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President

Ms Emily O'Reilly
The European Ombudsman
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EIB- Corporate Use

Complaints Reference: 805/2018/THH

Dear Ms O'Reilly,

I refer to your letter of 29 March 2019 communicating your Recommendation in a case concerning the European Investment Bank's refusal to grant public access to documents regarding a loan to Volkswagen.

In essence, you recommend that the EIB should grant public access to the report and recommendation of the European Anti-Fraud Office (OLAF) concerning the EIB loan to Volkswagen as well as to the EIB's internal notes of 5 October 2017 and 9 October 2017. In your Recommendation, you consider that personal data, that is any text in these documents, which could lead to individuals being identified, should be redacted.

In my letter dated 18 February 2019, I informed you of the EIB's willingness, in principle, to disclose a redacted version of the OLAF Report, if 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. I also informed you that the EIB published a summary of the OLAF report in line with the EIB Group Transparency Policy, which provides the public with an informative and meaningful account of the OLAF investigation into this matter.



With the objective to establish a fruitful cooperation among EU institutions and bodies, I had invited OLAF and the EO to an inter-institutional meeting in order to find a viable solution enabling public disclosure of the OLAF Report and Recommendation while securing the protection of legitimate interests which were not protected by the approach recommended by your proposal for solution.

I note with regret that you have declined my invitation for an inter-institutional meeting and that you reiterated the same recommendation made in your proposal for solution. In accordance with the EO's Statute, please find attached the EIB's detailed opinion explaining the reasons why the EIB is not in a position to accept the EO's recommendations. I trust that the enclosed document sufficiently illustrates the EIB's position on the matter and I remain at your disposal for any further information.

Yours sincerely,

Enclosures: 1

Cc: DG OLAF



Annex 1 – EIB's detailed opinion on the EO's Recommendation

1. Background information

In its reply to the EO's proposal for solution, the EIB informed the EO of the publication of a meaningful summary of the OLAF Report and Recommendation on the Bank's website. The EO was also informed that, although the Bank was in principle willing to disclose a redacted version of the OLAF Report, OLAF's objections needed to be reconciled before proceeding to do so. Therefore, the EIB invited the Ombudsman and OLAF to an inter-institutional meeting to further discuss the redactions which were necessary to protect: (i) the investigation and the interests of the persons involved; and (ii) the financial and economic policy of the EU and the Bank.

The European Ombudsman did not reply to the EIB's invitation. On 29 March 2019, the EO issued the following recommendations:

1. The EIB should grant public access to the OLAF report and recommendation concerning the EIB loan to Volkswagen, with appropriate redactions of personal data, that is any text which could lead to individuals being identified; and
2. The EIB should grant public access to their internal notes of 5 October 2017 and 9 October 2017, with appropriate redactions of personal data, that is any text, which could lead to individuals being identified.

2. Consultation with OLAF

In line with the EIB Group Transparency Policy (EIB TP), the EIB deemed it important to take into account OLAF's position on the disclosure of the OLAF Report and Recommendation recommended by the EO. OLAF expressed its position in email exchanges and various conversations with the EIB at working level as well as in official letters of its Director-General in February and, following the EO Recommendation, in June 2019.

In essence, OLAF takes the view that its final reports and recommendations should not be disclosed in order to protect the legitimate rights of the persons concerned, to ensure the effectiveness of the national administrative and judicial proceedings as well as to protect personal data.

OLAF argues that the applicable rules and relevant case-law of the EU Courts recognise a general presumption of non-disclosure of OLAF reports, even for closed cases, in order to ensure that the procedures in question are properly operated and that their objectives are not undermined. OLAF further states that its reports are not decisions but acts of preliminary nature in view of the decision-making process.



In OLAF's view, the disclosure of its final report and recommendation alongside the EIB internal documents discussing them is presumed to affect the decision-making at the EIB.

OLAF recognises the very high profile of the investigation in question and the resulting considerable interest of the public to be informed. However, it stresses that the institution handling the application for documents has to perform an assessment based on clear criteria for determining, first, the public interest in disclosure and second, for balancing it against other interests at stake.

Against this background, OLAF considers that the confidentiality of its investigations, as provided for in Regulation 883/2013, protects the fundamental rights of the persons under investigation. In other words, the public interest in disclosure must be balanced against fundamental principles of the EU legal order, such as the presumption of innocence (article 48 of the European Charter of Fundamental Rights). OLAF notes that the EO's recommendation does not address this issue at all.

Moreover, OLAF stresses that, although the EO's recommendation reiterates the circumstance that a certain part of the information contained in its Report has become public in the US, the public disclosure of an otherwise sensitive document cannot, as a general rule, depend on the question whether a public disclosure has occurred in a third country, i.e. outside the EU legal framework. As a matter of fact, the circumstance that information that could identify individuals has become public elsewhere makes it much more difficult to protect the identity of individuals by redacting a document, as individuals may be identifiable from the information that is already in the public domain.

Finally, OLAF confirms that the information contained in the report is not related to emissions into the environment.

3. EIB's detailed opinion

Throughout 2018, the EIB was actively involved in a complex negotiation with VW, which led to the completion of its follow-up of the OLAF recommendation through the signature of an agreement in December 2018.

The Bank deems that the confidentiality of documents pertaining to the OLAF investigation was justified by the need to ensure that the EIB could adequately follow up on OLAF's recommendation.

In its reply to the EO's proposal for solution, which was sent after completion of the EIB's follow-up on OLAF's recommendation, the EIB expressed its willingness, in principle, to disclose a redacted version of the OLAF Report, subject to a condition: 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.

With the objective to establish a fruitful cooperation among EU institutions and bodies, the EIB invited OLAF and the EO to an inter-institutional meeting in order to find a viable solution enabling public disclosure of the OLAF Report and Recommendation while securing the protection of legitimate interests which were not protected by the approach recommended in the EO's proposal for solution.

The following paragraphs outline the EIB's detailed opinion on each of the EO's recommendations.

3.1 Disclosure of the OLAF report and recommendation, with only redactions of personal data

a. Aarhus-related allegations

In her Recommendation (par. 33), the EO states that the documents at stake do not provide environmental information as such. However, the EO considers that the documents requested are very obviously related to emissions into the environment, since the OLAF investigation was directly prompted by the emissions scandal, VW's culpability in that scandal and public and others' concern that EIB funding had contributed to the development of devices which directly led to the production of noxious emissions into the environment.

EIB position:

In order to trigger the application of the special regime established by Regulation (EC) N° 1367/2006 (hereinafter, the Aarhus Regulation), the information requested must qualify as "*environmental information*".

Whereas the EO agrees that the information contained in the requested documents does not qualify as "environmental information", these documents are not subject to the special regime of transparency established by the Aarhus Regulation. The EIB takes note of the EO's views referred in par. 33 of the EO's Recommendation; however, these views do not alter the fact that the requested documents do not contain information qualifying as "environmental information" (and consequently information related to emissions into the environment).

The EIB considers that **the Aarhus-related allegation submitted by the complainant in support of his right of access to documents should have thus been declared ungrounded.**



b. Protection of the financial and economic policy of the EU and the Bank

In her Recommendation (para. 32), the EO states that transparency can be attained without jeopardising the Bank's role or the trust placed in the Bank. The EO finds that release of the report in this case will likely enhance trust in the Bank and that commercial information (such as the interest rate when the conditions of the loan were originally agreed or the liquidity situation of the client at the time) is over a decade old and market conditions and other factors have significantly changed. The EO insists that there is a "*strong overriding public interest*" for the release of the "*advantageous interest rate compared to the market conditions applicable at the time of the conclusion of the finance contract*".

The EO recommendation argues that given (i) the time elapsed and (ii) the very exceptional circumstances of the case, there is an obvious and overriding public interest in making public the facts contained in the requested documents, including the relevant timelines and the advantageous interest rate, which are not published in the summary.

EIB position:

The EO's Recommendation does not take into consideration the double nature of the EIB as an EU body **and** a Bank; its conclusions appear therefore unbalanced, as they do not sufficiently consider the implications of the release of the information at stake on the Bank.

The EIB notes that it had not invoked the exception concerning the protection of commercial interests in its communications to the EO, but rather the exception concerning the protection of the financial and economic policy of the EU and the Bank.

The EIB is subject to the special regime laid down by Article 15.3 of the TFEU¹. The exclusion of the application of the same transparency standards as required by EU law for all the other EU institutions and bodies is justified in the case of the EIB by the need to preserve confidentiality in the banking relationship between the Bank and its clients. This protection is not meant to serve the interests of EIB clients, but the higher interest of the EU as protected by Article 5.4 bullet two of the EIB TP.

For this reason, the EIB persists in considering that the disclosure of commercial information, shared with EIB clients as part of a banking relationship based on trust and confidence, would result in a loss of confidence of future EIB clients. Such loss would undermine the EIB's capability to properly operate on the markets,

¹ Article 15.3 applies also to the CJEU and the ECB



to attract future clients and, ultimately, **to function as an instrument of economic planning within the Union and in the general interest of the Union.**

This is a public interest which must be preserved and indeed resists, in accordance with Article 5.7 of the EIB TP, considerations pertaining to overriding public interests. Granting public access to information, which should be protected against disclosure, is not compliant with the EIB TP adopted by the EIB Board of Directors.

For these reasons, the EIB is not in a position to accept the EO's recommendation to publish the commercial information at stake.

c. Protection of confidentiality of OLAF's investigations

The EO accepts that it was incumbent on the EIB to consult OLAF on the possible release of the OLAF Report and Recommendation in line with the EIB TP. However, the EO does not consider these documents to be confidential under the EIB TP as the latter would apply only to fraud investigations conducted by the EIB or on its behalf and the investigation in question was conducted by OLAF.

The EO considers all the investigative activities listed under Section 2.1.1 of the OLAF Report to be "*quite normal and routine for any investigative body*"; as such the EO concludes that the disclosure of this information would not undermine the methodology and modus operandi of OLAF investigations. Finally, the EO highlights that if she had considered the complaint about the denial of public access to the same OLAF documents by OLAF itself, she would have reached exactly the same conclusions.

EIB position:

The EO's Recommendation suggests that the EIB could not apply the exception under art. 5.5 of its Transparency Policy to the present case as the investigation in question was conducted by OLAF.

However, it should be noted that the same article of the EIB Group Transparency Policy stipulates that, in case of publication of a summary of investigations, such publication should be compliant with the EU legislation concerning investigations conducted by OLAF. As part of the consultation with OLAF, the latter reiterates that the relevant EU legislation and case law confirm the confidentiality of investigations, even after these have been completed.

The EIB also notes that the adequacy of OLAF's investigations can be scrutinised by the EU judicature and the EO. The power of inspection by the EO, an institutional device of representative democracy, is sufficient to ensure the democratic control on the exercise of investigative functions, without the risk of divulging its features.



d. Protection of personal data

In her Recommendation (par. 34), the EO states that much of the information concerning the roles of the identified individuals is already in the public domain, for example in US Department of Justice public documents.

EIB position:

The EIB considers that the above statement of the EO allows the identification of personal data contained in the OLAF report and recommendation, which otherwise would have been unidentifiable.

e. Final remark and conclusion

In accordance with the applicable regulatory framework (i.e. the Treaty on the Functioning of the European Union, the EO Statute and its Implementing Provisions)², the EO carries out its inquiries by interacting with the EU bodies concerned by its work for them to be able to inform the EO's decisions.

Although the complainant had submitted a complaint with the EO concerning the OLAF's denial to grant public access to the OLAF report and recommendation, the EO decided not:

- (i) To carry out an inquiry on the complaint concerning OLAF's refusal;
- (ii) To ask OLAF – as allowed by the EO's Implementing Provision – to provide information or documents or to clarify information or documents already provided by the EIB, for the purposes of the inquiry on the EIB.
- (iii) To accept the EIB's invitation to an inter-institutional meeting which was proposed to solve the above-mentioned issues.

The approach taken in the present inquiry made it impossible for OLAF to inform the EO decision-making process. The EO decision has an impact on OLAF insofar as the EO (i) implies that OLAF committed an instance of maladministration in refusing access to its report (par. 36 of the Recommendation) and (ii) recommends the EIB to disclose

² Article 228 TFEU “[...] Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views”; art. 3 of the EO Statute “[...] As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint. If the Ombudsman finds there has been maladministration, he shall inform the institution or body concerned, where appropriate making draft recommendations. The institution or body so informed shall send the Ombudsman a detailed opinion within three months.”; art. 9 of the EO Statute “The Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union [...]”. Art. 4.10 of the EO's Implementing Provisions “The Ombudsman may, for the purposes of carrying out an inquiry, ask the complainant or any third party to provide the Ombudsman with information or documents, or to clarify information or documents already provided to the Ombudsman. [...]”. Art. 9.1 of the EO's Implementing Provisions “If the Ombudsman considers it appropriate to do so, the Ombudsman may take steps to ensure that a complaint is dealt with as a matter of priority, taking into account strategic objectives.”



information which OLAF considers confidential (para. 28, 29, 31 and 34 of the EO Recommendation).

Considering that OLAF was not given the opportunity to provide the EO with its detailed opinion on the matter, including an assessment of the legal basis justifying the confidentiality of the OLAF report, it is not clear on which grounds the EO states that she would have reached exactly the same conclusion if she had inquired OLAF.

Requesting and assessing the detailed opinion of an EU body concerned by the inquiry is crucial for the EO's conclusions not to be perceived as based on the sole arguments of the complainant and the EO's own convictions. The engagement with institutions/bodies complained against is instrumental to ensure that the EO operates in "*complete independence, in the general interest of the Communities and of the citizens of the Union*" as laid down by the EO Statute.

Based on the reasons expressed in the present paragraph, and taking into consideration (i) the information provided by OLAF as part of the consultation carried out by the EIB and (ii) the EO's decision not to participate in an inter-institutional meeting, the EIB did not find the EO's arguments compelling. It therefore decided not to accept the EO's recommendation.

3.2 Disclosure of EIB internal notes, with only redactions of personal data

The EO takes the view that, as the Bank's follow-up action has been completed and it is therefore no longer reasonably foreseeable that release would undermine any follow-up action, the internal notes of the EIB dated 5 and 9 October 2017 should also be released, with appropriate redactions of personal data, that is any text which could lead to individuals being identified.

EIB position:

It is important to note that the EIB has never recognised in its communications with the EO "the extraordinary level of public interest in this unique case" with specific regard to its internal notes. The EIB therefore has not, and still does not, find any overriding public interest in disclosure of these documents³. Moreover, it should be noted that the EIB has already published a press release with details of the outcome of the follow up of the OLAF investigation⁴.

³ It is also to be noted that the Recommendation of the EO focuses on the public interest to disclose the OLAF Report. The EO's rationale behind the recommendation concerning the internal notes is limited to paragraph 35, i.e. the fact that the follow-up action has already been completed. The EIB emphasizes that, in the absence of an overriding public interest in the disclosure of the internal notes, the exception invoked to justify non-disclosure of the notes extend beyond any decisions having been taken.

⁴ <https://www.eib.org/en/press/news/agreement-reached-between-the-european-investment-bank-and-volkswagen-ag-in-relation-to-eib-loan-antrieb-rdi>



The two internal notes referred to by the European Ombudsman concern the findings of OLAF's investigation as well as the initiation of the EIB's follow-up on OLAF's recommendation.

The EIB is of the opinion that these internal notes should not be disclosed because they were drafted in the context of the follow-up to an investigation conducted by OLAF, the outcome of which suggested that certain actions be taken by the Bank.

A recommendation made by OLAF that certain actions be taken by the Bank necessarily implies that a decision to proceed to carry out those actions is made by the competent authority(ies) of the Bank⁵. Indeed, the recommendation made by OLAF implied the Bank's application of 26(1)(i) of the its Exclusion Procedures which foresees that the Inspector General makes a proposal to begin negotiations and that the President and Vice-President, where appropriate, may decide to consult the Management Committee. Indeed, this is precisely the decision-making procedure that was followed in this case and although that decision has been taken and the negotiations have since been closed, the documents concerned by that process remain covered by Article 5.6 of the EIB-TP, which serves to protect the decision-making process of the Bank "even after the decision has been taken". Granting public access to them would seriously harm the decision-making process by virtue of the release of internal information and opinions that contain the reasoning and analysis of EIB services which should only be destined to inform the decision to undertake, or not, negotiations, and not the public.

Based on the reasons expressed in this paragraph, the EIB did not find the EO's arguments compelling. It therefore decided not to accept the EO's recommendation.

4. Conclusions

The EIB is not in a position to accept the EO's recommendations based on the EIB Group Transparency Policy and in the absence of an agreement with the EO and OLAF.

The EIB is of the opinion that the outcome of the present inquiry would have been different if the EO had accepted the EIB's invitation to a high-level inter-institutional meeting.

⁵ This is all the more so since, strictly speaking, while OLAF may, in its reports, make certain recommendations, those recommendations impose no obligation, even of a procedural nature, on the authorities to which it is addressed. Furthermore, EIB internal procedures foresee a decision is taken where settlement negotiations are possible (see section 26(1)(i) of the Exclusion Procedures "[...] the Inspector General may make a proposal to begin settlement negotiations with a Respondent(s) and that the President and Vice-President may decide to consult the Management Committee, as appropriate, before determining whether to approve such a proposal").



For this reason and despite its unsuccessful attempts, the EIB reiterates its invitation to EO and OLAF, with a view to reaching a viable solution on the disclosure of the (redacted) version of the OLAF report which would take into consideration all the legitimate interests deserving protection.