

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

Decision

Case OI/8/2010/CK - **Opened on** 22/06/2010 - **Recommendation on** 05/04/2013 - **Decision on** 13/03/2014 - **Institution concerned** European Anti-Fraud Office (Critical remark) |

The background to the complaint

1. This own-initiative inquiry is based on a complaint submitted by an NGO based in a third country and by its Executive Director ('the complainants'). This complaint concerned an external investigation carried out by the European Anti-Fraud Office (OLAF) into alleged fraud by the complainants.
2. In 1998 and 2001, the complainants signed two contracts with the Commission for the implementation of two EU projects. On 16 August 2006, after receiving information from informants, OLAF opened an investigation into allegations of double funding of the projects, money laundering and misappropriation of funds by the complainants. On 6 and 7 February 2008, OLAF's investigators went to the premises of the NGO in Country X in order to carry out an on-the-spot check. However, the complainants refused to allow them onto the premises.
3. On 29 October 2008, OLAF closed its investigation. It transmitted its findings to the competent services of the Commission, as well as to the authorities of Country X.
4. In April 2009, the Commission issued a recovery order for the entire amount it had paid for one of the two projects, on the grounds that the project audit reports submitted by the complainants to justify the expenditure under the project had been forged. The complainants did not challenge the recovery order.
5. On 21 January 2010, the complainants made a request to OLAF for access to the final case report it had drawn up after its investigation (the 'Final Case Report').
6. On 24 February 2010, OLAF informed the complainants that it had handled their request for access under Regulation 1049/2001 [1] . OLAF further pointed out that it rejected their request, considering that the document was covered by four exceptions: (i) the protection of privacy and



integrity of individuals; (ii) the protection of commercial interests; (iii) the protection of the purposes of inspections, investigations and audits; and (iv) the protection of the Commission's decision-making process before a decision has been taken.

7. By letter of 10 March 2010, the complainants invited OLAF to reconsider its decision not to disclose the Final Case Report.

8. On 15 June 2010, OLAF confirmed its decision not to disclose the requested document.

9. In the meantime, the complainants had already complained to the European Ombudsman. The complaint was inadmissible as the complainants were not citizens of the European Union nor were they resident, nor having registered offices, in a Member State of the Union. [2] Nevertheless, in light of the seriousness of the issues raised, the Ombudsman opened an own-initiative inquiry into the case.

The subject matter of the inquiry

10. The own-initiative inquiry covered the following allegations and claims:

Allegations:

(1) OLAF committed a breach of confidentiality and failed to respect professional secrecy by disclosing information about the complainants to the national authorities of Country X, to the media and to other improper recipients.

(2) OLAF wrongly failed to grant the complainants access to its Final Case Report.

(3) OLAF failed to respect the complainants' presumption of innocence, the rights of defence and the principle of fairness in the investigation it carried out.

Claims:

(1) OLAF should offer the complainants an apology.

(2) OLAF should grant the complainants access to the document requested.

(3) OLAF should provide financial compensation to the complainants for the damage caused.

The inquiry

11. On 22 June 2010, the Ombudsman opened an inquiry and asked OLAF to provide an



opinion on the allegations and claims set out above.

12. On 22 September 2010, the Ombudsman received OLAF's opinion, which was forwarded to the complainants with an invitation to make observations. The Ombudsman received the complainants' observations on 29 October 2010.

13. On 25 and 26 June 2011, the Ombudsman's services carried out an inspection of OLAF's file. On 5 September 2011, the Ombudsman sent a copy of the report on the inspection to OLAF and to the complainants. On 23 September 2011, the Ombudsman received comments from the complainants.

14. On 5 April 2013, the Ombudsman made a draft recommendation to OLAF in relation to the issue of access to the Final Case Report. The draft recommendation was that OLAF should specify and justify the precise grounds for refusing access and, in the event that such grounds did not exist, that it should consider granting partial access to the Report (see Para. 41). OLAF submitted its reply on 19 September 2013. The Ombudsman forwarded this reply to the complainants and invited them to submit observations, which they did on 31 October 2013.

The Ombudsman's analysis and conclusions

Preliminary remark

15. The Ombudsman's inquiry in this case is limited to the following:

1. OLAF's alleged unauthorised disclosure of information
2. OLAF's refusal to disclose the final case report
3. Alleged irregularities related to OLAF's on-the-spot check.

This decision does not examine OLAF's decision to start an investigation. Nor will it deal with the substance of OLAF's findings.

A. Alleged unauthorised disclosure of information

Arguments presented to the Ombudsman

16. The complainants argued that OLAF was responsible for a number of unauthorised disclosures of information. In particular, the complainants submitted that three articles in the press of Country X, published in June 2006, referred to an OLAF investigation against them. They also referred to a news story broadcast by channel Y on 28 and 29 November 2009, in



which it was reported that OLAF had found the complainants "guilty of financial fraud and embezzlement of funds". In the complainants' view, OLAF had breached its obligation to maintain confidentiality. The complainants also alleged that OLAF disclosed information regarding its investigation to the informants. In this respect, they submitted copies of e-mails exchanged between OLAF's investigators and some of the informants. Finally, the complainants challenged OLAF's decision to forward the Final Case Report to the Intelligence Agency of Country X. In their view, OLAF should have forwarded its report to the competent judicial authorities.

17. In its opinion, OLAF rejected the complainants' assertions. It revealed that it was contacted by journalists on two occasions, in June 2006 and November 2009. OLAF provided records as to the questions asked and the replies provided by its spokesperson which were general in nature. OLAF stressed that it was not the only person or authority in possession of the information leaked to the press. It added that its services contacted the informants during the investigation with a view to cooperating with them. In line with OLAF's manual of procedures, the informants were subsequently only informed about the fact that the investigation had been closed. No access to the Final Case Report or any related information was granted to them.

18. OLAF also explained that it contacted the Embassy of Country X in Brussels, which also serves as the Mission of Country X to the EU, given that this was the first time that it needed to carry out investigations in relation to Country X. It added that it was the government of Country X which indicated the department within its administration which could assist OLAF's services on the occasion of their visit to the country. In OLAF's view, it was not entitled to question the choice made by the government of Country X.

19. In their observations, the complainants took the view that even though it was possible that the informants could have provided information to the press, OLAF should have provided evidence to establish that the information came from another source and not its services. They also maintained that OLAF had provided more information to the informants than simply notifying them of the closure of the case. As regards the authorities of Country X, the complainants argued that the Intelligence Agency of that country was responsible for numerous human rights abuses. In their view, OLAF should not have relied solely on diplomatic assurances, but should have instead examined whether the Intelligence Agency was indeed a competent authority. In this respect, they stressed that OLAF had a responsibility to respect the fundamental rights of all the persons with whom it interacts and should not assist authorities which are responsible for human rights violations. They referred to a number of judgments of the European Court of Human Rights ('ECHR') regarding extraditions and expulsions towards third countries where there is a risk of ill-treatment.

The Ombudsman's assessment

20. The complainants alleged that OLAF had made unauthorised disclosures of information to (a) the press, (b) the informants and (c) the authorities of Country X.



(a) Alleged unauthorised disclosure to the press

21. The Ombudsman notes that, in relation to alleged unlawful leaks of information, the Courts of the European Union have consistently ruled that the aggrieved party must, in principle, establish that the information concerning him published in the press resulted from leaks of information attributable to the administration [3]. The strict application of that rule may be mitigated, however, where a harmful event may have been the result of a number of different causes and where the EU institution has adduced no evidence enabling it to be established to which of those causes the event was imputable, although it was best placed to provide evidence in that respect, so that the uncertainty which remains must be construed against it [4]. It is in the light of these principles that the existence of the leaks alleged by the complainants must be examined.

22. In this case, it appears that both the articles and the news story repeated (i) information which was contained in the informants' letters to OLAF, such as the numbers of foreign bank accounts and information regarding funds that the complainants had allegedly received from different sources, as well as (ii) statements made by officials of Country X. Apart from a general statement that OLAF had asked the authorities of Country X to look into the matter, there was no reference to the specific findings of OLAF or to views expressed by the latter's staff. In addition, the complainants submitted that the informants *"had initiated a defamatory campaign"* against them and sent e-mails to a large number of recipients in which they repeated their accusations against the complainants.

23. In light of the above, the Ombudsman considers that it cannot be established from the content of the articles or the news story that the information they contained originated from OLAF. In fact, it seems perfectly possible that the source of the said information could have been the informants and/or the authorities of Country X.

24. That having been said, the Ombudsman notes that it took OLAF four years to reply to the complainants' allegations regarding leaks to the press. In fact, the complainants contacted OLAF for the first time by letter of 30 June 2006, requesting explanations about the various press articles published between 14 and 27 June 2006. On 21 January 2010, they reiterated their grievances regarding the alleged leaks, and requested explanations about the news story broadcast in November 2009. OLAF replied on 21 September 2010, apologising for its omission to reply earlier. In the Ombudsman's view, a possible disclosure of confidential information to the press is a very serious issue that needs to be properly addressed. Once informed of the alleged leaks, the institution concerned should take adequate measures (i) to investigate the matter and (ii) to inform the persons concerned of its findings as swiftly as possible. In the present case, OLAF failed to inform the complainant in a timely manner about its communications with the press and to state clearly that it bore no responsibility for the leaks in question. However, the Ombudsman notes that, in its letter of 21 September 2010, OLAF acknowledged its oversight and apologised for it. In light of OLAF's apology, there are no grounds to pursue the matter further. The Ombudsman will make a corresponding further remark with a view to assisting OLAF.



(b) Alleged unauthorised disclosure to informants

25. The Ombudsman notes that the documents submitted by the complainants (copies of emails between OLAF and the informants) concerned purely procedural issues and contained no information regarding the substantive investigation. Accordingly, the documents supplied by the complainants do not support their allegation that OLAF disclosed to the informants information concerning the substance of its investigation. Neither, based on the Ombudsman's services inspection of the OLAF file, is there any evidence that OLAF disclosed to the informants any substantive information regarding its investigation. In fact, documents in OLAF's file show that, on 19 October 2009, the informants contacted OLAF seeking further information about the investigation and that OLAF refused to provide them with such information. The Ombudsman therefore concludes that it has not been established that OLAF disclosed information related to the content of its investigation or any other information that could breach the confidentiality of its investigation or the rights of defence of the complainants.

(c) Alleged unauthorised disclosure to the authorities of Country X

26. Together with its opinion, OLAF provided the Ombudsman with copy of a letter from the Ambassador of Country X dated 27 December 2007, in which the Intelligence Agency of Country X was designated as the contact point regarding this case. The Ombudsman shares OLAF's view that OLAF cannot itself choose the authority from which to seek necessary assistance in so far as third countries are concerned. It was therefore reasonable for OLAF to rely on the guidance received from the government of the third country concerned as to which authority was competent to deal with a specific matter.

27. The complainants suggest that OLAF should not have cooperated with the Intelligence Agency of Country X, since the latter was responsible for human rights violations. The Ombudsman considers, however, that this statement is unsubstantiated. In the absence of compelling evidence that cooperation with the Intelligence Service of Country X was likely to pose risks to the integrity and well-being of the complainants, OLAF had no basis on which to decline to work with that Service. It appears from the OLAF file that it had no solid grounds for believing that cooperation with the Intelligence Service would pose a risk to the complainants' integrity and well-being. The complainants referred extensively to the case-law of the ECHR. The Ombudsman notes, nevertheless, that this case-law is irrelevant to the subject matter at stake in the present case, as it concerns the responsibility of the host country for expulsions or extraditions to third countries where there is a risk of torture or ill-treatment. In light of the above, the Ombudsman finds no maladministration in this respect.

Conclusion

28. In light of the above considerations, the Ombudsman considers that no maladministration



can be found as regards the complainants' first allegation.

B. Alleged unjustified refusal to disclose the requested document and related claim

Arguments presented to the Ombudsman

[5]

29. In its opinion, OLAF stated that access to the Final Case Report should be refused for the reasons that it had already put forward in its letter to the complainants dated 15 June 2010. OLAF explained to the complainants that their request for access to documents had been dealt with under Regulation 1049/2001, as the interested parties have no specific right of direct access to the OLAF investigation file. It added that the interested parties have a right of access under the same terms and conditions as any other natural or legal person [6] and that, when dealing with public access requests, OLAF needs to take into account that any document it discloses would enter the public domain. As regards substance, OLAF explained that the Final Case Report was covered by four exceptions provided for by Regulation 1049/2001.

30. First, OLAF invoked the exception related to the purpose of inspections, investigations and audits [7]. In particular, OLAF stated that the requested document contains OLAF's findings regarding its investigation, possible mismanagement of EU funds and forgery of documents. It expressed the view that, since the relevant information had been transmitted to the Commission and the authorities of Country X, disclosure of the document would jeopardise the outcome of various follow-up proceedings. In addition, disclosure would reveal what kind of evidence had been gathered from different sources. In this regard, OLAF referred to the *Franchet and Byk* judgment, where the Court considered that disclosure of documents that could constitute evidence in national court proceedings could compromise the effective use of this evidence by the national authorities [8].

31. Second, OLAF referred to the protection of the Commission's decision-making process in a matter where the decision has not yet been adopted [9]. According to OLAF, disclosure of the requested document could jeopardise the outcome of the ongoing recovery procedure, by exposing the Commission and its services to possible external interference and thus preventing it from adopting a final decision free from external influence.

32. Third, OLAF invoked the protection of privacy and integrity of individuals [10]. It argued that the requested document contains the personal data of individuals, such as officials of the national authorities, as well as employees of private companies and of persons active in NGOs, the disclosure of which would affect their privacy. Fourth, OLAF put forward the exception related to the protection of commercial interests [11]. It stated that the requested document contains information that would harm the reputation of legal entities before a final decision is taken by national authorities. Finally, OLAF noted that the above exceptions covered the document concerned to such an extent that the rest of the text would have been deprived of substance and would, therefore, have been meaningless. It thus concluded that partial access



was not possible.

33. The complainants stated that OLAF failed to demonstrate how the exceptions that it had relied upon apply to the requested document. In relation to the first exception, they argued that there were no ongoing investigations, given that OLAF's investigation had been completed and that the Commission had initiated recovery proceedings. Regarding the second exception, the complainants argued that OLAF simply asserted that disclosure of the Final Case Report would jeopardise the outcome of the proceedings initiated by the Commission without, however, specifying to what kind of external interference OLAF referred. In relation to the third and fourth exceptions, the complainants noted that the interests of natural and legal persons could be protected by simply removing their names. In their view, OLAF did not provide adequate justification as to why it could not provide them with a redacted version of the requested document.

The Ombudsman's assessment leading to a draft recommendation

34. After having carefully examined the arguments submitted, the Ombudsman reached the conclusion that the position adopted by OLAF was not convincing [12] .

(a) Protection of the purpose of investigations

35. As regards the exception related to the purpose of inspections, investigations and audits, the Ombudsman noted that, according to the case-law, this exception cannot, in principle, be validly invoked when (i) the investigation has essentially ended, and (ii) the various authorities (EU and/or national ones) are merely in the process of deciding on follow-up action [13] .

36. In the present case, OLAF completed its investigation in October 2008 by drafting a final report and transmitting the relevant information to the Commission and the authorities of Country X. At the time the complainants sought access, there was, therefore, no longer an ongoing investigation by OLAF into the case. The Ombudsman further noted that, by the time the complainants requested access to the Final Case Report, the Commission had already decided to initiate recovery proceedings. In particular, it had already issued a recovery order in March 2009, the legality of which was never challenged by the complainants. It was clear therefore that any additional investigation that the Commission might have carried out on the basis of the Final Case Report should have been completed before it issued its recovery order. Regarding the possible existence of ongoing investigations in Country X, the Ombudsman noted that OLAF did not refer to any specific investigation or judicial proceedings which were ongoing at the time of its decision and which might have constituted follow-up action to its Final Case Report.

37. Furthermore, the Ombudsman stressed that, according to the case-law, an important element to be taken into consideration in relation to follow-up or additional investigations,



inspections and audits is whether these activities are being carried out " *within a reasonable period* [14] ". As the Court stated in *Franchet and Byk* , "to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to the [relevant] documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities" [15] .

38. In this case, the information submitted to the Ombudsman did not show that the authorities of Country X, which have been in possession of the Final Case Report since October 2008, had undertaken any kind of follow-up action with a view to further investigating the matter or to initiating judicial proceedings. Indeed, if OLAF wished to rely on the exception protecting the purpose of investigations in order to reject a request for public access made in 2010, almost two years after it had sent its Final Case Report to Country X, it should have enquired with Country X to determine whether a national investigation was ongoing or was likely to be commenced. However, no such efforts were made by OLAF.

(b) Protection of the Commission's decision-making process

39. As regards the second exception relied upon by OLAF, the Ombudsman found OLAF's explanations vague and abstract, as they did not provide sufficiently concrete information on how the release of the document could seriously undermine the Commission's decision-making process. In any event, as pointed out, the Commission's *decision-making process* regarding the decision to recover the amount paid to the complainants had already ended when the request for public access was made.

(c) Protection of personal data

and

(d) Protection of commercial interests

40. As regards OLAF's argument that the disclosure of the Final Case Report could affect the privacy of individuals whose personal data are contained in it, as well as the reputation of legal entities before a final decision is taken by national authorities, it was clear that these risks existed, in particular, with respect to the identity of the informants whose information led OLAF to investigate the matter. The Ombudsman therefore found that OLAF was entitled to invoke the exception set out in Article 4(1)(b) in order to justify its refusal to grant access to the parts of the document that would have allowed the informants to be identified. The same applied to the possible harm to the reputation of the individuals and the legal entities involved. Nevertheless, the Ombudsman could not overlook the fact that the relevant interests could be protected by simply blanking out the names of the individuals and legal entities concerned.



41. In light of the above findings, the Ombudsman considered that OLAF failed to respond adequately to the complainants' request for access to the Final Case Report, and that this constituted an instance of maladministration. The Ombudsman made the following draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman:

OLAF should specify and substantiate its reasons for refusing to provide partial access to the Final Case Report. In case there are no such reasons, OLAF should consider the possibility of providing partial access to the requested document by blanking out the names of the individuals and legal entities concerned.

The arguments presented to the Ombudsman after the draft recommendation

42. In its reply, OLAF agreed with the Ombudsman's view that it needed to specify and substantiate its reasons for refusing to provide access. OLAF submitted, however, that it considered that it had respected this obligation in this case. OLAF also expressed doubts as to the applicability of Regulation 1049/2001 to the complainants' request.

43. As regards the exception related to the protection of the purpose of inspections, investigations and audits, OLAF submitted that the Regulation setting up OLAF, that is to say, Regulation 1073/1999 [16] needed to be taken into account for determining the scope of application of Regulation 1049/2001. Article 8 of Regulation 1073/1999 provides that information that OLAF obtains during an investigation is subject to professional secrecy and must be treated by OLAF as confidential. That provision aimed, on the one hand, at safeguarding the successful conduct of an investigation in the public interest and, on the other hand, at safeguarding the legitimate interests of the individuals so that the information they provide to OLAF is used only for the purposes of the investigation. The principal purpose of Article 8 of Regulation 1073/1999 was thus to protect OLAF's investigative activities. OLAF underlined that, as regards the relevant exception in Regulation 1049/2001, it was not the investigative activity as such that is protected but the purpose of the investigation. It is for that reason that various acts of investigation may remain covered by the exception in question as long as that purpose has not been attained, even if the particular investigation which gave rise to the document to which access is sought has been completed. OLAF noted in this respect that the purpose of OLAF's investigations is the fight against fraud, corruption and other illegal activities affecting the financial interests of the EU.

44. In relation to the recovery procedure, OLAF stressed that, in the present case, follow-up action had indeed been taken and that the end of this procedure was predictable and not uncertain. The purpose of the protection of the EU's financial interests could only be achieved where EU funds unduly paid are recovered or where the recovery is legitimately waived. OLAF added that, following the complainants' failure to pay, the Commission took legal action, which was still pending before the national court. In its view, disclosing the Final Case Report, which constitutes admissible evidence before a court under Article 9(2) of Regulation 1073/1999,



might jeopardise the EU's position in the relevant proceedings and affect the decision to pursue any legal action.

45. As to ongoing inquiries and investigations in Country X, OLAF noted that, due to very limited communication from the authorities of that country, it had no up-to-date information on whether any investigation had formally been opened at the time of the request. According to OLAF, criminal proceedings were however pending against the complainants in Country Y and those proceedings were also partially related to facts covered by the Final Case Report. OLAF added that since January 2007, OLAF had been in regular contact with the law enforcement authorities of Country Y. In view of the above, OLAF considered that even partial access to the requested document could not be granted.

46. As regards the exceptions relating to personal data and commercial interests, OLAF agreed that partial access would have been possible in principle, if these had been the only exceptions that were applicable. However, OLAF submitted that a sufficient level of protection of personal data (and commercial interests) could not be ensured by simply blanking out the names of the individuals and legal entities concerned, as the Ombudsman had suggested. OLAF had a particular duty to protect the personal data of persons involved in its investigations as well as the identity of whistleblowers and other informants. Depending on the extent of publicly known information, disclosure of even indirect indications as to the identity of a person might affect the reputation of the persons involved in the investigation, and consequently qualify as a violation of OLAF's duty of confidentiality and thus result in a non-contractual liability on the part of the Commission.

47. In their observations, the complainants argued that the Ombudsman should not consider OLAF's reply, given that it had been submitted after the expiry of the deadline set by the Ombudsman. The complainants also argued that OLAF's doubts as to the applicability of Regulation 1049/2001 were absurd. In their view, whether or not they had a personal interest in disclosure was not a valid reason for not providing them with the Final Case Report under Regulation 1049/2001. Moreover, when they initially asked for access to the Final Case Report, OLAF treated that request as a request for public access to documents under Regulation No 1049/2001.

48. The complainants considered that OLAF had failed once again to justify its refusal to disclose the Final Case Report. In particular, with respect to the exception related to the purpose of the investigation, they argued that OLAF failed to establish that disclosure would specifically and effectively undermine the protection of the purpose of the investigations. Accepting OLAF's assertion that the purpose of its investigations was *"the fight against fraud, corruption and other illegal activities affecting the financial interest of the EU"* would amount to permitting OLAF to refuse disclosure of any document relating to any of its investigations merely by referring to a possible future adverse impact with respect to informants and witnesses.

49. The complainants reiterated that OLAF's investigation and its purpose were completed at the time of their request for access and that the entities, to which OLAF's Final Case Report had officially been sent, namely the Commission and the national authorities of Country X, had



already taken decisions with regard to the findings in OLAF's report. In particular, the Commission took a decision to initiate recovery proceedings, while the authorities of Country X decided not to pursue the matter further. The proceedings in Country Y were not the result of or a follow-up action to OLAF's investigation, but resulted from allegations submitted by an informant to the judicial authorities of that country.

50. In relation to the exception regarding data protection, the complainants argued that it was not clear from OLAF's submission which, if any, specific information in the Final Case Report could be used to identify the informants or other relevant parties and why it would not be possible to redact such information and then disclose the report.

The Ombudsman's assessment after the draft recommendation

51. In the draft recommendation, the Ombudsman invited OLAF to *specify and substantiate its reasons for refusing to provide partial access to the Final Case Report*. The Ombudsman regrets that OLAF did not use this opportunity to correct the instance of maladministration identified in the draft recommendation. In fact, OLAF's reply mainly contains comments and references to general rules and principles applicable to OLAF's investigations without, however, explaining how these rules could have entitled OLAF to refuse disclosing the requested document.

52. The Ombudsman is surprised that OLAF decided to question the applicability of Regulation 1049/2001 to the complainants' request at this stage of the procedure, after OLAF, itself, had decided to handle the complainants' request for access to the Final Case Report under Regulation 1049/2001.

53. The Ombudsman cannot share OLAF's view that the scope of Regulation 1049/2001 is limited by Regulation 1073/1999. In this respect, OLAF referred to three judgments of the Court of Justice, namely *Agrofert Holding*, *TGI* and *Bavarian Lager* [17]. The Ombudsman notes that this case-law concerns specific fields of EU law (State aid, mergers and personal data protection) in relation to which the Court has accepted that there is a special relationship between the relevant legislation and Regulation 1049/2001. According to the Court of Justice, this relationship entitles institutions to rely on general presumptions which apply to certain categories of documents and thus dispenses them from explaining how access to the requested documents could specifically and actually undermine the interest protected by an exception (*TGI*, *Agrofert*), or requires the applicant to demonstrate a specific interest in the disclosure sought (*Bavarian Lager*).

54. That being said, the legal framework governing OLAF's activities is not among the above-mentioned fields of law. What is more, the Court has already decided a number of cases involving requests for access to documents in OLAF's possession, without accepting an argument such as the one submitted by OLAF in this case. In fact, in *Franchet and Byk*, the Commission suggested that the need to respect the rules of confidentiality made it impossible to allow public access to any document relating to the essential part of an OLAF investigation, even when it is completed. The Court did not accept this argument. Instead, it held that the fact



that a document concerns an inspection or investigation cannot in itself justify application of the exception invoked [18] . As the Court pointed out, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception and that the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner [19] . OLAF's argument must therefore fail.

55. In the draft recommendation, the Ombudsman set out in detail the reasons why OLAF had failed to explain in a convincing manner how the purpose of the investigation in question could be endangered by the disclosure of the Final Case Report. Regrettably, OLAF ignored these reasons and, instead, limited itself to stating in a vague and general manner that the purpose of OLAF's investigations was the fight against illegal activities affecting the financial interests of the EU. As the complainants correctly observed, accepting such an argument as a valid justification for non-disclosure would mean that OLAF could reject any request for access to documents relating to its investigations and that it could do so for an indefinite period of time. Such an interpretation would be in flagrant contradiction with the principle confirmed, time and again, by the Courts of the EU, according to which any exception to the right of access to documents under Regulation 1049/2001 must be interpreted and applied strictly.

56. Since OLAF confirmed in its reply that, at the time of the request, it had no up-to-date information on whether any investigation was formally opened by the authorities or courts in Country X, its argument based on such investigations remains unconvincing. As regards OLAF's reference to pending criminal proceedings against the complainants in Country Y, suffice it to say that OLAF neither provided any information regarding the link between the proceedings in that country and its investigation, nor explained how the disclosure of the Final Case Report could impact upon those proceedings. As to the recovery procedure, OLAF submitted no arguments that could call into question the assessment set out in the Ombudsman's draft recommendation.

57. The Ombudsman also regrets that OLAF did not view the draft recommendation as an opportunity to carry out a fresh assessment of the request and disclose the document, especially in view of the fact that more than five years have passed since the initial request was made. The Ombudsman concludes that, in light of the above, OLAF acted wrongly by rejecting the complainants' request for access to the Final Case Report without being able to invoke convincing arguments to justify its decision. OLAF's approach in this case raises a more general question as its policy regarding requests for access to Final Case Reports. Accordingly, the Ombudsman will consider the possibility of launching an own-initiative inquiry into OLAF's practices in this area.

C. Alleged irregularities related to the on-the-spot check

Arguments presented to the Ombudsman

58. The complainants criticised the following irregularities that allegedly affected OLAF's



investigation and impacted upon their rights of defence:

- (a) There was no legal basis for the on-the-spot investigation.
- (b) There was no information relating to the specific allegations against them and the modalities of the on-the-spot investigation; OLAF also failed to invite them to express their views on these allegations.

In particular, the complainants argued that in none of the letters that preceded OLAF's visit to Country X did OLAF set out, in a clear and comprehensive manner, the allegations against them that it was investigating, or inform them about the procedural aspects of the investigation and their procedural rights.

- (c) There was an unauthorised national official present during the on-the-spot check.

The complainants noted that, during the on-the-spot check, OLAF's investigators were accompanied by a person, Z, who was introduced as a "translator". His presence was not communicated to them and was not mentioned in OLAF's "Investigation Authority" among the names of the investigators. In addition, Z did not provide any form of identification.

59. In its opinion, OLAF argued that the on-the-spot check was based on the General Conditions applicable to the grant contract between the Commission and the complainants. During the inspection carried out by the Ombudsman's representatives, OLAF clarified that its investigators acted as part of the Commission in accordance with Article 3 of the Regulation 1073/1999 and Article 2(1) of the Commission Decision 1999/352.

60. OLAF further argued that, as this was an external investigation, the provisions of its Manual for Operational Procedures ('the Manual') did not apply because they only concerned internal investigations. In OLAF's view, its obligation to inform the interested party at the beginning of the investigation was restricted to internal investigations. In addition, it argued that, in any event, it had provided the complainants with information regarding concrete allegations, on 7 February 2008, orally during the on-the-spot check, and, on 27 February 2008, in its letter following the mission to Country X. OLAF also argued that the informants had explicitly requested it not to share information with the complainants, as they had expressed fears of a potential retaliation. OLAF had an obligation to avoid disclosing information that could compromise the informants' anonymity.

61. As regards Z, OLAF argued that his presence at the on-the-spot check had been requested for the purpose of his providing linguistic assistance to OLAF, as he was a translator and interpreter and he had no involvement in any operational activity. However, as soon as it became obvious that his presence was a problem for the complainants, he was asked to leave.

62. In their observations, the complainants argued that OLAF had no jurisdiction to conduct investigations outside the EU. In their view, the grant contract signed between them and the Commission did not constitute a sufficient legal basis for such an investigation. Only a



cooperation agreement between OLAF and Country X could provide the former with the authority to carry out an external investigation in that country under Regulation 1073/1999. The complainants rejected OLAF's argument that there was a *de facto* agreement with Country X, given that such an informal mechanism would, in their view, be contrary to EU law. The complainants further argued that OLAF's distinction between internal and external investigations was artificial and in contradiction with its obligation to carry out its investigations with full respect for human rights and fundamental freedoms, in particular the principle of fairness.

The Ombudsman's assessment

(a) The alleged absence of a legal basis for the on-the-spot check

63. The Ombudsman notes that Article 16(2) of Annex II of the General Conditions applicable to the grant contract signed between the Commission and the complainants provided that the *"beneficiary must consent to record-based or on-the-spot inspections by the Commission or the Court of Auditors of the use made of the grant, in accordance with the regulation applicable to the general budget of the Community..."*. While this provision does not explicitly refer to investigations by OLAF, it should be understood as covering the latter's activities, given that OLAF is part of the European Commission, despite its independent status as far as the carrying out of its investigations is concerned [20]. Article 1(1) of Regulation 1073/1999 provides that OLAF *"shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas"*. The complainants' argument that there was no legal basis for OLAF to carry out an investigation in their case is therefore not convincing. What remains to be examined is the complainants' argument that the absence of a cooperation agreement between OLAF and Country X impacted on the legality of the operation.

64. Article 3 of Regulation 1073/1999, which concerns external investigations, provides that OLAF shall carry out on-the-spot inspections and checks in Member States and, in accordance with the cooperation agreements in force, in third countries. According to the complainants, the existence of an agreement is a prerequisite for the legality of the inspection. The Ombudsman cannot share this view. It is her understanding that the purpose of the requirement of a cooperation agreement is to ensure that OLAF will conduct its inspections in full respect of the sovereignty of a third country. Thus, in the Ombudsman's view, nothing prevents OLAF from conducting an inspection on the basis of a *de facto* agreement, in this case, the consent given by the competent authorities of Country X. The Ombudsman concludes, therefore, that there was no maladministration in this respect.

(b) Alleged breaches of the complainants' rights of defence

65. At the time the on-the-spot check was carried out, the conduct of OLAF's investigations was governed by Regulation 1073/1999, as complemented by internal guidelines, mainly OLAF's



Manual.

66. Recital 10 of Regulation 1073/1999 provides that investigations must be conducted " *with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value* ". Although the Manual repeats OLAF's obligation to respect fundamental rights, it makes a distinction between internal and external investigations when it comes to the procedural guarantees that the persons concerned [21] enjoy. In particular, persons concerned in internal investigations have a right to be notified at various stages of the investigation [22] and are given the opportunity to express their views on all the facts which concern them before the drafting of the final case report [23] , whereas in case of external investigations the Manual seems to leave it to OLAF's discretion whether to inform the persons concerned and invite them to an interview.

67. OLAF based its reply to the complainants' grievances on the above distinction introduced by its Manual. In the Ombudsman's view, however, OLAF's approach regarding its obligations vis-à-vis persons under investigation is overly formalistic, and the distinction mentioned above appears to be artificial and unjustified. In fact, Regulation 1073/1999 does not provide for any such distinction. Recital 10 of the Regulation refers to "investigations" without distinguishing between internal and external ones. Such a distinction is even harder to justify in light of the EU Charter of Fundamental Rights. Respect for fundamental rights, such as the right to be heard and the rights of defence, cannot be conditional upon the type of the investigation that OLAF conducts. In light of the above, the Ombudsman cannot accept OLAF's argument that, because the investigation in question was an external one, OLAF had no obligation to grant the complainants certain procedural guarantees.

68. The Ombudsman has already taken the view that persons under investigation should be informed, at an appropriate time in an investigation, of the scope of the investigation. This allows them effectively to exercise their rights of defence. In order to understand the scope of the investigation, it is not necessary to provide the persons concerned with a detailed account of the evidence gathered thus far in support of those allegations [24] . However, it is clearly fundamental that those persons be informed of the allegations that are to be investigated.

69. In this case, OLAF did not provide sufficient information to the complainants in relation to the scope of the investigation before or at the time when the on-the-spot check was carried out. In its letter of 21 August 2006, OLAF merely stated that it had opened an investigation against them. In its letter announcing the on-the-spot check of 13 January 2008, OLAF noted that the purpose of the check was to verify the documentation of two projects as well as all other documents related to activities financed by the Commission. It was not until after its visit to Country X, in its letter of 27 February 2008, that OLAF identified, to a certain extent, the allegations against the complainants, namely that the reports related to the projects were allegedly forged. Consequently, it was more than 18 months after the investigation had been opened that the complainants received official information about the scope of the investigation against them. In the Ombudsman's view, such a delay is at odds with OLAF's obligation to



respect the rights of defence of persons under investigation.

70. OLAF argued that it was prevented from disclosing more information to the complainants because of the need to respect confidentiality and the informants' anonymity. The Ombudsman does not find this argument convincing. As already stated, OLAF did not have to provide the complainants with a detailed account of all the information and the evidence gathered in support of the different allegations. The Ombudsman considers that a simple presentation of the main allegations made against the complainants would not have endangered the anonymity of the informants.

71. The Ombudsman further notes that, contrary to principles of good administration, OLAF also failed to invite the complainants to present their views before finalising its position on the allegations against them and the evidence supporting those allegations.

72. In light of the above, the Ombudsman concludes that OLAF failed to respect the complainants' rights of defence. This is an instance of maladministration.

(c) Regarding the presence of Z during the on-the-spot check

73. The Ombudsman considers that there may well be situations in which the presence of an interpreter may be useful in cases where OLAF carries out investigations in third countries. It is not clear whether there was a need for an interpreter in the present case. In any event, the Ombudsman considers it obvious that the persons under investigation should be informed in an adequate and timely manner about the identity and functions of any person accompanying OLAF's investigators. In the present case, it should however be noted that OLAF submitted, without being contradicted by the complainants, that Z left the complainants' premises following their objections and did not participate in any step of the investigation. There is therefore no need for further inquiries into this aspect of the case.

D. Other claims

Arguments presented to the Ombudsman

74. The complainants requested that OLAF offer them an apology as well as provide them with financial compensation for the emotional suffering, the damage to their reputation and the limitations on their ability to carry out their human rights work resulting from the behaviour criticised by them.

75. In its opinion, OLAF apologised for the delay in replying to the complainants' letter of 21 January 2010, in which the latter asked for clarifications in relation to the leaks to the press. In relation to the issue of financial compensation, OLAF noted that non-contractual liability on the part of an EU institution requires a sufficiently serious breach of a rule of law protecting



individuals, the existence of a real and current injury, and a causal link between the breach and the damage. As OLAF did not consider that any breach had occurred, it considered the claim unsubstantiated [25] .

The Ombudsman's assessment

76. As OLAF correctly observed, a claim for compensation based on non-contractual liability requires all three of the conditions mentioned above to be fulfilled. It also follows from the settled case-law of the Union courts that, if any one of the said conditions is not satisfied, the claim for damages fails [26] . The Ombudsman found, in the course of the present inquiry, an instance of maladministration which could be considered to be a sufficiently serious breach of a rule of law protecting individuals, namely OLAF's failure to ensure the complainants' rights of defence. However, the other two conditions for non-contractual liability do not appear to be satisfied. Apart from the fact that the alleged damages have not been substantiated, the required causal link between the breach of the right of defence and the alleged damages to the complainants' reputation and their ability to pursue their activities has not been established. The claim for compensation can therefore not succeed.

77. Last, while the Ombudsman regrets that OLAF apologised only for its delay in replying to the complainants' requests regarding the leaks to the press, she does not consider it appropriate to seek a further apology from OLAF by way of a further draft recommendation. It should be recalled that the present inquiry was carried out at the Ombudsman's own initiative. In light of the circumstances of the case, the Ombudsman in any event considers that her findings of maladministration constitute adequate satisfaction for the complainants.

E. Conclusions

78. The Ombudsman has identified two instances of maladministration: (i) OLAF's failure to **provide convincing reasons for refusing to provide access to the Final Case Report, and (ii) OLAF's failure to respect the complainants' right of defence.** Whenever the Ombudsman finds an instance of maladministration, she makes, where appropriate, a friendly solution proposal or a draft recommendation to the institution concerned. In the present case, the Ombudsman addressed a draft recommendation to OLAF in relation to the issue of access to documents, which was regrettably not accepted by OLAF. As to the second instance of maladministration, the Ombudsman does not find it useful to pursue the matter further by issuing a draft recommendation, in view of the fact that new rules regarding OLAF in general and the way it conducts investigations in particular entered into force on 1 October 2013. These rules, namely Commission Decision 2013/478 [27] and Regulation 883/2013 [28] , were the result of a lengthy and fruitful reform process. One of the objectives pursued by this reform was to strengthen the procedural rights of persons concerned by investigations by laying down procedural guarantees that are to be respected during both internal and external investigations. According to Recital 23 of the new Regulation, the procedural guarantees and fundamental rights of persons concerned and of witnesses should be respected without discrimination at all



times and at all stages of both external and internal investigations [29] . The Ombudsman trusts that OLAF will give full effect to these provisions and ensure that the procedural guarantees and fundamental rights of persons concerned are respected regardless of the type of the investigation.

79. The Ombudsman therefore considers it appropriate to make two critical remarks as regards the instances of maladministration that occurred in the present case.

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion and critical remarks:

Where an EU institution rejects a request for public access to documents, it needs to establish that one or more of the exceptions set out in Regulation 1049/2001 apply. In this case, OLAF failed to provide convincing reasons for refusing to provide at least partial access to the document concerned and, on the face of it, its decision to refuse access was not justified. This constitutes an instance of maladministration.

Principles of good administration require that parties under investigation should be (i) informed of the scope of the investigation and (ii) invited to present their views before the closure of the case. This allows them effectively to exercise their rights of defence. In this case, OLAF failed to (i) provide sufficient information in a timely manner to the persons concerned in relation to the scope of the investigation and (ii) did not invite them to present their views before finalising its position. This constitutes a further instance of maladministration.

There has been no maladministration as regards the remaining allegations and claims.

The complainant and OLAF will be informed of this decision.

Further remark

A possible disclosure of confidential information to the press is a very serious issue that needs to be properly addressed. It would therefore be most advisable if OLAF, once it has been informed of such alleged leaks on its part, were (i) to take adequate measures to investigate the incident and (ii) to inform any person concerned of its findings as swiftly as possible.



Emily O'Reilly

Done in Strasbourg on 13 April 2014

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145, p. 43.

[2] These are the rules laid down in Article 228 of the Treaty on the Functioning of the European Union.

[3] See, to that effect, the judgments in Case T-259/03 *Nikolaou v Commission* [2007] ECR II-99, paragraph 141, and in Case T-48/05 *Yves Franchet and Daniel Byk v Commission* [2008] ECR II-1585, paragraph 182.

[4] Case T-48/05 *Franchet and Byk v Commission* , cited above, paragraph 183.

[5] For a more detailed presentation of the Arguments presented to the Ombudsman as well as the Ombudsman's detailed assessment, see the Draft recommendation of the European Ombudsman in own-initiative inquiry OI/8/2010/(VIK)CK concerning the European Anti-Fraud Office, available at:
<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/49793/html.bookmark>
[Link]

[7] Article 4 (2), third indent of Regulation 1049/2001.

[8] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* , [2006] ECR-II-2023, paragraphs 121-125.

[9] Article 4(3) first paragraph of Regulation 1049/2001.

[10] Article 4(1)(b) of Regulation 1049/2001.

[11] Article 4(2) first indent of Regulation 1049/2001.

[12] The full text of the draft recommendation is available on the Ombudsman's website, see above footnote 4.

[13] Decision of the European Ombudsman closing his inquiry into complaint 943/2007/PB against the European Anti-Fraud Office, paragraph 27.

[14] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* , cited above, paragraph 113.



[15] *Idem* , paragraph 111.

[16] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L 136, p. 1.

[17] Case C-477/10 P *Commission v Agrofert Holding* , judgment of 28 June 2012, not yet reported in the ECR, paragraph 52; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 58; Case C- 28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055, paragraph 56.

[18] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* , cited above, paragraph 105.

[19] *Idem* , paragraph 115.

[20] Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ 1999 L 136, p. 20.

[21] The concept of person concerned designates any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by OLAF.

[22] 3.1.1 *Right to be informed*

Internal investigations

OLAF must notify the person concerned at various stages of an internal investigation: at the initial stage, to arrange an interview, and at the closure of the case.

Where an internal investigation requires absolute secrecy, or at the request of a national judicial authority subject to national law, notification of the person concerned may be deferred, on the basis of a reasoned written decision. In this case, OLAF may ask the Community body not yet to inform the person concerned. As soon as the reasons for the deferral cease to apply, the information will be forwarded to the person concerned. If the case is closed and no further action taken, the person concerned is informed in writing. If the case is closed with follow-up, the person concerned is informed in writing to which authority the case has been passed on, unless this would be detrimental to the follow-up action.

External investigations

In external investigations, OLAF investigators inform the person subject to the investigation, as long as this would not be harmful to the investigation. OLAF investigators also inform the person concerned when the investigation has been closed as long as this would not be harmful to any further action.



[23] 3.1.2 Contradictory procedure

Internal investigations

OLAF investigators must take into due consideration that members, officials and servants of Community bodies are required to cooperate with OLAF in its investigative efforts. This duty extends not only to an obligation to provide information, but also to cooperate in any other aspect as required by OLAF in the conduct of an internal investigation. Conclusions cannot be drawn referring by name to a member, official or servant of a Community body once the investigation has been completed, without first giving the person concerned the opportunity to express his views on all the facts which concern him. Thus, the person concerned is invited to an interview before conclusions which refer to him by name in a final case report are drawn. At the interview, OLAF staff may only disclose the information necessary to reach conclusions affecting the interviewee directly.

External investigations

In external investigations, OLAF investigators enable the person concerned to express his views on all the facts that concern him before drawing any final conclusions. Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority.

[24] Decision of the European Ombudsman closing the inquiry into complaint 1560/2010/(ML)FOR against the European Anti-Fraud Office (OLAF), paragraphs 41-42.

[25] See Case 111/86 *Evelyne Delauche v Commission* [1987] ECR-5345, paragraph 30: "... the Community can only be held liable for damages if a number of conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered, and the existence of a causal link between the act and the damage alleged to have been suffered."

[26] See, for example, Case T-170/00 *Förde-Reederei v Council and Commission* [2002] ECR II-515, paragraph 37 and Case C-122/01 *P. T. Port v Commission* [2003] ECR I-4261, paragraph 30.

[27] Commission Decision 2013/478/EU of 27 September 2013, amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office, OJ 2013 L 257, p. 19.

[28] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the



Council and Council Regulation (Euratom) No 1074/1999, OJ 2013 L 248, p. 1.

[29] See also Article 9 of Regulation 883/2013, which provides the same procedural guarantees for both types of investigations.