

Decisión en el asunto 2048/2011/OV - Acceso público a los informes de las misiones de la OLAF

Decisión

Caso 2048/2011/OV - Abierto el 04/11/2011 - Decisión de 11/12/2013 - Institución concernida Oficina Europea de Lucha contra el Fraude (No se constató mala administración)
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El reclamante solicitó a la OLAF acceso público a tres informes de misiones conjuntas y sus anexos en relación con la investigación de la OLAF sobre la importación fraudulenta de textiles de Bangladesh a la UE. La OLAF denegó el acceso, argumentando que la publicación de los documentos perjudicaría el propósito de una investigación, afectaría a los intereses comerciales de terceras partes y socavaría la protección de la privacidad y los datos personales de las personas identificadas en los documentos. La OLAF señaló que los procedimientos de recuperación de derechos de aduana todavía estaban en curso en algunos Estados miembros.

El reclamante se dirigió al Defensor del Pueblo, alegando que la OLAF había denegado erróneamente el acceso a los documentos solicitados.

En su dictamen, la OLAF sostuvo su postura. Señaló nuevamente que había todavía unos 50 recursos presentados ante los juzgados nacionales en varios Estados miembros, de los cuales alrededor de 30 se estaban tramitando en el Reino Unido.

El Defensor del Pueblo constató que, dado que los tres informes de misiones conjuntas y sus anexos constituían prueba en los procedimientos nacionales de recuperación vigentes, la publicación de los documentos perjudicaría el propósito de estos procedimientos. De hecho, era razonablemente previsible y no una pura hipótesis que la revelación de los documentos solicitados podría comprometer el uso eficaz de las pruebas pertinentes.

El Defensor del Pueblo cerró la investigación concluyendo que no se había producido mala administración.

The background to the complaint

1. The present complaint concerns a refusal to give public access to OLAF mission reports.



2. On 29 March 2011, the complainant, a lawyer in a Belgian law firm, submitted three separate applications for public access under Regulation 1049/2001 [1] to the following three documents:

1) Bangladesh - European Community - Final report of the joint mission of administrative cooperation in March 2007 (including all the annexes);

2) Bangladesh - European Community - Final report of the joint mission of administrative cooperation in April 2008 (including all the annexes); and

3) Bangladesh Authorities (Export Promotion Bureau (EPB) - European Commission (OLAF) Final report of the joint mission of administrative cooperation in March 2009 (including all the annexes).

3. As the complainant did not receive a reply to his applications within the prescribed time limit, he made a confirmatory application on 3 May 2011.

4. On 20 July 2011, OLAF refused access to the three documents on the grounds that public access would undermine the purpose of an investigation, undermine commercial interests of a third party, undermine OLAF's decision-making processes and undermine the protection of privacy and personal data of persons identified in the documents.

5. By registered letter of 3 August 2011, the complainant made a confirmatory application. In his letter, the complainant stated that, in the meantime, he had obtained access to the 2008 and 2009 mission reports (from the Belgian administration), but that he did not have the 2007 mission report and its annexes, or the annexes to the 2008 and 2009 mission reports. He made various arguments as regards why these should be released.

6. As OLAF did not respond to the complainant's confirmatory application, he submitted a complaint to the Ombudsman.

The subject matter of the inquiry

7. In his complaint to the Ombudsman, the complainant made the following allegation and claim:

Allegation:

OLAF has wrongly refused access to: 1) the "Bangladesh - European Community Final report of the joint mission of administrative cooperation in March 2007" (case OF/2006/0644), including all the annexes; 2) all the annexes to the "Bangladesh - European Community Final report of the joint mission of administrative cooperation in April 2008" (case OF/2007/0821); and 3) all the annexes to the "Bangladesh authorities (EPB) - European Commission (OLAF) Final report of



the joint mission of administrative cooperation in March 2009" (case OF/2007/0822).

Claim:

OLAF should grant access to the requested documents.

The inquiry

8. The complaint was forwarded to OLAF for an opinion. On 10 January 2012, the Ombudsman's services inspected OLAF's files. (The inspection concerned all the documents requested by the complainant, and OLAF's three investigation files OF/2006/0644, OF/2007/0821 and OF/2007/0822.) Three days later, OLAF sent its reply to the confirmatory application. On 6 February 2012, the Ombudsman sent a copy of the inspection report to the complainant and to OLAF. OLAF sent its opinion on 7 February 2012. The Ombudsman forwarded the opinion to the complainant, inviting him to submit observations on the opinion and the inspection report. The complainant however did not send any observations.

The Ombudsman's analysis and conclusions

A. Allegedly wrong refusal by OLAF to grant access to mission reports and the related claim

OLAF's explicit decision on the confirmatory application

9. On 13 January 2012 - that is to say, after the Ombudsman had opened the present inquiry and three days after the Ombudsman's inspection of the files - OLAF sent its reply to the complainant's request for documents.

10. In its reply, by way of preliminary remark, OLAF pointed out that it was legally bound, under the legislation governing OLAF investigations, to treat the information obtained during its investigations as confidential and subject to professional secrecy (it referred specifically to Article 8(2) of Regulation 1073/99 [2]). OLAF pointed out that these rules on confidentiality and professional secrecy seek to protect the purpose of investigations and the legitimate rights of persons concerned.

11. OLAF also stated that, as the purpose of Regulation 1049/2001 is to provide public access to documents, as a consequence, a document disclosed under Regulation 1049/2001 enters into the public domain.

12. With respect to the complainant having obtained access to the 2008 and 2009 joint mission



reports, OLAF clarified that it itself had not disclosed these documents to the public and that, therefore, the 2008 and 2009 mission reports may have been disclosed to private persons in accordance with privileged access rights in the framework of national customs duty recovery procedures. However, OLAF underlined, such privileged access did not constitute public disclosure of documents under Regulation 1049/2001.

13. OLAF then described the content of the documents to which the complainant requested access. It stated that the March 2007 joint mission report contained the results of the verification of the authenticity/validity of Bangladesh Generalised System of Preferences (GSP) certificates of origin (Form A) presented to the Member States in support of import into the EU at a preferential tariff, and the definition of the originating status of these goods under the GSP legislation. The annexes to the three joint mission reports, of 2007, 2008 and 2009, contained the following documents: reports of visits by OLAF investigators to the Bangladeshi authorities as well as to the exporting companies concerned; correspondence between OLAF, other Commission services and the competent Bangladeshi authorities; supporting documents exchanged during or after the missions, such as lists and copies of GSP certificates of origin, lists of companies concerned by invalid or false certificates of origin (Form A); and samples of Single Administrative Document (SAD) declarations.

14. OLAF thus confirmed its initial refusal to grant access. It stated that it still considered that the release of the documents would undermine the purpose of an investigation, undermine commercial interests of third parties and undermine the protection of privacy and personal data of persons identified in the documents. OLAF no longer considered that public access would undermine OLAF's decision-making processes.

15. As regards undermining the purpose of an investigation, OLAF stated that its investigations into cases OF/2006/0644, OF/2007/0821 and OF/2007/0822 had ceased, but that related follow-up proceedings at national level were ongoing and could lead to further recoveries and/or criminal or administrative investigations by the national authorities of the Member States. Therefore, the fact that the documents containing information on OLAF's investigations in these cases were drawn up and/or exchanged during the investigation phase, does not render the exception inapplicable, since it is foreseeable that the final outcome of OLAF's investigations could be seriously undermined. It added that the ongoing related proceedings in the Member States can be extremely lengthy, particularly where they involve criminal or judicial appeals, and it is not exceptional for such cases to last more than 10 years.

16. OLAF stated, specifically, that, following its investigations, it transmitted information to the competent customs authorities of the 18 Member States concerned to enable them to initiate recovery proceedings and/or decide whether additional criminal or administrative proceedings should be conducted. OLAF underlined that not all of the related proceedings had been completed in Belgium, Germany, Spain, the UK, Italy and the Netherlands. The information contained in the requested documents concerns similar textile products and the same exporters and is relevant for the proceedings in various Member States. Therefore, it stated, the disclosure of information relating to imports from those companies, in a given Member State, may have a direct impact on ongoing proceedings in another Member State. Given that a



reasonable period of time for the conclusion of these proceedings has not yet elapsed, the disclosure of this information would prejudice the outcome of these proceedings.

17. OLAF further argued that the disclosure of the requested documents would reveal commercial and financial information of the operators in the various Member States concerned and could compromise the effective use of evidence in legal proceedings and ongoing customs duty recovery procedures in the Member States. Therefore, not only the purpose of the follow-up activities of the Member States but also the purpose of the follow-up activities of the Commission (namely the recovery of the customs duties) would clearly be undermined, to the detriment of the EU budget.

18. In this regard, OLAF referred to the judgment of the General Court in *Franchet and Byk* [3] , in which the Court considered that disclosure of documents which could constitute evidence in national court proceedings could compromise the effective use of this evidence by the national authorities. OLAF also referred to the judgment of the General Court in *Dalmine Spa v Commission* [4] , where the Court ruled that communication of information to undertakings relating to an ongoing investigation might prejudice the effectiveness of the Commission's investigation in that it would enable the undertakings in question to identify what information was already known to the Commission and therefore what information could still be concealed from it. The General Court also recognised that even a party subject to an investigation may be refused certain information if the disclosure of that information prejudices the effectiveness of that investigation. OLAF argued that this reasoning applied *a fortiori* to disclosure of information to the public.

19. OLAF also argued that all the requested documents were part of the information exchanged between the Commission (OLAF) and the competent Bangladeshi authorities in accordance with Articles 19 and 20 of Regulation 515/97 [5] . This Regulation provides the legal basis for mutual assistance and close cooperation between the administrative and customs authorities of the Member States (or third countries) and the Commission. The requested documents contain, more particularly, operational information exchanged in the framework of the investigations by OLAF and the customs authorities of the Member States, as well as consultations on the interpretation of rules of origin for textiles in specific cases. This information is protected by the obligation of professional secrecy set out in Article 45 of Regulation 515/97, which states that any information transmitted pursuant to the Regulation must not be sent to persons other than those in the Member States or within the EU institutions whose functions require them to know or use it.

20. OLAF cited Article 45(3) of Regulation 515/97, which states: " *paragraphs 1 and 2 shall not preclude the use of information obtained under this Regulation in any legal action or proceedings subsequently initiated in respect of failure to comply with customs or agricultural legislation* ". OLAF, however, pointed out that the complainant's application for public access was dealt with under Regulation 1049/2001, and not within the context of legal proceedings. In the present case, the public disclosure of the requested documents would be contrary to the purposes of Regulation 515/97 and to OLAF's future ability to conduct investigations in cooperation with the competent customs authorities of the Member States and of third



countries.

21. OLAF further stated that the annexes to the joint mission reports contained correspondence with the competent Bangladeshi authorities, exchanged in the framework of a specific investigation conducted by OLAF and the customs authorities of the Member States for the purpose of detecting possible fraud and any other illegal activity prejudicial to the EU budget. Putting these documents into the public domain would give the public an insight into the working methods of OLAF and the customs authorities of the Member States in their investigations of customs fraud cases.

22. OLAF stated that, moreover, the future of OLAF's own investigations would be affected by public access to the requested documents. In matters like the present one, there is a necessity to preserve OLAF's ability to conduct investigations in cooperation with its counterparts in the Member States and in third countries, without the need to consider that their correspondence might be disclosed to the public after the adoption of the OLAF final case report. The information exchanged in the present case between the Bangladeshi authorities and OLAF concerns not only the specific investigations, but also, more generally, the investigation strategy, actions taken and operational actions conducted. Putting this kind of information into the public domain would enable importers to find ways to evade duties to be paid to the EU budget and to circumvent rules of the EU customs legislation. Moreover, the third country authorities would refrain from providing complete information to OLAF. As this information is necessary for the cooperation and mutual assistance between the Commission and the national customs authorities in order to fight fraud, it would deprive OLAF of essential information to launch, conduct and successfully finalise current and future anti-fraud investigations. OLAF pointed out that there are, currently, ongoing investigations in respect of further suspected similar irregularities concerning imports of textiles declared as originating in Bangladesh. It stated that disclosure of the documents could prejudice these investigations.

23. OLAF also argued that part of the requested documents included personal data of identified individuals which cannot be disclosed to the public. The documents more particularly included personal data of Commission employees, of officials of authorities of the Member States and Bangladesh, and of employees of private entities. Disclosure of these personal data in the context of the ongoing follow-up proceedings would, in violation of Regulation 45/2001, clearly undermine the privacy and the integrity of the individuals concerned. OLAF stated that it must take all measures necessary to avoid exposing the persons concerned to undue external pressure which would result in a serious undermining of possible future OLAF investigations and OLAF's decision-making process. The public disclosure of the officials' names may facilitate or encourage criticism against them, which, by express design or inevitable effect, would interfere with OLAF's ability to conduct this kind of investigation independently. Furthermore, it would harm the cooperation between OLAF and the competent authorities of Member States. Ultimately, this would interfere with OLAF's capacity to adopt final positions free from external influences in the general interest.

24. OLAF also stated that the requested documents contained the names of the companies which were subject to verification activities in the framework of the Bangladesh-OLAF joint



missions. The information in the documents includes the identities of the companies concerned by invalid or false certificates of origin Form A. Public disclosure of these names would harm the reputation of legal entities. Revealing the names of the legal entities involved in such an investigation would show them in a negative light, give rise to possible misrepresentations of their actions and, consequently, harm their reputation and other legitimate business interests.

25. Furthermore, OLAF stated, some of the annexes to the joint mission reports are copies of the reports drawn up by the officials of the joint missions following visits to the premises of the private entities concerned. Parts of these annexes contain commercially sensitive information on the private entities, the disclosure of which could harm their commercial interests. In particular, the disclosure of these documents would reveal information on the commercial secrets of private companies, such as composition of production, market share, manufacturers of textile products and ongoing legal proceedings related to the private companies. Clearly, disclosure of this information to the public would harm the legitimate business and commercial interests of the undertakings concerned.

26. OLAF also stated that most of the annexes were third-party documents from the Bangladeshi authorities and that, in accordance with Article 4(4) of the Regulation, it would have to consult the Bangladeshi authorities with a view to assessing whether the exceptions apply, unless it was clear that the documents shall or shall not be disclosed. In OLAF's view, it was clear, however, on the basis of the reasons set out above, that the disclosure of the requested documents would undermine the purpose of its investigations, as it would hamper ongoing exchange of information with the relevant authorities of the Member States and Bangladesh under Regulation 515/97. Therefore, consultation of the Bangladesh authorities was not necessary.

27. As regards whether there was an overriding public interest in disclosure, OLAF argued that, given the nature of its anti-fraud investigations, and in particular the confidential nature of evidence collected by it, there must be very clear elements demonstrating the existence of an overriding public interest to justify putting evidence from the investigation file into the public domain. However, on the basis of the above, OLAF considered that there were no elements that would show the existence of an overriding public interest in disclosure of the refused documents that would outweigh the interests in protecting OLAF's capacity to carry out anti-fraud investigations, including the capacity of the national authorities to take decisions or further actions following such investigations.

28. Finally, OLAF stated that it had examined the possibility of granting partial access to the requested documents, but that, as the information they contained fell entirely under at least one of the exceptions invoked, partial access was not possible.

Arguments presented to the Ombudsman in the course of the inquiry

29. In its opinion submitted to the Ombudsman, OLAF stated that the grounds for refusing



access to the requested documents were set out in its reply of 13 January 2012 to the confirmatory application (see paragraphs 9-28 above). OLAF, however, also drew the Ombudsman's attention to the particular aspects of the present case, namely that about 50 sets of appeal proceedings were still ongoing in the national courts of various Member States, of which about 30 were in the UK, and that the requested documents contain personal data of identified individuals and data of companies involved in the verifications by the missions. OLAF also pointed out that the complainant, a Belgian lawyer, had not indicated on behalf of which client he was acting. OLAF stated that a company which is subject to recovery procedures can, exercising its rights of defence, seek access to the relevant documents in the context of these recovery procedures and related court or repayment/remission procedures ("*REM/REC procedures*") [6] .

30. OLAF also apologised for the delay in the handling of the requests for access.

31. On 10 January 2012, during the inspection carried out by the Ombudsman's services, OLAF's representatives pointed out that, during the 2009 mission, OLAF had obtained the four following documents for each of the over 3 000 fraudulent importations: i) form A — a document issued by the Bangladeshi authorities according to which goods are entitled to the preferential tariff; ii) a commercial invoice; iii) a transport document/bill of lading; and iv) the Bangladeshi customs document for export. OLAF stated that documents iii) and iv) had been falsified and then used to obtain the Form A, which had thus been unduly obtained. The OLAF representatives further explained that the OLAF investigation into the fraudulent import of textiles from Bangladesh had started in 2006, that there had already been four OLAF missions to Bangladesh, and that a fifth mission was planned. They also mentioned that the files to which the complainant requested access comprised thousands of pages.

32. During the inspection, OLAF provided for each of the three OLAF investigation files a copy of: 1) the OLAF Final Case Report; 2) the Case closure note; and 3) the OLAF Follow-up Recommendation, as well as a copy of a follow-up letter that OLAF had sent to all the Member States and to the Bangladeshi authorities on, respectively, 14 and 17 September 2010. In reply to the question what the current position was with regard to the follow-up actions in the Member States, the OLAF representatives provided a printout of the "OWNRES" database which indicated the status (open/closed) of the administrative or judicial procedures in various Member States.

33. The complainant did not submit observations on the Commission's opinion or on the inspection report. In a telephone conversation with the Ombudsman's Office on 11 September 2012, the complainant indicated that he had nothing to add and that he maintained his complaint.

The Ombudsman's assessment

34. The Ombudsman first notes that the documents requested by the complainant, in particular the annexes to the final reports of the joint missions, are very voluminous and comprise, in total,



several thousands of pages. They are:

I. Final report of the joint mission of administrative cooperation (OF/2006/0644) of 29 March 2007, including the following 9 annexes (containing a total of 643 pages) :

- 1) An OLAF report of a visit (29 March 2007) to the Bangladesh National Board of Revenue (NBR) and documents received from the NBR;
- 2) An OLAF report of a visit (29 March 2007) to a Bangladeshi exporters association and documents received from the association;
- 3) A statement by the EPB and a list of false certificates for Denmark and the UK identified during the mission;
- 4) An OLAF report of a visit (24 March 2007) to an exporter, and supporting documents;
- 5) List of invalid GSP Forms A (identified during the mission) concerning two exporters;
- 6) List of certificates still to be verified by the EPB;
- 7) Supporting documents relating to an exporter;
- 8) Supporting documents relating to an exporter; and
- 9) A CD-ROM provided by the EPB with a master list of forms A issued by the EPB in Bangladesh for exports between January 2004 and February 2007 containing the names of exporter and importer companies.

II. 7 annexes to the Final report of the joint mission of administrative cooperation (OF/2007/0821) of 24 April 2008:

- 1) Lists of false certificates;
- 2) List of altered certificates;
- 3) Witness statement by the Director of an exporting company; official and false EPB letters to the UK Customs;
- 4) False EPB letters to the customs authorities in various Member States;
- 5) + 6) a CD-ROM with export files from the Bangladesh NBR and data from the EPB data base; and
- 7) List of certificates still to be verified by the EPB.



III. 11 annexes to the Final report of the joint mission of administrative cooperation (OF/2007/0822) of 25 March 2009:

- 1) Statement by the EPB and list of false GSP certificates;
- 2) Statement by the EPB in relation to invalid certificates issued by the EPB on the basis of false information provided by exporters, and list of the certificates;
- 3) List of companies concerned by invalid certificates;
- 4) Letters from the EPB to the NBR of March 2009;
- 5) Letter from the NBR to the EPB, and a CD-ROM containing export records of two companies;
- 6) Statement by the Director of an exporting company, and letter from a Bangladeshi exporters association to the EPB (with a translation into English);
- 7) Statement by an EPB Director concerning a company (with a translation into English);
- 8) Samples of Single Administrative Documents (SADs) from a customs office;
- 9) Lists of GSP certificates of eight companies provided by OLAF to the EPB;
- 10) Annex 10 consisted of four boxes of documents concerning 3 311 fraudulent imports of textiles from Bangladesh into the EU by eight companies. For each single fraudulent import, the box contained the 4 forms described above (namely i) form A; ii) a commercial invoice; iii) a transport document/bill of lading; and iv) the Bangladesh customs document for export); and
- 11) Documentation provided by the EPB to OLAF (lists of EPB copies of GSP certificates and lists of certificates with discrepancies).

35. The Ombudsman notes that, in its opinion, OLAF stated that the complainant had not indicated on behalf of which client he was acting. It added that a company which is subject to recovery procedures can, exercising its rights of defence, seek access to the relevant documents in the context of these recovery procedures and related court or repayment/remission procedures. The Ombudsman considers that this argument is not relevant, in the context of the present case. She notes that the fact the complainant obtained, from the Belgian authorities, copies of two of the documents he had originally requested from the Commission (see paragraph 5 above), or the fact that the complainant, or any other party, might obtain similar access to other requested documents from a national authority, has no bearing on the question of whether OLAF should grant public access to the same documents under Regulation 1049/2001. The rights of access to files held by national authorities are subject to criteria and conditions which are specific to the procedures in which those files are used by the national authorities. The fact that a party may obtain individual access to such files from a national authority does not imply that an EU institution should or should not, pursuant to



Regulation 1049/2001, grant public access to the same files.

36. The Ombudsman also notes that the question of whether the exceptions referred to by OLAF could validly be invoked needs to be assessed in relation to the situation at the time OLAF adopted the decision on the confirmatory application [7], which was 13 January 2012. Any later developments are irrelevant in this respect. The Ombudsman notes that OLAF investigations OF/2006/0644, OF/2007/0821 and OF/2008/0822 [8] were closed on 14 December 2009. The final case reports concluded that no further operational activities by OLAF were necessary and that the cases could be closed, with financial follow-up. The case closure notes were therefore accompanied by (financial) Follow-up Recommendations, which set out that OLAF should monitor the recovery by 18 Member States of the established amounts in (evaded) customs duties (amounting to a total customs debt of more than EUR 30 million). It also appeared from the inspection that OLAF transmitted all the information concerning its findings relating to the fraud, including the mission reports, to the Member States. In particular, on 28 July 2009, OLAF informed all the Member States about the mission findings and requested them to recover the customs duties. On 14 September 2010, OLAF again wrote to all the Member States sending its last mission report for information and follow-up. OLAF pointed out that even the Member States that had not yet received imports of textiles from Bangladesh were also potentially concerned by the imports since the actual imports of the goods might have taken place in another Member State.

37. As regards ongoing procedures in the Member States, information extracted from OLAF's internal database (OWNRES) showed the amounts of customs duties established, recovered and subject to administrative and/or judicial appeals in the Member States. A printout from the database (dated 23 November 2011) showed that many recovery proceedings in the Member States were still ongoing (over 100) at the time OLAF replied to the confirmatory application. In its reply, OLAF explicitly referred to ongoing proceedings in Belgium, Germany, Spain, the UK, Italy and the Netherlands. Later, in its opinion, OLAF again confirmed that approximately 50 sets of appeal proceedings were ongoing in the national courts of several Member States, of which about 30 were in the UK.

Preliminary remark concerning categories of documents of the same nature

38. The Ombudsman notes from the list of documents set out above that the complainant's request in fact covers 28 sets of documents, some of which are extremely voluminous and therefore stored on CD-ROM. It is worth noting that annex 10 to the March 2009 joint mission report alone comprises 4 large boxes of documents.

39. According to the EU case-law, certain conditions need to be fulfilled in order for an institution to invoke the exceptions set out in Article 4 of Regulation 1049/2001. First, the examination required for the purposes of processing a request for access to documents must be specific in nature. The mere fact that a document *concerns* an interest protected by an exception is not sufficient to justify application of that exception since limiting or excluding public access to a document may be justified only if the institution has previously assessed whether access to the document would *specifically and effectively undermine* the protected interest. The



risk of a protected interest being undermined must *be reasonably foreseeable and not purely hypothetical*. Furthermore, the institution needs to carry out its relevant analysis (i) "on a document-by-document basis" and (ii) "in an individual and specific way" [9] .

40. However, the Ombudsman recalls, an individual and specific examination of each document may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused, or, on the contrary, granted. In *Sweden and Turco v Council* and later in *Commission v Technische Glaswerke Ilmenau* , the Court of Justice held that, in assessing whether releasing a document would undermine a protected interest, it is in principle open to the institution to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature [10] .

41. In the present case, it is clear that, when invoking the various exceptions of Article 4 of Regulation 1049/2001, OLAF proceeded, not to a document-by-document examination, but to an overall examination of all the documents.

42. The inspection of the documents has shown that all the documents to which access was requested can indeed be considered to form part of a *category of documents of the same nature* , namely, OLAF (joint) mission reports containing the results of an OLAF investigation into the fraudulent importation of textiles from Bangladesh into the EU, and the supporting documents/proof for (annexes to) these mission reports. The Ombudsman does nevertheless note that, as regards the content of the various documents, OLAF, in its reply to the confirmatory application, did not merely refer to the "annexes" to which the complainant had requested access. On the contrary, OLAF provided a more detailed description of those documents on page 3 of its reply to the confirmatory application, where, before examining the various exceptions, it described the content of i) the March 2007 joint mission report, and of ii) the various annexes to the three joint mission reports (see paragraph 13 above).

43. OLAF relied on three exceptions in order to refuse access to the documents. The Ombudsman will first analyse whether OLAF could invoke the exception set out in Article 4(2), third indent, of the Regulation.

The purpose of inspections, investigations and audits (Article 4(2), third indent, of Regulation 1049/2001):

44. The Ombudsman notes that, in its reply to the confirmatory application, OLAF stated that Regulation 1073/99 requires it to treat the information it obtains during investigations as confidential and subject to professional secrecy and that the rules on confidentiality and professional secrecy are intended to protect the purpose of investigations and the legitimate rights of persons concerned. OLAF also referred to Article 45 of Regulation 515/97.

45. Article 8(1) of Regulation 1073/99 states that "[i] nformation obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions ". Among these relevant provisions is Regulation 515/97/EC, which provides the legal basis for mutual



assistance and close cooperation between the administrative and customs authorities of the Member States (or third countries) and the Commission (and thereby OLAF). OLAF explained that the documents requested by the complainant contain operational information exchanged between OLAF and the customs authorities of Bangladesh and the Member States and that, on the basis of Article 45 of Regulation 515/97/EC, this information was protected by an obligation of professional secrecy. Article 45(1) to (3) of Regulation 515/97/EC state:

" 1. [...] any information transmitted pursuant to this Regulation shall be of a confidential nature , *including the data stored in the CIS* [Customs Information System]. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member States receiving it and the corresponding provisions applicable to Community authorities .

In particular, the information referred to in the first subparagraph may not be sent to persons other than those in the Member States or within the Community institutions whose functions require them to know or use it . *Nor may it be used for purposes other than those provided for in this Regulation, unless the Member State, or the Commission, which supplied it or entered it in the CIS has expressly agreed, subject to the conditions laid down by that Member State or by the Commission and insofar as such communication or use is not prohibited by the provisions in force in the Member State in which the recipient authority is based.*

2. [...] information concerning natural and legal persons shall be transmitted under this Regulation only where strictly necessary to prevent, investigate or take proceedings in respect of operations in breach of customs or agricultural legislation .

3. Paragraphs 1 and 2 shall not preclude the use of information obtained under this Regulation in any legal action or proceedings subsequently initiated in respect of failure to comply with customs or agricultural legislation " (emphasis added).

46. The Ombudsman notes that, until now, the Court of Justice has expressly acknowledged the possibility of relying on general presumptions applying to certain categories of documents in three specific circumstances, namely, procedures for reviewing State aid [11] , merger control procedures [12] and proceedings pending before the European Union Courts [13] . The Court, in *LPN v Commission* [14] , acknowledged that such general presumptions should also apply to the pre-litigation phase of infringement procedures under Article 258 TFEU. However, the Court has not yet had an opportunity to take a position on whether the possibility of relying on such general presumptions should also apply to an investigation conducted by OLAF and to subsequent national proceedings based on OLAF's findings, including proceedings initiated by the customs authorities of the Member States following reception of information from OLAF.

47. While it is for the European Court of Justice to rule on whether the *Commission v Technische Glaswerke Ilmenau* case-law can be extended to cover the documents in an OLAF investigation file, the Ombudsman is of the view that Regulation 1073/99 and Regulation 515/97 do give grounds for a general presumption that disclosure of documents in the file of an ongoing OLAF investigation, in principle, would undermine the purpose of that ongoing investigation.



Indeed, similar to the rules limiting access to the files in State aid or merger control procedures, the Articles cited above contain strict rules limiting access to the information obtained by OLAF and transmitted to the Member States in the framework of an external investigation.

48. The general presumption set out above applies while OLAF is investigating a matter.

49. In the present case, it is clear that OLAF's investigation was closed on 14 December 2009. Therefore, no general presumption can exist that disclosure of the requested case-specific documents would undermine the purpose of OLAF's closed investigation - or of future OLAF investigations.

50. However, when it closed its investigation, OLAF transmitted all its findings and the evidence supporting them - including the three joint mission reports and annexes to which the complainant requested access - to the customs authorities of the Member States. On the basis of the information transmitted by OLAF to the Member States, the customs authorities of the Member States started proceedings for the recovery of customs duties. As OLAF indicated in its reply of 13 January 2012 to the confirmatory application and in its opinion of 7 February 2012, several sets of recovery proceedings at national level were *ongoing* at that time. Moreover, related appeal proceedings were also before the national courts.

51. As already stated above, all the documents to which the complainant requested access constitute a category of documents of the same nature, namely (joint) mission reports containing the results of an OLAF investigation into the fraudulent importation of textiles from Bangladesh into the EU, including the supporting documents (annexes). Those documents clearly fall within the activity of "investigation", within the meaning of Article 4(2), third indent, of Regulation 1049/2001. Moreover, seen from the perspective of the national recovery proceedings, all those documents constitute evidence in those proceedings. In this respect, the Ombudsman points out that Article 9(2) of Regulation 1073/99 explicitly provides that reports drawn up by OLAF following an investigation (namely, specifying the facts established, the financial loss, if any, and the findings of the investigation) " shall constitute admissible evidence in administrative or judicial proceedings of the Member State *in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors* ". On the basis of the above, the Ombudsman concludes that, in the present case, given that several sets of national recovery proceedings were still ongoing, OLAF could rely on the presumption that disclosure of the documents in the OLAF's joint mission reports would undermine the purpose of these ongoing national recovery proceedings. In this context, OLAF correctly pointed out that disclosure of the documents could compromise the effective use of the evidence in the ongoing customs duty recovery proceedings. In *Franchet and Byk* , to which OLAF also referred, the General Court held that granting access, even partial, to documents sent to national authorities which showed, in OLAF's view, different irregularities could compromise the effective use of this material by the national authorities, given that the persons implicated in the suspected irregularities could act in such a way as to prevent the efficient conduct of the various procedures or investigations [15] . In the present case, which, at the national level, concerns the recovery of customs duties, it is reasonably foreseeable and not purely hypothetical that the disclosure of information contained



in the OLAF joint mission reports and annexes could compromise the effective use of that evidence.

52. The Ombudsman notes that OLAF requested the national authorities, in the framework of its financial monitoring, to keep it informed about the outcome of the recovery proceedings. This is clearly shown by OLAF's OWNRES database, which contained an overview of the ongoing or closed proceedings in the 18 Member States. It is also on the basis of the information obtained from the national authorities that OLAF was able, in its reply to the confirmatory application, to state that several sets of recovery proceedings in specific Member States were still ongoing.

53. According to the case-law, the above general presumption is rebuttable. It is thus up to the complainant to demonstrate that a given document to which he requested access is not covered by that presumption or that there is an overriding public interest justifying the disclosure of the document [16]. It is obviously difficult for a person making a request for access to rebut such a general presumption with regard to a given document if that person is not given access to that document. However, the Ombudsman has the possibility of doing so *ex officio*. In the present case, the Ombudsman inspected all the documents to which the complainant requested access and came to the conclusion that there is no document whose release would not undermine the national recovery proceedings, since it is reasonably foreseeable, and not purely hypothetical, that every single document constitutes relevant evidence in the recovery proceedings. It should be borne in mind in this respect that OLAF sent the entire joint mission reports (namely, with all the annexes containing the supporting evidence) to the national customs authorities so that the latter could initiate recovery proceedings.

54. The Ombudsman further considers that, since all the documents fall entirely under the exception set out in Article 4(2), third indent, of Regulation 1049/2001, OLAF correctly concluded that *no partial access* could be granted.

55. OLAF also correctly concluded that there was *no overriding public interest* in disclosure. The Ombudsman notes, in this respect, that the complainant himself did not refer to an overriding public interest. OLAF, *ex officio*, analysed whether there was such an overriding public interest and correctly concluded that there were no elements that would show the existence of an overriding public interest in disclosure of the refused documents. Having inspected the documents, the Ombudsman is convinced that no public interest would be served by the disclosure of the documents.

56. For the sake of completeness, the Ombudsman notes from the inspection that most of the annexes to the joint mission reports were *third-party documents* originating from the Bangladeshi authorities, for which Article 4(4) of Regulation 1049/2001 provides that the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the documents shall not be disclosed. In the present case, on the basis of the findings above, the Ombudsman considers that OLAF correctly took the view that it was clear that disclosure of the requested documents would undermine the purpose of the investigation by the national customs authorities, and that therefore no consultation of the Bangladeshi authorities was necessary.



57. Considering the Ombudsman's finding that OLAF correctly concluded that all the documents to which access was requested were covered by the exception set out in Article 4(2), third indent, of the Regulation, there is no need for the Ombudsman to analyse the two further exceptions invoked by OLAF.

58. The Ombudsman concludes that the present decision concerns the legal situation - including the national recovery proceedings which were ongoing - at the time of OLAF's reply to the confirmatory application (that is to say, 13 January 2012). It is not excluded that all those recovery proceedings have in the meantime been concluded. The Ombudsman therefore points out that nothing prevents the complainant from making a new request for access to OLAF, which would then have to take into consideration the latest legal developments in the case, more particularly whether proceedings at the national level are still ongoing.

B. Conclusion

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

There was no maladministration by OLAF.

The complainant and OLAF will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 11 December 2013

[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 L 145, p. 43.

[2] 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. On 1 October 2013, this Regulation was repealed by 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.

[3] Joined Cases T-391/03 and T-70/04 *Franchet and Byk*, [2006] ECR II-2023, paragraphs 121-123.



[4] Case T-50/00 *Dalmine Spa v Commission* , [2004] ECR II-2395, paragraph 83.

[5] Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ 1997 L 82, p. 1, amended by Council Regulation (EC) No 807/2003 of 14 April 2003 (OJ 2003 L 122, p. 36) and by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008 (OJ 2008 L 218, p. 48).

[6] Under the Community Customs (Articles 235 and following), importers from which customs duties are recovered can, in certain circumstances, apply for repayment or remission (namely a waiver of the recovery). This is known as " *REM/REC procedures* " (Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ 1992 L 302, p 1). The consolidated version is available at :

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992R2913:20070101:EN:PDF>
[Enlace].

[7] The General Court has held that " *in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for the final decision* " , see Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [ECR] 2006 II-2023, paragraph 46.

[8] There was in fact one overall OLAF investigation into the fraudulent importation of textiles from Bangladesh, which was divided into three phases: phase 1 focused on false and invalid certificates of origin Form A submitted for importation into the UK and Denmark; phase 2 focused on false certificates of origin Form A (which were never issued by the EPB); and phase 3 focused on genuine, but incorrect, certificates of origin Form A issued on the basis of false and misleading information.

[9] Case T-403/05 *MyTravel Group plc v Commission* [2008] ECR II-2027, paragraph 98.

[10] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 50; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885, paragraph 54.

[11] See *Commission v Technische Glaswerke Ilmenau* , cited above.

[12] See Case C-404/10 P *Commission v Éditions Odile Jacob* , judgment of 28 June 2012, not yet published in the ECR, paragraph 116; Case C-477/10 P *Commission v Agrofert Holding*, judgment of 28 June 2012, not yet published in the ECR.



[13] See Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533.

[14] Joined cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, judgment of 14 November 2013, not yet published in the ECR.

[15] Joined Cases T-391/03 and T-70/04 *Franchet and Byk*, cited above, paragraphs 121-122.

[16] See *Commission v Technische Glaswerke Ilmenau* cited above, paragraph 62; Case C-477/10 P *Commission v Agrofert Holding*, cited above, paragraph 68.