

Dr Werner Hoyer

President

Ms Emily O'Reilly  
The European Ombudsman  
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F - 67001 Strasbourg  
FRANCE

Luxembourg, 18 February 2019

IG/CM/RR/SD/nh

Complaints Reference: 805/2018/THH

Dear Ms O'Reilly,

I refer to your letter of 13 December 2018 communicating your proposal for a solution in a case concerning the European Investment Bank's refusal to grant public access to documents regarding a loan to Volkswagen.

On the basis of your assessment, you propose that the EIB should grant public access to the report and recommendation of the European Anti-Fraud Office concerning the EIB loan to Volkswagen ("OLAF report"), with appropriate redactions only for personal data.

I would like to inform you that the EIB published a summary of the OLAF report in line with article 5.5 of the EIB Group's Transparency Policy (<http://www.eib.org/attachments/press/summary-olaf-report-antrieb-rdi-volkswagen-ag.pdf>). I trust that the summary provides the complainant and the public with an informative and meaningful account of the OLAF investigation into this matter.

With regard to your proposal for solution, the Bank is in principle willing to grant public access to a redacted version of the OLAF report. The Bank's decision is taken considering the extraordinary level of public interest in this unique case and provided that a fair balance is made between the public interest in disclosure and other public interests, which should be protected by redacting the OLAF report beyond personal data.



Given that the author of the document is OLAF, the Bank requested an official opinion from OLAF on the disclosure of the report. In its formal opinion, however, OLAF expressed strong opposition to the (even partial) disclosure of the report. Notwithstanding the Bank's willingness to grant public access to a redacted version of the OLAF report, the formal opinion of OLAF cannot be neglected and the EIB needs OLAF's cooperation in order to properly identify the information whose disclosure would undermine OLAF's investigative function.

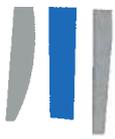
I trust that your involvement in the process would be beneficial in order to enable the EIB to proceed with the disclosure of a redacted version of the OLAF report.

It is for this reason that I invite a delegation from the EO and a delegation from OLAF to a formal inter-institutional meeting to take place in Brussels on 6 March 2019 with a view to achieving a mutually agreed solution on the redactions which are necessary in order to protect the investigative functions and thus facilitating the disclosure of a redacted version of the OLAF Report in a more consensual environment. I asked the EIB competent services to liaise with your office and OLAF for the organisation of this operational meeting.

Please find attached the EIB's position concerning the case at stake, including the rationale behind the need for redactions beyond personal data (Annex I). I remain at your disposal for any further information.

Yours sincerely,

*Enclosure: 1*



## **Annex I – EIB’s position with regard to EO’s assessment and proposal for solution in case 805/2018/THH**

Following the conclusion of the agreement with VW (<http://www.eib.org/en/infocentre/press/news/all/agreement-reached-between-the-european-investment-bank-and-volkswagen-ag-in-relation-to-eib-loan-antrieb-rdi.htm>), the EIB has provided public access to a summary of the OLAF report and recommendation (“OLAF report”) in accordance with the EIB Group Transparency Policy (TP), and consulted OLAF with a view to receiving a formal opinion on the disclosure of a redacted version of the OLAF report.

### *1. Consultation with OLAF*

The report at stake has been drafted and signed by OLAF and represents the final outcome of its investigative work on the VW case. The EIB thus consulted OLAF on the possibility of the disclosure of a redacted version of the OLAF report.

According to OLAF, the report should not be disclosed based on the general presumption of non-disclosure applicable to OLAF reports even for closed cases. OLAF substantiated its opinion on the basis of case law of the ECJ.

In addition, because of the amount of information that was released from other sources, OLAF considers that it is very difficult to protect the personal data of the persons involved in the OLAF investigation as required by applicable EU law if the report would be disclosed. OLAF also indicates that due to the preliminary nature of its findings, the presumption of innocence has also to be taken into account, in particular when the identity of persons can be derived from the context of information.

Furthermore, in OLAF’s view, setting out purely general considerations cannot provide an appropriate basis for establishing that an overriding public interest, as construed by case law, prevails over the reasons justifying the refusal to disclose the documents at stake.

### *2. EIB’s assessment of the case*

The EIB cannot share the EO’s considerations on the impact/mitigation of the disclosure of the OLAF Report while court proceedings and the follow-up of OLAF investigation were ongoing. Indeed, the protection of court proceedings is an autonomous exception prescribed by the EIB Group TP and is not ensured by redaction of personal data only.

Because of the above, the EIB trusts that, at the time of the Bank’s refusal and until (i) court proceedings stimulated by the OLAF investigation and (ii) the follow-up of the OLAF investigation were ongoing (i.e. for long part of the EO’s inquiry), the Bank has legitimately refused access to the requested document and as such did not commit an instance of maladministration.



With regard to the EO's proposal for solution, the EIB agrees with the Ombudsman that for this unique case there is indeed a strong public interest in the disclosure of information concerning the Dieselpgate, although for different reasons than those expressed in the EO's letter.

For instance, while the EO's proposal for solution seems to indicate that the report contains information on public health or environment, the OLAF report is focused on misrepresentations (which qualify as a prohibited conduct under the Bank's Anti-Fraud Policy) made by VW to EIB in order to obtain and maintain the EIB loan. It should also be noted that, although the OLAF report establishes a link between the EIB loan and the development of the engine in such a way to cheat emissions testing, it does not contain evidence of any direct link between the EIB funding to VW and the development of the defeat device itself.

The EIB is of the view that, given the heavy mediatisation of the Dieselpgate, the importance of the sector concerned, the scale of the case as well as its impact on public's trust in business ethics, the EIB would agree that for this unique case there is indeed a strong public interest in disclosure.

As a result of its assessment of the document at stake, the EO's proposal for solution and the OLAF's formal opinion, the EIB is concerned that the disclosure of all the information but personal data contained in the OLAF report would not:

- (i) Sufficiently protect public interests whose protection shall be ensured even in the presence of an overriding public interest (art. 5.4 of the TP); and
- (ii) Be proportionate with regard to the public interest to protect investigations.

### 3. *Public interests deserving protection in case of disclosure of the OLAF report*

- a) Protection of the public interest, as regards the financial and economic policy of the EU and its institutions and bodies

A *sui generis* instrument of economic planning within the Union, the EIB is the financial arm of the EU implementing a broad range of internal and external policies in the interest of the Union.

As acknowledged by the EU judicature, the EIB is not only an EU body; it is also a Bank, operating through the exchange of information with its clients as part of a Banking relationship based on trust and confidence. Information which may be identified as falling under the exception of commercial interest for other EU institutions and bodies take a very different profile in the EIB because of its mandate and *modus operandi*.



Disclosing information on the interest rate of the loan or the liquidity situation of VW throughout the project cycle would concretely and seriously affect respectively the EIB's margins of negotiation on its loan conditions in the future as well as the clients' trust and confidence, a fundamental condition for the Bank to properly operate on the markets and attract future clients. These concrete risks cannot be neglected in order to preserve the role of the EIB as the financial arm of the EU.

b) Protection of privacy and the integrity of the individual

Under EU law (including Regulation 833/2013 concerning OLAF investigations), the Bank is required to protect the legitimate interests of persons concerned and witnesses.

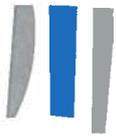
The EO acknowledged the need to protect the interests of the persons concerned and recommended that personal data be redacted. However, the mere removal of the names of persons concerned from the document would not prevent possible identification of these individuals. The identity of persons can be derived from other information contained in the report.

Given the amount of information already publicly available, it appears difficult to protect the interests of the individuals involved without redacting the passages of the OLAF report, which would allow, directly or indirectly, the identification of the individuals concerned by and involved in the OLAF investigation.

c) Protection of the investigative functions

Disclosure of investigative reports risks revealing aspects of the methodology and modus operandi of investigations, thus ultimately weakening their impacts. Furthermore, disclosure of information on investigative methodology poses the risk of discouraging individuals (potential complainants or witnesses), as well as national authorities, from cooperating and providing information concerning possible cases of prohibited conduct thereby depriving OLAF and the EIB of information that is of use for the purpose of undertaking investigations.

It should be noted that under Regulation 833/2013 concerning OLAF investigations, the Bank (as a body concerned by the OLAF investigation) is required to ensure the confidentiality of the investigation conducted by OLAF. In addition, the EIB TP establishes an exception to disclosure when the latter would undermine the protection of the purpose of investigations. This exception applies also after the investigation has been closed or the follow-up action has been taken. In the concrete case therefore, in accordance with the TP, the exception to the presumption of transparency would extend beyond any action taken by the Bank concerning the follow-up of the VW case. The above provision of the TP is followed by a dedicated paragraph concerning the Bank's possibility to publish a summary of investigations that have been closed.



In the present case, it is necessary to balance the public interest in disclosure of information concerning the misuse of public funds and misrepresentations leading to such misuse on the one hand with, on the other hand, the equally legitimate public interest to protect the investigations. The latter aims at ensuring that investigative activities unveiling and sanctioning prohibited conducts across and beyond the EU are not spoiled of their capacity to protect the EU and its citizens from irregular uses of EU funds.

#### 4. Way forward

Based on the above and after thorough assessment of the OLAF report, the EO's proposal for solution and OLAF's formal opinion, the EIB decided to:

- Publish a summary of the OLAF report and recommendation, including information relevant to the public interest and excerpts of the report. Whereas the reading of OLAF report (redacted as indicated above) would be difficult, if not meaningless, for the public, an informative summary is more adequate to convey the facts and findings relevant to the public interest and is fully in line with the Bank's TP.
- The Bank is in principle willing to grant public access, on an exceptional basis, to a redacted version of the OLAF report. However, the strenuous opposition of OLAF to the disclosure of the report cannot be neglected. In this context, the EIB is not in a position to ensure that the necessary redactions for the protection of OLAF's investigative functions are made without the cooperation of OLAF, which carried out the investigation at stake.

Based on the above, the Bank invites the European Ombudsman and OLAF to a formal inter-institutional meeting in early March 2019 with a view to achieving a mutually agreed solution on which redactions are necessary for the protection of OLAF's investigative functions.