national authorities, it is bound by the relevant national procedural rules. In their confirmatory application of 6 September 2004, the complainants stated that their rights of defence constituted an overriding public interest which outweighed the protection of the court proceedings and of the purpose of inspections, investigations and audits. The complainants further stated that the Belgian investigation had been completed and that they had no other possibility to obtain the documents. In its reply of 26 October 2004, OLAF confirmed its refusal to grant access to the documents, pointing out that the complainants' rights of defence were a private and not an overriding public interest.

165. The documents concerned by the present request were documents created by OLAF but included in the criminal investigation files of the Italian and Spanish courts. With regard to OLAF's argument that the requested documents could only be released in the framework of the national criminal procedures and that, once these documents have been transferred to the national authorities, OLAF was bound by the national procedural rules, the Ombudsman referred to his findings in paragraph 136 above, which were also applicable to the present documents. OLAF's argument was therefore not substantiated.

166. In its reply of 18 August 2004, OLAF neither informed the complainants that the request was not clear enough, nor did it invite them to submit more details. Instead, and although it was not entirely clear to which specific documents access was requested and refused, OLAF stated that it could not release the documents on the basis of Article 4(2), second and third indent, of the Regulation. As regards the reference to the exception of the protection of the purpose of inspections, investigations and audits in Article 4(2), third indent, of the Regulation, the Ombudsman noted that OLAF did not provide a particular explanation as to why this exception would be applicable. OLAF's reasoning to refuse access to the report seemed rather to be based on the exception concerning the protection of court proceedings in Article 4(2), second indent of the Regulation. However, and as already stated above with regard to the analysis of request no. 6(ii), OLAF did not explain how the release of the requested documents could undermine the protection of the proceedings pending before national courts. In its reply of 26 October 2004 on the confirmatory application, OLAF provided no further explanations, but only dealt with the issue of the overriding public interest. On the basis of the above considerations,



the Ombudsman's provisional conclusion was that OLAF had failed, with regard to request no. 9, to show that its decision to refuse access on the basis of Articles 4(2), second and third indent of the Regulation was well-founded. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below.

167. " 10) Each document held by OLAF relating to the way in which the competent Spanish authorities issued the AGRIM certificates and any changes in time of this procedure for issuing AGRIM certificates in Spain "

In its reply of 18 August 2004, OLAF stated that it did not possess any relevant documents. In their confirmatory application of 6 September 2004, the complainants expressed their understanding that Spain had issued blank AGRIM certificates. The complainants also outlined their belief that, in 1999, when the system had been abused, the Spanish authorities had introduced a new procedure, according to which the AGRIM certificates were to be issued by the Spanish Ministry of Commerce, with effect from 1 January 2000. Nevertheless, the falsification of certificates continued. The complainants referred to a Ministry report concerning the theft of certificates at the end of 1999, after which a new certificate had been introduced in June 2000. They stated that it was highly likely that OLAF had verified this procedure and, therefore, possessed documents concerning this issue. In its reply of 26 October 2004, OLAF reiterated that it did not possess any documents that would be covered by the complainants' request.

168. In their confirmatory application, the complainants also reiterated their view that the Commission should be in possession of a sample of the authentic Spanish stamp, since Regulation 3719/88 obliges Member States to communicate the stamps to the Commission. The complainants therefore requested access to copies of all official stamps used in Spain from 1997 until September 2004. As regards this specific request, OLAF indicated in its reply of 26 October 2004 that it concerned the complainants' initial request nos. 11 and 12, for which a reply would be given by DG AGRI. This part of the request was therefore dealt with below under the section entitled " *The applications for access transferred by OLAF to DG AGRI* ".

169. As regards the rest of the complainants' request no. 10, during their inspections of 18 July and 25 September 2007, the Ombudsman's services found that, apart from the two faxes of 16 August and 23 November 1999 from the Spanish Ministry of Economic Affairs to DG AGRI, no relevant documents in this context were mentioned in the list provided by OLAF. The said faxes were the subject of the complainants' request no. 1 and were dealt with above under the relevant section. Given that the list provided by OLAF did not mention other documents and that there was no reason to believe that this list was incomplete, the Ombudsman considered that OLAF did not act wrongly when replying that it did not possess any relevant documents. No instance of maladministration was therefore found with regard to this aspect of the request.

170. " 13) Each document held by OLAF in relation to the theft of AGRIM certificates which probably took place at the end of 1999 in the Spanish Ministry. In particular, documents which concern a possible investigation of the theft and the further follow-up that was given to this case "



In its reply of 18 August 2004, OLAF stated that it did not possess any relevant document. In their confirmatory application of 6 September 2004, the complainants quoted a section from a synthesis report compiled by the Portuguese investigators and dated 1 February 2001 which stated, among other things, the following: " ... *the truth is that the relevant institution (OLAF) could conclude from inquiries that the falsification which started in Spain and of which it is presumed that it started with the theft of certificates from the Secretaria General do Comercio Exterior de Madrid/Espanha ...* " [35] On this basis, the complainants stated that it would be unusual if OLAF did not have further information or a document concerning this theft.

171. In its reply of 26 October 2004, OLAF reiterated that it did not possess any such document. During their inspection of 18 July 2007, the Ombudsman's services found that the list provided by OLAF did not mention a document concerning the theft referred to in the Portuguese investigators' report. However, it had to be pointed out that the report stated that the falsification was "*presumed*" to have started with the theft. The complainants' view might, therefore, have been based on a misunderstanding, given that the 'presumption' might have been that of the Portuguese investigators, and not OLAF's, or might have simply been a hypothesis that was not corroborated by any documentary evidence. Given these circumstances, the Ombudsman considered that OLAF's reply that it did not possess any relevant documents in relation to this theft did not constitute an instance of maladministration.

172. " 14) Documents with statistical information about the import of bananas from Latin America in the period 1998-2000 "

In its reply of 18 August 2004, OLAF stated that the statistics on the import and export of bananas were available on the Comext database of Eurostat and provided the link to this database. However, in their confirmatory application of 6 September 2004, the complainants stated that they could not find the statistics in the said database. They, therefore, reiterated their request. In its reply of 26 October 2004 to the confirmatory application, OLAF enclosed a diskette with the relevant statistics on the import of bananas. Given that OLAF granted access to the requested documents even before the complaint was lodged with the Ombudsman, the Ombudsman considered that this request did not need to be considered here.

173. " 16) The full bundle with reference AM 2000/36, supplement AM 2000/36 SOI and, if any, all other supplements "

On 25 September 2007, the Ombudsman's representatives inspected documents AM 2000/36 of 28 June 2000 and AM 2000/36 SOI of 3 October 2000, which were the subject of this request. During the inspection, the OLAF representative explained that " AM " referred to " *Assistance Mutuelle* " and that these documents were printouts from OLAF's electronic system for communication with the authorities in the Member States. The printouts themselves mentioned that they were covered by Article 45 of Regulation 515/97 [36] , which provides that any information transmitted pursuant to this Regulation is confidential and cannot be released to third persons. It had to be noted, however, that OLAF did not rely on this provision when refusing to grant access to the documents concerned.





174. It appeared that, in its decision of 26 October 2004 on the confirmatory application, OLAF confirmed its refusal to grant access to the requested documents by referring to the exception foreseen in Article 4(2), third indent, of the Regulation. OLAF stated that these documents formed part of the investigation files of the judicial authorities in various Member States. Disclosure of these documents could therefore undermine these inquiries. In that decision, OLAF did not however examine specifically whether the documents fell within the sphere covered by this exception and why disclosure of these documents would actually undermine the protection of the purpose of inspections, investigations and audits. In this context, reference could be made to what had already been discussed above in the framework of the analysis of the second part of request no. 1.

175. On the basis of the above considerations, the Ombudsman provisionally concluded that OLAF had failed, with regard to request no. 16, to show that its decision to refuse full or partial access on the basis of the exception of Article 4(2), third indent, of the Regulation was well-founded. This could constitute an instance of maladministration and the Ombudsman therefore made a proposal for a friendly solution below.

176. " 17) All other documents concerning the administrative inquiry , *and among others*:

(i) the conclusion which was finally reached in relation to AGRIM certificates presented in Belgium, whether they are duplicates of genuine AGRIM certificates or false certificates ... ;

(ii) the information and pieces of evidence on the basis of which OLAF concluded in its document AMA 36/2000 of 28 June 2000 that the stamps on the allegedly false Spanish AGRIM certificates differ in terms of the abbreviations from the stamps considered genuine "

In its reply of 18 August 2004, OLAF refused access to the documents on the basis of Article 4(2), second and third indent of the Regulation, pointing out that these documents formed part of the criminal investigation files in the relevant Member States. In their confirmatory application of 6 September 2004, the complainants stated that their rights of defence constituted an overriding public interest which outweighed the need to protect the court proceedings and the purpose of inspections, investigations and audits. In its reply of 26 October 2004 on the confirmatory application, OLAF rejected this argument and confirmed its previous decision.

177. The Ombudsman noted, as already pointed out above with regard to requests no. 6(ii) and 9, that OLAF had refused access on the basis of Article 4(2), second and third indent, of the Regulation, without explaining specifically how disclosure of the requested items would actually undermine the protection of the purpose of inspections, investigations and audits and court proceedings. The Ombudsman's provisional conclusion was, therefore, that OLAF had failed, with regard to request no. 17(i) and (ii), to show that its decision to refuse full or partial access on the basis of the exception contained in Article 4(2), second and third indent of the Regulation was well-founded. This could constitute an instance of maladministration. The Ombudsman therefore made a proposal for a friendly solution below in this regard.



178. As regards the remainder of request no. 17, OLAF, in its reply of 18 August 2004, stated that the request was not clear enough and asked for more information from the complainants. The complainants did not, however, provide additional information concerning the first phrase of request no. 17. In light of these circumstances, no instance of maladministration was found with regard to this aspect of the request.

## II) The applications for access transferred by OLAF to DG AGRI

179. For all the requests other than those dealt with above, OLAF indicated that the complainants would receive a reply from DG AGRI. More specifically, in its reply of 18 August 2004 to the complainants' initial request of 28 June 2004, OLAF indicated that "*you will receive a separate answer for the requests 11, 12, 15, 17(i), last sentence ( " how the distinction is made between so-called duplicates and so-called false certificates " ), 17(iii) and 17(iv) from DG AGRI, which is competent for these matters*". Moreover, in its reply of 26 October 2004 to the complainants' confirmatory application of 6 September 2004 for a "*copy of the authentic official Spanish stamps used in Spain from 1997 until now ...*" (that is, the first of the four additional requests in the complainants' confirmatory application), OLAF indicated that this request concerned the original requests no. 11 and 12 of the initial application and that DG AGRI would therefore reply to it.

180. It appeared from the inspection carried out by the Ombudsman's representatives on 25 September 2007 that, following an e-mail of 9 August 2004 from OLAF to DG AGRI and further e-mail correspondence, OLAF and DG AGRI agreed that the requests no. 11, 12, 15, 17(i), last sentence, 17(iii) and 17(iv) would be dealt with by DG AGRI. It further emerged that DG AGRI replied to these requests on 20 August and 2 September 2004 and gave access to the requested documents. However, due to an oversight, these replies were not sent to the complainants but rather to a law firm representing a third company which had made the same request for access. Nevertheless, it appeared that, after it became aware of this oversight, DG AGRI replied to the complainants' request of 28 June 2004 and sent the requested documents in December 2007 [37]. In its letter, DG AGRI also provided an apology for the late reply. In their observations, the complainants indicated that, although they deplored the mistake, they were grateful to DG AGRI for sending the requested documents.

181. It appeared from the above that the complainants received the documents from DG AGRI which formed the subject of their requests no. 11, 12, 15, 17(i) last sentence, 17(iii) and 17(iv) and of their request no. 1 of their confirmatory application. In their observations, the complainants did not object to DG AGRI's reply, for instance, by stating that certain documents had been refused or were missing. The complainants merely submitted that the transfer of their requests to DG AGRI in no way released OLAF from its obligation to grant access "*to all useful documents*".

182. As regards the complainants' fourth allegation, and the substantive question raised therein, namely, whether or not OLAF infringed the Regulation by forwarding the complainants' requests to DG AGRI, the Ombudsman first noted that Article 4(4) of the Regulation, which concerns third-party documents and which - according to the complainants - should have been applied,



did not appear applicable for the relationship between OLAF and DG AGRI. Article 3(b) of the Regulation defines a " *third party* " as being " *any natural or legal person, or any entity outside the institution concerned , including the Member States, other Community or non-Community institutions and bodies and third countries* " (emphasis added). Considering that both OLAF and DG AGRI are different services belonging to one and the same institution, namely, the European Commission, DG AGRI cannot be considered as a third party in relation to OLAF. Moreover, Article 4(4) would, in any event, only be relevant if the documents concerned had been drawn up by DG AGRI, which does not appear to be the case. The Commission's Decision of 5 December 2001, which contains the detailed rules for the application of the Regulation within the Commission, was thus applicable to OLAF. Article 3 of this Decision makes it clear that the reply to the application for access is sent by the department concerned. In the present case, OLAF did not appear to have argued that it did not have the relevant documents, but simply stated that DG AGRI would deal with the matter. However, given that the complainants finally obtained access to the requested documents, the Ombudsman considered that no further inquiries into this aspect of the case appeared to be necessary.

### III. The proposal for a friendly solution

183. In view of the above, the Ombudsman made a proposal for a friendly solution, which consisted of inviting OLAF to reconsider its refusal to grant full or partial access to the documents covered by:

- The second part of request no. 1, ( " *particularly but not exclusively the documents and information supplied to OLAF by the Spanish Ministry of Economic Affairs, reference to which is made in OLAF's letter of 1 February 2000 (ref. 000822) addressed to the [ Belgian ] National Investigation Directorate of the Customs and Excise Administration ...* " ) ;
- Request no. 1, second indent ( " *a copy of the alleged duplicates and a copy of the alleged genuine certificates* " );
- Request no. 2 (Document no. 6724 of 31 August 2000);
- Request no. 4 (Documents nos. 3891, 8851, 8898, 9202, 9419 and 9420);
- Request no. 6, with respect to the Mission Report of 5 June 2000 (document no. 004412) and the Mission Reports of 13 September and 31 October 2001 to Bremerhaven and Hamburg respectively;
- Request no. 6(ii);
- Request no. 8 (with respect to the Final Case Report of 13 May 2002);
- Request no. 9;
- Request no. 16.



- Request no. 17(i) and (ii)

*The arguments presented to the Ombudsman after his friendly solution proposal*

184. In its reply, OLAF explained that it accepted the Ombudsman's proposal for a friendly solution. It stated that, after consulting the relevant judicial authorities of the Member States concerned, it concluded that, at this stage, disclosure of the relevant documents would not undermine the protection of OLAF's investigations and of court proceedings in those Member States. Accordingly and in response to the requests formulated in the Ombudsman's friendly solution proposal, OLAF attached to its opinion copies of the relevant documents.

185. With regard to request no. 1, second indent, OLAF pointed out that more than 1 200 identified false certificates had been collected over a period of more than one year. OLAF, therefore, stated that, if the complainants would like to obtain copies of certain specific false certificates, they would need to specify the ones they wish.

186. OLAF also pointed out that parts of the relevant documents were covered by two of the exceptions established by Article 4 of the Regulation and could, therefore, not be disclosed. These exceptions concerned the release of information which would undermine the protection of:

- privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data (Article 4(1)(b) of the Regulation). OLAF stated that the documents contained the names of individuals, disclosure of which could be harmful to their privacy and integrity.

- the commercial interests of a natural or legal person (Article 4(2), first indent, of the Regulation). OLAF stated that the documents contained the names of persons, disclosure of which could harm their commercial interests.

OLAF pointed out that it had thus blanked out all the information referring directly or indirectly to any identified or identifiable individual and legal entity involved in the case, whose interests might be at stake.

187. In their observations on this reply, the complainants confirmed that the Ombudsman's proposal for a friendly solution had been successful. They thanked the Ombudsman's services for obtaining this result with OLAF.

188. However, the complainants made a number of comments concerning the documents released by OLAF in response to their requests no. 1, second indent, and 17(i) and (ii).

189. As regards the documents released in response to their request no 1, second indent, the complainants underlined that the aim of their request was to obtain a copy of the alleged duplicates and a copy of the allegedly genuine certificates which were mentioned in the letter of



the Spanish Ministry of Economic Affairs to OLAF of January 2000 [38] . The complainants pointed out that, as was clearly indicated in the fax of the Spanish Ministry of Economic Affairs to DG AGRI dated 23 July 1999, which OLAF released following the friendly solution proposal, the case concerned 4 AGRIM certificates with the following serial numbers: ES3656012744, ES 3656012866, ES 3656012376 and ES 3656012044. They stated that OLAF provided them with examples of genuine certificates and of false certificates (both with existing and non-existing serial numbers), but that it was not clear whether the false certificates provided concerned the certificates used by one of the complainants, to which reference was made in the letter of the Spanish Ministry of Economic Affairs to OLAF of January 2000.

190. As regards the documents released in response to their requests no. 17(i) and (ii), the complainants submitted that the documents released by OLAF only provided very limited information on the duplication of import certificates released in Spain. In particular, they argued that the documents disclosed by OLAF did not clearly state whether the certificates used by one of the complainants were duplicates of genuine certificates or false certificates, and what the distinction between them would be. They, furthermore, stated that no information or evidence was provided concerning the fact that the allegedly Spanish AGRIM certificates differed from the stamps considered to be genuine with respect to the abbreviations used therein.

#### *The Ombudsman's assessment after his friendly solution proposal*

191. The Ombudsman is satisfied to note that OLAF has accepted his friendly solution proposal and that, as a result, a total of 168 pages of documents has been released to the complainants. He further notes that the complainants have confirmed that the friendly solution proposal has been successful.

192. The complainants, nevertheless, consider that the information contained in these documents is not sufficient to answer all the questions they wished to address when they submitted the said requests for access. The complainants thus appear to consider that OLAF should provide them with further information. Given that the present case concerns OLAF's handling of requests for access to documents, the Ombudsman considers that it would not be appropriate to pursue the issue of the complainants' request for further information within the framework of the present inquiry. The Ombudsman will, however, forward a copy of the complainants' observations to OLAF. He trusts that OLAF will duly deal with the complainant's request for further information set out in these observations. The complainants are, of course, free to turn to the Ombudsman again, if OLAF fails to provide them with a satisfactory reply, within an appropriate period of time.

## **B. Conclusion**

193. On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

A friendly solution has been achieved between the complainants and OLAF.



The complainants and OLAF will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 18 December 2009

[1] Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[2] The Community rules for the importation of bananas entitle importers with a valid import licence to lower customs duties. These licences are called AGRIM certificates.

[3] Emphasis in the original; translation from Dutch by the Ombudsman's services.

[4] It was only in their complaints to the Ombudsman that the complainants clarified that they intended to make an additional request for access to four documents in their confirmatory application of 6 September 2004. In the confirmatory application itself, this additional request is not clearly identifiable. Instead, the four further documents are mentioned in the framework of the complainants' comments on OLAF's reply of 18 August 2004 to their initial application.

[5] The Background Note stated: " *Find attached a draft Decisions [sic] for the opening of investigations* ".

[6] Translation from Dutch by the Ombudsman's services.

[7] Translation from Dutch by the Ombudsman's services.

[8] Case T-188/98 *Kuijer v Council* [2000] ECR II-1959.

[9] The Ombudsman notes that the complainants mentioned request no. " 3 " in the list on page 8 of their complaints, but that " 3 " was omitted in the same list mentioned on page 9 of their complaint. Also, request no. 3 does not figure in the detailed description on page 9 of the complaint, in which the complainants provide what they consider to be *prima facie* evidence that the relevant documents existed.

[10] Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products, OJ 1988 L 331, p. 1.

[11] Quote from Article 3(2) of the Ombudsman's Statute (version in force until 31 July 2008), <http://www.ombudsman.europa.eu/lbasis/en/statute.htm> [Link].





[12] Case T-204/99 *Olli Mattila v Council and Commission* [2001] ECR II-2265.

[13] Commission Decision of 5 December 2001 amending its rules of procedure, OJ 2001 L 345, p.94.

[14] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

[15] See footnote 9 above.

[16] See footnote 4 above.

[17] Case T-380/04, *Terezakis v Commission*, judgment of 30 January 2008, not yet published in the ECR, paragraph 88.

[18] Joined cases T-110/03, T-150/03 and T-405/03 *Jose Maria Sison v Council* [2005] ECR II-1429, paragraphs 60-61.

[19] The Court of First Instance has held that " *in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle open to review only if it is a measure definitely laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for the final decision* ", see Case T-70/04 *Franchet and Byk v Commission* [ECR] 2006 II-2023, paragraph 46.

[20] The Ombudsman noted that the section in OLAF's reply of 26 October 2004 to the confirmatory application dealing with this part of the application for access mentioned "*Verzoeken 1 (tweede streepje) en 16*" (in English: "*Requests 1 (second indent) and 16*" ), whereas OLAF's reply of 18 August 2004 mentioned "*Verzoeken 1 (tweede deel ...) en 16*" (in English: "*Requests 1 (second part) and 16*" ).

[21] Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, par. 87 and 89.

[22] Translation from Dutch by the Ombudsman's services.

[23] Case T-204/99 *Olli Mattila v Council and Commission* [2001] ECR II-2265, paragraph 69.

[24] OJ 1993 L 340, p. 43.

[25] OJ 1994 L 46, p. 58.

[26] It was unclear which letter the complainants referred to.

[27] " *OLAF does not possess documents which could be released further to these requests* " (translation by the Ombudsman's services).



[28] Case T-123/99 *JT's Corporation v Commission* , [2000] ECR II-3269, paragraph 58, and Case T-311/00 *British American Tobacco (Investments) v Commission* , [2002] ECR II-2781, paragraph 35.

[29] Two of the suspects involved in the sale of false French licences owned, or had owned, companies in Monaco (see OLAF's Final Case Report of 13 May 2002, page 4).

[30] This note was in fact the report written by Mr J. from OLAF, which is the subject of the complainants' request no. 6 ii). It is discussed below in the relevant section.

[31] See Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 88.

[32] See Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 138.

[33] Case T-121/05 *Borax Europe v Commission* , judgment of 11 March 2009, not yet published in the ECR, paragraph 71, and Case T-166/05 *Borax Europe v Commission* , judgment of 11 March 2009, not yet published in the ECR, paragraph 106.

[34] Case T-121/05 *Borax Europe v Commission* , judgment of 11 March 2009, not yet published in the ECR, paragraphs 71 and Case T-166/05 *Borax Europe v Commission* , judgment of 11 March 2009, not yet published in the ECR, paragraph 106.

[35] Translation from Dutch by the Ombudsman's services.

[36] Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1997 L 82, p. 1. Article 45(1) of this Regulation provides that " [ r ] egardless of the form, any information transmitted pursuant to this Regulation shall be of a confidential nature, including the data stored in the CIS. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities. In particular, the information referred to in the first subparagraph may not be sent to persons other than those in the Member States or within the Community institutions whose functions require them to know or use it ... "

[37] DG AGRI's letter bore two dates, a printed one of 4 December 2007 and a stamped one of 10 December 2007.

[38] As pointed out in footnote 26 above, it is unclear to which letter exactly the complainants referred.

