

## Draft recommendation of the European Ombudsman in the inquiry into complaint 257/2013/OV against the European Commission

Recommendation

**Case** 257/2013/OV - **Opened on** 05/03/2013 - **Recommendation on** 09/04/2014 - **Decision on** 11/09/2014 - **Institutions concerned** European Commission ( Critical remark ) | European Commission ( No further inquiries justified ) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

### The background to the complaint

1. The complaint, submitted by Corporate Europe Observatory, concerns a refusal by the European Commission to grant public access to documents concerning the 'resignation' of Mr John Dalli from his position as Commissioner on 16 October 2012 [2] [3] [4] .
2. In May 2012, a tobacco producer (Swedish Match) complained to the Commission that a Maltese businessman (Mr X), who claimed to be acting on behalf and for the benefit of then Commissioner Dalli, had requested money from the tobacco company in return for seeking to influence the EU's prohibition on the sale of 'snus' [5] in the framework of the revision of the Tobacco Products Directive. The Commission immediately informed the European Anti-Fraud Office (OLAF), which launched an investigation. OLAF sent its investigation report to the Commission on 15 October 2012. Commission President Barroso met Commissioner Dalli on 16 October 2012. The Commission issued a press release immediately after that meeting announcing that Commissioner Dalli had decided to resign in order to be able to defend his reputation and that of the Commission. The press release stated that the OLAF report did not find any conclusive evidence of the direct participation of Mr Dalli in the events investigated by OLAF, but did consider that he was aware of these events. It added that Mr Dalli categorically rejected OLAF's findings.
3. In the same period, OLAF sent its investigation report to the Attorney General of Malta [6] . The Commission said that it would now be for the Maltese judiciary to decide on the follow-up.
4. On 26 October 2012, the complainant made a request for public access under Regulation 1049/2001 [7] to " *all documents related to Commissioner Dalli's resignation over the issues*



*covered in the OLAF investigation, including all minutes (and other notes) of meetings, all correspondence (including by email), both internal and external, and any other documents held by the Commission on these matters. Please note that this request does not only cover documents directly related to the OLAF report, but also the Commission's discussions more generally on the matter of Mr Dalli, and the contacts between [Mr X] and the tobacco industry, the Commission's contacts with Swedish Match and ESTOC [8] on this issue, etc ".*

**5.** On 22 November 2012, the Commission replied. It identified 11 documents (five documents relating to contacts with Swedish Match and ESTOC and six documents concerning the resignation of Mr Dalli).

**6.** The Commission granted full access to all five documents relating to contacts it had with Swedish Match and ESTOC. These documents were:

- An e-mail exchange of 18-19 June 2012 between ESTOC and the secretariat of the Commission's Impact Assessment Board in which ESTOC requested a meeting;
- An e-mail of 18 September 2012 in which Swedish Match thanked the Commission's Secretariat-General for having agreed to meet it on the same day;
- A Commission one-page note for the file dated 24 September 2012 concerning the above-mentioned meeting with Swedish Match held on 18 September 2012;
- A letter of 12 October 2012 from Swedish Match to the Commission's Secretary-General asking for a meeting regarding the EU ban on snus;
- The Secretary General's reply to Swedish Match of 22 October 2012, suggesting to Swedish Match to make contact with the new Commissioner once appointed.

**7.** The six documents which the Commission identified in relation to the resignation of Commissioner Dalli were:

- The Commission's press release of 16 October 2012 on the resignation of Commissioner Dalli;
- Two letters from Commissioner Dalli to President Barroso, dated 27 July and 21 October 2012 [9] ;
- A letter from President Barroso to Commissioner Dalli of 23 October 2012 stating that the resignation is irrevocable and rejecting the Commissioner's allegations;
- Two (undated) notes for the file concerning meetings between President Barroso and Commissioner Dalli.

**8.** The Commission granted the complainant access to the press release and the President's letter of 23 October 2012 to Commissioner Dalli. It however stated that it could not disclose the



four other documents, since they were covered by the exception of Article 4(2), third indent, of Regulation 1049/2001.

9. On 23 November 2012, the complainant wrote to the Commission to challenge the Commission's initial refusal to grant public access to the four undisclosed documents.

10. On 16 January 2013, the Commission replied, stating that disclosure of the four documents would undermine the purpose of an investigation, namely the investigation of Commissioner Dalli's conduct by the competent Maltese authorities.

11. The Commission added that disclosure of the two requested notes would, at that stage, undermine the purpose of its own follow-up actions. Specifically, it stated that early disclosure of these documents would facilitate and encourage criticism which, either by express design or by inevitable effect, would interfere with the Commission's ability to conduct follow-up actions and ultimately, with the Commission's capacity to adopt final decisions in the general interest of the Union, free from external influences.

12. The Commission also argued that, since the four documents dealt exclusively with the issue of the Commissioner's exchanges with President Barroso regarding the events that led to his resignation, no partial access could be granted.

13. As regards whether there was an overriding public interest in disclosing the documents, the Commission stated that full clarification of the facts and the role played by different actors was precisely the purpose of the ongoing investigation by the Maltese judicial authorities. The Commission argued that the public interest in making the content of these four documents public did not outweigh the need to safeguard the integrity of the ongoing judicial investigation. Thus, **no overriding public interest** in disclosing the four documents had been demonstrated.

## The subject matter of the inquiry

14. On 31 January 2013, the complainant complained to the Ombudsman. The Ombudsman asked the Commission to submit an opinion on the following allegations and claim.

### Allegations:

1) The Commission failed to identify in its files all documents relevant to the complainant's request for public access of 26 October 2012;

2) The Commission wrongly refused access to (i) two letters from Commissioner Dalli to President Barroso of 27 July and 21 October 2012, (ii) two (undated) Commission notes for the file concerning meetings between President Barroso and Commissioner Dalli, and (iii) other documents covered by the complainant's request but not identified by the Commission.



## **Claim:**

The Commission should grant access to the requested documents.

## **The inquiry**

**15.** On 5 March 2013, the Ombudsman sent the complaint to the Commission for an opinion. The Ombudsman also asked to inspect the file. The Commission sent its opinion on 16 July 2013. The Ombudsman sent the Commission's opinion to the complainant which sent its observations on 30 August 2013. As regards the Ombudsman's request to inspect the file, the Commission initially replied that the Ombudsman should carry out the inspection personally, without being accompanied by staff members. However, following further discussions between the Ombudsman and the Commission's services, the Commission agreed that the Ombudsman's staff could inspect the Commission's file on 16 December 2013 [10]. The inspection report was sent to the complainant who sent further observations on 22 January 2014.

## **The Ombudsman's analysis and conclusions**

### **A. Alleged failure of the Commission to identify all the documents relevant to the complainant's request**

#### **Arguments presented to the Ombudsman**

**16.** The complainant alleged that the Commission failed to identify all the documents in its files relevant to the request for public access. In support of this allegation, the complainant argued that the Commission had not included among the documents identified as covered by its request: (i) the letter of Swedish Match to the Commission of 14 May 2012, (ii) the Secretary-General's reply of 30 May 2012 (both letters are mentioned in the Secretary-General's e-mail of 16 October 2012 to Swedish Match which was released to the complainant following the confirmatory application), as well as (iii) Commission documents referring to the contacts between Mr X and the tobacco industry.

**17.** The complainant noted that the letter of Swedish Match to the Commission dated 14 May 2012 is probably the letter whereby Swedish Match lodged its complaint about Commissioner Dalli.

**18.** The complainant also referred to the Commission's statement that it was not in possession of any exchanges between Mr X and the tobacco industry. It argued that this statement constituted a misinterpretation of its request for access. It insisted that its request for access



related to **the Commission's discussions " on the matter of Mr Dalli "** and the contacts between Mr X and the tobacco industry. The complainant thus clarified that its request was not directed at obtaining access to the exchanges between Mr X and the tobacco industry, but to Commission documents referring to these exchanges.

**19.** In its opinion, the Commission stated that it had identified all the documents which fell within the scope of the complainant's request for access. The Commission added that it was not in possession of documents regarding the contacts between Mr X and the tobacco industry. It also stated that the exchange of e-mails of 16 and 17 October 2012 was disclosed in its reply to the complainant's confirmatory application. Therefore, in its view, there were no grounds for the allegation.

**20.** In its observations on the Commission's opinion, the complainant argued again that there had been delays in releasing the documents and that the Commission had not addressed this point. It also reiterated its view that the correspondence between the Commission's Secretary-General and Swedish Match of 14 and 30 May 2012 fell within the scope of its request for documents. The complainant argued that these documents should have been released.

**21.** In its observations on the inspection report, the complainant pointed out that the Ombudsman's inspection had not focused on the e-mail exchange between Swedish Match and the Commission's Secretary-General of 14 and 30 May 2012. The complainant added that a more in-depth search of the Commission's file should have been performed in order to determine whether the documents identified to date in fact constitute all the Commission documents that fall within the scope of the complainant's request.

## **The Ombudsman's assessment**

**22.** The complainant alleges that the Commission failed to identify all the documents in its files relevant to the request for public access. It specifically mentions documents referring to the contacts between Mr X and the tobacco industry. It also refers to the letter of 14 May 2012 from Swedish Match to the Commission and the Secretary-General's reply of 30 May 2012.

**23.** The complainant's allegation raises two separate issues. First, was the Commission correct to exclude from the scope of the request for public access two documents which have been shown to exist, namely, the letter/e-mail of 14 May 2012 from Swedish Match to the Commission and the Secretary-General's reply of 30 May 2012 to Swedish Match? Second, was the Commission correct when it maintained that there existed no other documents which fell within the scope of the request for public access? As regards the second issue, the Ombudsman notes that the Court of Justice of the European Union ('CJEU') has stated that any statement made by the EU institutions relating to the non-existence of a requested document is presumed to be legal. That presumption also applies where the institution declares that it is not in possession of the documents requested. That presumption of legality can, however, be rebutted on the basis of relevant and consistent evidence [11] .



24. As regards whether any relevant and consistent evidence exists for rebutting this legal presumption, the Ombudsman notes that the allegations of Swedish Match were brought directly to the attention of a very high-ranking Commission official in May 2012. Once these allegations were brought to the Commission's attention in writing, through the letter of 14 May 2012, the Commission immediately transferred the case to OLAF. Given the extremely serious and sensitive nature of the allegations, which concerned a Commissioner, and the fact that the OLAF investigation was ongoing at the time, it would not have been in any manner unusual for the Commission and OLAF to maintain strict confidentiality, even within the Commission and OLAF, in respect of the existence of the allegations and of the OLAF investigation. To act otherwise could have compromised the effectiveness of the OLAF investigation which was ongoing. It would thus not have been unusual for the Commission to refrain from producing further internal documentation on the issues under investigation by OLAF until OLAF had completed its inquiry. However, the letter dated 14 May and the Secretary-General's reply of 30 May 2012, clearly exist. The issue, therefore, is whether the Commission was correct to exclude these documents from the scope of the complainant's request.

25. The Ombudsman notes that in its initial request of 26 October 2012, the complainant requested access to "*all documents related to Commissioner Dalli's resignation over the issues covered in the OLAF investigation ...*". The Ombudsman is surprised that the Commission did not identify the two letters of 14 and 30 May 2012 as falling within the scope of the complainant's request. These two letters are mentioned in the e-mail of 16 October 2012 from the Commission's Secretary-General to Swedish Match which sheds light on the subject of those letters. In that e-mail, the Secretary-General wrote: "*On 30 May, I wrote to thank you for your letter of 14 May, received on 21 May, and to inform you that the Commission has referred the case to OLAF ... for investigation.*" On 15 October the Commission received OLAF's final report on the investigation ..." (emphasis added). This e-mail makes it clear that letters sent on 14 and 30 May 2012 deal with the matter investigated by OLAF. They should thus have been understood as falling within the scope of the complainant's request. It would indeed hardly make sense to release the e-mail of 16 October 2012 (and thus to consider that it fell within the complainant's request), but to take the opposite view in respect of the two letters mentioned therein and to consider that they were not covered by that request.

26. The fact that the Commission did not identify the letters of 14 and 30 May 2012 as being covered by the request is all the more surprising given that the Commission released (and thus regarded as covered by the request) several documents (see paragraph 6 above) which, in fact, have nothing to do with the OLAF investigation or with Commissioner Dalli's resignation, but which concern the revision of the Tobacco Products Directive (and more particularly the position of *snus* in that context).

27. It is also important to note that several of these documents (as well as the letter from Commissioner Dalli to President Barroso of 27 July 2012 and the note of their meeting of July 2012 which are examined below), in fact *pre-date* Commissioner Dalli's resignation. The fact that the Commission considered these documents to be covered by the request shows that it did not understand the request as being confined to documents created after the resignation of



Mr Dalli.

28. The Ombudsman therefore concludes that the Commission's failure to consider that the letters of 14 and 30 May 2012 were covered by the complainant's request constitutes an instance of maladministration. The Ombudsman does not consider it to be in the interest of the complainant to make a draft recommendation to the Commission for it to deal with the request for public access to those documents, since the complainant could obtain a quicker response from the Commission by immediately submitting a new request for public access to those documents [12]. When closing this inquiry, the Ombudsman will take a final position on the Commission's failure to consider that the letters of 14 and 30 May 2012 fell within the scope of the complainant's request for public access to documents.

## B. The allegation that the Commission wrongly refused access

### Arguments presented to the Ombudsman

29. The complainant alleged that the Commission wrongly refused access to (i) two letters from Commissioner Dalli to President Barroso of 27 July and 21 October 2012, (ii) two (undated) Commission notes for the file concerning meetings between President Barroso and Commissioner Dalli, and (iii) other documents covered by the complainant's request but not identified by the Commission.

30. The complainant stated that the Commission's arguments, that it was obliged to refuse access to the four documents in order to protect an investigation and its follow-up actions, were not convincing. The complainant noted that the Commission itself had stated that the documents were not part of the OLAF investigation. The Commission also failed to clarify what kind of Commission "*follow-up action*" it was referring to when it refused access. The complainant noted that the Commission's spokesperson had in fact stated, in a press conference of 22 October 2012, that the whole issue of the Commissioner's resignation was "*over*".

31. Furthermore, in the complainant's view, there is a clear overriding public interest in the disclosure of the documents. The complainant stressed that the documents not only contain information on the accusations against the Commissioner, but they also shed light on the Commission's handling of the case. These are two separate grounds for the argument that there is a strong overriding public interest in disclosure. The complainant also pointed out that, with regard to 'third party documents', the Commission had not consulted Mr Dalli about the complainant's request for access. Given that the Commissioner had publicly stated that he would like the OLAF report to be made public, it is likely that he would not have objected to the disclosure of the documents.

32. The complainant also argued that the Commission should have granted at least partial





access.

**33.** The Commission submitted that its refusal to grant access to the two letters sent by Commissioner Dalli to President Barroso and to the two notes had been explained in detail in its reply of 16 January 2013. The Commission maintained its view that the exception stipulated in the third indent of Article 4(2) of Regulation 1049/2001 clearly applied, since an investigation was "*now being pursued by the Maltese authorities*". It stated that the four documents to which access was denied are clearly related to the matters which are part of that investigation.

**34.** The Commission finally put forward a new argument in relation to its answer to the confirmatory application. It stated that Commissioner Dalli's letter to President Barroso of 21 October 2012 and the two notes on the meetings between Mr Dalli and the President relate to an ongoing court case (Case T-562/12).

**35.** The complainant rejected the Commission's statement that its refusal had been explained in detail in its reply of 16 January 2013. The complainant pointed out that the Commission's arguments, in particular that relating to the "*follow-up actions*" which the Commission referred to, were not convincing.

**36.** With regard to the new argument invoked by the Commission in support of its decision not to release a number of documents (namely, the existence of court case T-562/12), the complainant pointed out that this case was announced in the Official Journal on 16 February 2013, long after the Commission replied to the initial and confirmatory requests for access (on 22 November 2012 and 16 January 2013, respectively). Therefore, it argued, this case cannot be used as the basis of an argument against disclosure at the relevant time.

**37.** The complainant argued that the Commission's statement that the OLAF investigation was "*now being pursued by the Maltese authorities*" was very unclear. The complainant pointed out that, in the months following its complaint, there were some significant developments of major relevance. The OLAF report was leaked and is now in the public domain. Moreover, while judicial proceedings were instituted in Malta against Mr X, newspaper reports of June 2013 mentioned that the Maltese authorities had decided not to initiate court proceedings against Mr Dalli.

**38.** The complainant again argued that the Commission had ignored the issue of partial access.

## **The Ombudsman's assessment**

**39.** On 16 December 2013, the Ombudsman's services inspected the documents at issue. A careful examination of these documents showed that they do not contain any significant information that was not already in the public domain on 16 January 2013. In particular, these documents do not contain information which is essentially different from the information that was already made public through, amongst others, (i) the Commission's press release of 16 October 2012, (ii) OLAF's press release of 19 October 2012, (iii) President Barroso's letter of 23 October





2012 to Commissioner Dalli, and (iv) the various public declarations of Mr Dalli following his departure from the Commission, including that made in the press conference he gave on 24 October 2012.

40. Notwithstanding the above, the Ombudsman makes the following observations in relation to the Commission's decision of 16 January 2013 in which it argued that (i) disclosing documents related to the OLAF investigation would interfere with the ongoing investigation by the Maltese authorities and (ii) disclosing the documents would interfere with the Commission's ability to conduct follow-up actions.

41. The Ombudsman points out that, according to the case-law of the CJEU, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical [13] . In this context, it is not sufficient to state that an investigation was ongoing at the relevant time. It is also necessary to determine whether disclosure of the requested documents would, given their specific content, undermine the purpose of that ongoing investigation.

42. The Ombudsman points out that, on 16 January 2013 (the date of the Commission's definitive decision on the request for access), a criminal investigation based on the OLAF investigation report was indeed under way in Malta [14] . At the time, that investigation covered the alleged actions of Mr Dalli. The question is thus whether releasing the four documents concerned at that time could have undermined that investigation.

43. The Ombudsman first notes that the Commission's reasoning against disclosure of the documents is very vague. The Commission merely stated that disclosing the documents would " *interfere* " with the ongoing investigation by the Maltese authorities. It did not state how, precisely, the disclosure of the documents at issue would have undermined the purpose of the Maltese investigation.

44. The Commission did not state, for example, that disclosing the documents would have prevented or impeded the Maltese authorities from gathering additional evidence (by alerting the investigated parties to sensitive details of the matters under investigation) or would have prejudiced a possible future criminal trial. The Ombudsman considers it useful in this context to make reference to the case-law of the European Court of Human Rights. The Court has stated that Article 6 § 2 of the European Convention on Human Rights [15] cannot prevent the authorities from informing the public about criminal investigations in progress. However, Article 6 § 2 of the Convention requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected [16] . Thus, while there certainly exists a possibility that releasing **detailed** information about an ongoing investigation could prejudice that ongoing investigation (in particular if such information would constitute evidence in eventual criminal court proceedings), there is no absolute presumption that releasing general information in relation to an investigation would prejudice the investigation. If this were the case, the Commission would be precluded from making public **any** information concerning the issues under investigation. In the present case, the Commission and OLAF did make public some information of a general nature concerning the OLAF investigation [17] .



45. In line with the above reasoning, the Ombudsman has already found, in the context of her related inquiry into complaint 598/2013/(LP)OV, that the fact that there was an ongoing criminal investigation in Malta from December 2012 to at least June 2013 justified not making **the OLAF investigation report public in January 2013**, since the public disclosure of evidence in that ongoing criminal investigation could have prejudiced the use of that evidence in a future criminal trial [18].

46. The Ombudsman however notes that the Commission had itself indicated, in its reply to the complainant of 22 November 2011, that the two letters from Commissioner Dalli to President Barroso, and the two notes on their meetings were **not part of the OLAF investigation file sent to the Maltese authorities**. There is no indication whatsoever (and the Commission has not stated so) that the Commission sent to the Maltese authorities the two letters from Commissioner Dalli to President Barroso and the two notes concerning their meetings. Nor has the Commission stated that these documents were part of the file and constituted evidence in the investigation by the Maltese authorities. Indeed, if the letters and the minutes had contained any evidence of use to the Maltese authorities in their criminal investigation, it would have been a serious error on the part of the Commission not to send them to the Maltese authorities.

47. Furthermore, the Ombudsman can confirm, on the basis of the inspection of the file, that the documents at issue make only general references to OLAF's investigation and its findings. These references contain no information in addition to that which is already in the public domain. None of the documents contain any of the evidence relied upon by OLAF in its findings.

48. In the context of her inquiry into complaint 598/2013/(LP)OV, the Ombudsman found that, except in obvious cases, OLAF should seek information and views from the national authorities before refusing access to documents because their disclosure would undermine ongoing national proceedings [19]. The same applies in the present case in which **it is far from obvious that releasing the requested documents would have undermined the investigation by the Maltese authorities**. The Ombudsman notes that the Commission has not contacted the Maltese authorities to ask them whether releasing the four documents would undermine their investigation.

49. In light of the above, it is not possible to agree that releasing these documents on 16 January 2013 could have specifically and effectively undermined the purpose of the investigation by the Maltese authorities.

50. As regards the Commission's second argument, that disclosing the documents would undermine the "*follow-up actions*" the Commission itself "*may decide to undertake*", the Ombudsman first notes that this argument is particularly vague. It fails to refer to any further concrete investigation, inspection or audit by the Commission of the actions of Mr Dalli. It fails to refer to any possible disciplinary measure the Commission may consider taking in relation to Mr Dalli. It also, evidently, fails to explain how any follow-up action might be undermined by the disclosure of the documents. Moreover, on the basis of an examination of the four documents, it is difficult to see what possible follow-up action might be undermined by the disclosure of the



documents. In this respect, the Ombudsman again underlines that the documents do not contain any significant information that was not already in the public domain on 16 January 2013. Thus, the Ombudsman considers that the risk of any follow-up action being undermined by the disclosure of the documents appears to be, at the very least, purely hypothetical. That argument thus cannot justify refusing access to the requested documents.

**51.** In light of the above, the Ombudsman considers that the Commission has failed to explain how disclosing the four requested documents in January 2013 would specifically and effectively have undermined the investigation by the Maltese authorities or the Commission's own follow-up actions. The Ombudsman is therefore not convinced that the Commission was entitled to invoke the exception stipulated in the third indent of Article 4(2) of Regulation 1049/2001, in order to refuse access to the four documents. In her view, the Commission's refusal to grant access on that basis therefore constitutes an instance of maladministration. The Ombudsman considers that the Commission should reconsider its refusal. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

**52.** The Ombudsman underlines that the application of the exceptions to public access under Regulation 1049/2001 is time sensitive. The Maltese authorities have now ceased to investigate the actions of Mr Dalli. Moreover, at present, even more detailed information about OLAF's investigation is available, such as the information contained in the publicly available notes of OLAF's Director General for the meeting of the European Parliament's Budgetary Control Committee of 18 June 2013 (in particular in " *The investigation* " section) [20] . Thus, it is even more evident, today, that there is no good reason for the Commission not to release the documents. Indeed, it is the Ombudsman's view that releasing such documents will serve to reassure the public that the Commission dealt very seriously and expeditiously with the matter.

**53.** The Ombudsman finally notes that, in its opinion, the Commission also invoked a new argument, namely that Commissioner Dalli's letter to President Barroso of 21 October 2012 and the two notes on the meetings between Mr Dalli and the President *relate* to an *ongoing court case* (Case T-562/12). If, by that argument, the Commission is maintaining that the documents concerned could not be released for that reason, it would still have to explain, considering the very general nature of the information contained in the documents, the fact that the information does not differ substantially from information already in the public domain, and the fact that the pleas and arguments of Mr Dalli were published in the Official Journal of 16 February 2013 and on the Court's website, how releasing the documents would specifically and effectively undermine those court proceedings (second indent of Article 4(2) of Regulation 1049/2001). The Ombudsman underlines, in this respect, that her services have inspected the documents. On that basis, the Ombudsman is able to confirm that the documents contain no information which, if released, could possibly be understood to undermine the conduct of court proceedings. The Ombudsman underlines in this respect that the mere fact that documents are submitted in the context of court proceedings of an administrative law and civil law nature, does not necessarily imply that they are covered by the exception stipulated in the second indent of Article 4(2) of Regulation 1049/2001. The Ombudsman points out that, in the context of such proceedings, parties regularly submit, by way of background information, many documents that



are rightly in the public domain. Such documents are not rendered confidential once more by the mere fact that they have been included in the various documents submitted to a court.

## B. The draft recommendation

On the basis of her inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

**The Commission should grant access to the two letters from Commissioner Dalli to President Barroso of 27 July and 21 October 2012, and to the two Commission notes for the file concerning meetings between President Barroso and Commissioner Dalli held on 27 July and 16 October 2012.**

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 July 2014.

Emily O'Reilly

Done in Strasbourg on 7 April 2014

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The complainant also submitted complaint 598/2013/(LP)OV which concerned its request for public access to the OLAF investigation report relating to the activities of, amongst others, former Commissioner Dalli. The Ombudsman closed her inquiry into that complaint on 16 December 2013, and addressed two further remarks to OLAF. The decision on that complaint is available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/52918/html.bookmark> [Link]

[3] Former Commissioner Dalli lodged an action for annulment and an action for damages before the General Court on 24 December 2012 (case T-562/12 *Dalli v Commission*). The action for annulment concerns an alleged decision of the President of the Commission of 16 October 2012 requiring Commissioner Dalli to submit his resignation following OLAF's report. The action for damages seeks compensation for the moral and material damage allegedly suffered as a result of that 'decision'. Details of these actions were published in the Official Journal of 16 February 2013.

[4] For easy reference, and without pre-empting the outcome of the above-mentioned court case, the Ombudsman will use the terms 'resignation' and 'resigned' in the present decision



when referring to the departure of Commissioner Dalli from the Commission.

[5] Snus is an oral tobacco product currently only sold legally in Sweden.

[6] On 19 October 2012, OLAF stated that it had referred the case to the competent Maltese judicial authorities " *for their consideration of the criminal aspects of the actions of the persons involved* ".

[7] 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.

[8] The European Smokeless Tobacco Council (ESTOC). ESTOC is an industry representative group of which Swedish Match is a member.

[9] In the Commission's decisions on the initial and confirmatory applications, the Ombudsman's letter opening the inquiry and the Commission's opinion, this letter is referred to as dated 24 October 2012. It emerged from the inspection, however, that the letter in question is dated 21 October 2012.

[10] The Ombudsman's representative inspected the two letters from Commissioner Dalli to President Barroso of 27 July and 21 October 2012 and the two notes for the file concerning meetings between President Barroso and Commissioner Dalli held on 27 July and 16 October 2012, as well as the file on the handling of the request for access at issue in this case (reference number GestDem 2012-5001) and the file concerning separate requests for public access made by the complainant (reference numbers GestDem 2013/243 and 2013/46).

[11] Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 29; Decision of the European Ombudsman in case 1207/2009/GG, paragraph 47; Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1, paragraph 155.

[12] Whereas the Commission must respond to a Draft Recommendation within 3 months, it must respond to any new request for public access to documents within 15 working days.

[13] Case T-471/08 *Toland v Parliament* [2011] ECR II-2717, paragraph 29.

[14] The Ombudsman notes that the speaking notes of OLAF's Director General for the meeting of the European Parliament's Budgetary Control Committee of 18 June 2013, read (see the second paragraph of page 2) as follows: " *Following the transmission of the OLAF investigation report to the Maltese Attorney General, the competent national authorities started their own criminal investigation concerning three persons. A Maltese judge then indicted the person who had allegedly asked for the bribe, who was taken into custody and is now facing a criminal trial, after having been freed on bail. The Maltese authorities were not able to conclude the investigation on Mr Dalli in December, when the other person was indicted. Mr Dalli presented certificates attesting that he was not medically fit and thus could not be summoned.*



*The criminal investigation on him has not been concluded yet. Recent statements made by the newly appointed Maltese Police Commissioner do not change these facts ."* The speaking notes are available at:

[http://ec.europa.eu/anti\\_fraud/documents/speeches/speaking\\_points\\_mr\\_kessler\\_cont\\_18062013\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/speeches/speaking_points_mr_kessler_cont_18062013_en.pdf)  
[Link]

[15] Article 6 § 2 of the Convention states that "*everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*".

[16] See *Karakas and Yesilimak v Turkey* , 43925/98, 28 June 2005, paragraphs 50-54; *Khuzhin and others v Russia* , 13470/02, 23 October 2008, paragraphs 95 and 96.

[17] The Commission's press release of 16 October 2012 relating to the resignation of Commissioner Dalli contains some information concerning the OLAF investigation. It states that "*... The company alleged that a Maltese entrepreneur had used his contacts with Mr Dalli to try to gain financial advantages from the company in return for seeking to influence a possible future legislative proposal on tobacco products, in particular on the EU export ban on snus. As soon as the Commission received the complaint it immediately requested OLAF to investigate.*

*The OLAF final report was sent to the Commission on 15 October. It found that the Maltese entrepreneur had approached the company using his contacts with Mr Dalli and sought to gain financial advantages in exchange for influence over a possible future legislative proposal on snus. No transaction was concluded between the company and the entrepreneur and no payment was made. The OLAF report did not find any conclusive evidence of the direct participation of Mr Dalli but did consider that he was aware of these events*".

[18] See the Ombudsman's decision of 16 December 2013 in case 598/2013/(LP)OV, paragraph 47, available at  
<http://www.ombudsman.europa.eu/cases/decision.faces/en/52918/html.bookmark>

[19] See the Ombudsman's decision of 16 December 2013 in case 598/2013/(LP)OV, paragraph 51 and the further remark.

[20] See:  
[http://ec.europa.eu/anti\\_fraud/documents/speeches/speaking\\_points\\_mr\\_kessler\\_cont\\_18062013\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/speeches/speaking_points_mr_kessler_cont_18062013_en.pdf)  
[Link]

See also:  
[http://ec.europa.eu/geninfo/query/resultaction.jsp?query\\_source=ANTIFRAUD&swlang=en&QueryText=Dalli](http://ec.europa.eu/geninfo/query/resultaction.jsp?query_source=ANTIFRAUD&swlang=en&QueryText=Dalli)  
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