



EUROPEAN ANTI-FRAUD OFFICE

The Director-General

Ms Emily O'REILLY
European Ombudsman

E-Mail:

By e-mail only

Brussels

Subject: Your letter of 30 October 2024 concerning complaint 1103/2024/MIK

Dear Ms O'Reilly,

On 30 October 2024¹, you informed OLAF of your preliminary views on the above-mentioned complaint concerning OLAF's partial refusal to grant public access to the case file and report from an investigation. You requested OLAF to reply to the issues raised in your letter and the assessment annexed to it.

Please find OLAF's views below.

1) General considerations concerning the application of a general presumption

The concept of 'general presumption' is well established in case law. The Court of Justice has acknowledged that institutions may rely on general presumptions that apply to certain categories of documents, as similar considerations are likely to apply to requests for disclosure concerning documents of the same nature. For instance, in the context of State aid procedures, the Court has recognised that interested parties, other than the Member State concerned, do not have the right to consult the Commission's administrative file. This reflects the existence of a general presumption that disclosure of documents of a case file would, in principle, undermine the protection of the objectives of investigative activities laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001².

The Court of Justice supports general presumptions to ensure that procedures function properly and their objectives are not compromised. Accordingly, a general presumption may be recognised when access to documents involved in certain procedures – such as OLAF's investigation procedures – is deemed incompatible with the proper conduct of those procedures³. This presumption mitigates risks of external interference and preserves

¹ Request for reply registered under reference number OCM(2024)34912.

² See judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 54 and the case-law cited; of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 65; and of 12 February 2019, *Hércules Club de Fútbol v Commission*, T-134/17, EU:T:2019:80, paragraph 34.

³ Judgments of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, EU:T:2016:322, paragraph 32; of 11 June 2015, *McCullough v Cedefop*, T-496/13 EU:T:2015:374, paragraph 91 and the case-law cited; Opinion of Advocate General Cruz Villalón in *Council v Access Info Europe*, C-280/11 P, EU:C:2013:325, point 75.

procedural integrity by limiting third-party intervention.⁴

The Court also ruled that, to determine the scope of the Regulation (EC) No 1049/2001, consideration must be given to the specific rules governing the administrative procedure under which the documents requested were gathered⁵. In this case, this is Regulation (EU, Euratom) No 883/2013⁶.

OLAF's investigations are subject to specific rules regarding access to and the handling of information obtained or produced during the investigation. Regulation (EU, Euratom) No 883/2013 requires OLAF to treat all such information as confidential and subject to professional secrecy, in accordance with its Article 10. Moreover, as noted in the OLAF's replies to the applicant, the regulation does not grant individuals the right to obtain documents from OLAF's case files. This restriction applies even to the persons concerned⁷, unless OLAF recommends judicial follow-up⁸. For other types of follow-up, access to OLAF's investigative documents may be granted by the relevant authorities, but only during contradictory procedures and before the adoption of any act that can adversely affect the person concerned⁹.

As held by the Court of Justice, if a document is not accessible under the 'access to file procedure', it cannot be made available to the public under Regulation (EC) No 1049/2001¹⁰. Permitting public access to these documents would paradoxically grant the general public greater rights than those afforded to the individuals directly involved, thereby undermining the balance of the OLAF investigative system established by the Union legislature.

Consequently, OLAF's investigation-related documents – including the final investigation report and other documents from the case file – are subject to a general presumption of non-disclosure to safeguard the overarching purpose of its investigative processes, not merely the objectives of an individual investigation.

2) The protection of the purpose of investigations (Article 4(2), third indent, of Regulation 1049/2001

The European Ombudsman's preliminary views:

The European Ombudsman deemed OLAF's reliance on this exception problematic due to its temporal limitation, as established by case law¹¹, whereas OLAF has confirmed the completion of all follow-up activities in this case.

OLAF's views:

OLAF wishes to point out, from the outset that, in the case at hand, its reply to the complainant's confirmatory application drew a distinction between, on the one hand, the final investigation report, to which partial access was granted, and, on the other hand, the remaining documents in the case file, to which access was refused. The final report is drawn up under the authority of the Director-General. It gives an account of the

⁴ *IMG v Commission*, T-110/15, cited above, paragraph 31; Opinion of Advocate General Wathelet in Joined Cases *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:528, points 66, 68, 74 and 76.

⁵ Judgment of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 153-154.

⁶ 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 L 248 18.9.2013, p. 1.

⁷ According to Article 2(5) of Regulation (EU, Euratom) No 883/2013, 'person concerned' shall mean any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by the Office.

⁸ Article 10(3b) of Regulation (EU, Euratom) No 883/2013.

⁹ Judgment of 20 July 2016, *Oikonomopoulos v Commission*, T-483/13, ECLI:EU:T:2016:421, paragraphs 240-241.

¹⁰ See to that effect *European Commission v Agrofert Holding a.s.*, C-477/10P, cited above, paragraph 63.

¹¹ It can only be applied during investigations and as long as a reasonable time has not elapsed for follow-up activities of authorities implementing OLAF's recommendations. Judgment of 1 September 2021, Case T-517/19, *Homoki v Commission*, paragraphs 61-63 and the case law cited.

investigative activities conducted by OLAF, of the evidence collected and of OLAF's assessment of that evidence. The final report thus reflects the outcome of the investigative work of OLAF.

OLAF also points out that, in this case, it has not applied a general presumption in relation to the final report, but made an individual assessment of it. In that regard, OLAF recalls that the application of a general presumption of confidentiality does not prevent the possibility of conducting an individual examination of specific documents. Conversely, even when a general presumption applies, an individual examination of the documents covered by such presumption can still be carried out. Indeed, according to the case law, the recourse to a general presumption of confidentiality is merely an option for the EU institution, body, office or agency concerned, which retains the possibility of carrying out a specific and individual examination of the documents requested to determine whether they are protected, in whole or in part, by one or more of the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001¹².

This does not mean, however, that this document could be made public in its entirety, as it contains confidential information that must remain protected, even after the investigation, or the follow-up procedures are completed. When making the decision to grant partial public access to the final report, OLAF considered the case law which recognises that parts of a final report – such as those containing personal data, internal notes and references to OLAF's methods – can be redacted, even after follow-up procedures are completed¹³.

As regards the other documents from the case file, OLAF applied a general presumption. The conclusion that the general presumption of non-accessibility must also apply to closed procedures is supported by several considerations specific to the OLAF investigative process and the need to preserve its future effectiveness.

In that regard, OLAF recalls that, as recognised by the Court in case *Ntouvas v ECDC*¹⁴, the exception laid down in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 is not designed to protect the inspections, investigations and audit as such, but their 'purpose'. The purpose of OLAF's investigations is, in essence, to protect the financial interests of the Union. In that regard, it has been recognised that the effectiveness of an OLAF investigation is of public interest, derived from the more general public interest of protecting the EU's financial interests¹⁵. Therefore, the purpose of OLAF's investigations must be protected beyond the specific period of an investigation and its follow-up.

Regulation (EU, Euratom) No 883/2013 seeks to balance, on the one hand, the obligation of Member States and EU institutions, bodies, offices and agencies, as well as the willingness of third parties, to provide sensitive information to OLAF so it can carry out its objectives and tasks¹⁶; and on the other hand, the need to guarantee enhanced protection for such information through the requirement of professional secrecy.

In this context, the integrity of OLAF's investigative process would be compromised if public access to documents, including those from closed case files, did not benefit from a general presumption of non-disclosure.

Moreover, by disclosing the requested documents, OLAF's responsibility under Regulation (EU, Euratom) No 883/2013, including its activities relating to safeguarding Union interests against irregular conduct liable to result in administrative or criminal proceedings, would be exposed to risks. These risks are reasonably foreseeable and are

¹² Judgment of 22 January 2020, *PTC Therapeutics International Ltd v EMA*, C-175/18 P, ECLI:EU:C:2020:23, paragraph 61.

¹³ *Homoki v Commission*, T-517/19, cited above, operative part.

¹⁴ Judgment of the General Court of 19 November 2014, *Ntouvas v ECDC*, T-223/12, EU:T:2014:975, paragraph 28.

¹⁵ See Opinion of Advocate General Hogan in case C-130/19, *European Court of Auditors v Karel Pinxten*, ECLI:EU:C:2020:1052, point 115,

¹⁶ Article 1 of Regulation (EU, Euratom) No 883/2013.

not merely hypothetical, as explained in the initial reply to the complainant¹⁷.

Disclosure of documents (including the final report) in the case file, related to OLAF's investigative strategies and methods could reveal its working procedures, thereby undermining its effectiveness in performing its tasks. It could also deter individuals from providing information about possible fraud, depriving OLAF of valuable information for initiating investigations¹⁸. Sources must be reassured that their statements will remain confidential; otherwise, they may withhold or censor sensitive information¹⁹. Consequently, OLAF's decision-making process in other investigations could be severely affected, which would significantly compromise the effectiveness of its investigations, as understood under the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

The specific confidentiality rules surrounding documents related to OLAF investigations, even for the persons concerned, are justified for several reasons. First, OLAF collects business secrets and highly confidential personal information, the disclosure of which could harm reputations of both natural and legal persons. Second, access to these documents, even after the investigation concludes, could jeopardise OLAF's future work²⁰. Revealing such information could expose its investigative methods, discourage cooperation, and ultimately undermine the integrity and effectiveness of its investigations.

As previously mentioned, these concerns are reasonably foreseeable and not purely hypothetical, particularly given the potential for OLAF to investigate similar fraud patterns or related matters. Additionally, the case law has established that granting even partial access to OLAF's investigative documents could hinder the effective use of that information by European and national authorities, as individuals suspected of irregularities could act to obstruct ongoing or future procedures²¹. As recognised by Regulation (EU, Euratom) No 883/2013, OLAF's operational efficiency relies heavily on cooperation with relevant Union institutions and bodies, as well as with the competent authorities of the Member States²².

In addition, the nature of the documents in the case file is such as to require a general presumption of non-disclosure because of the sensitive and detailed information they contain. A case file provides a comprehensive account of the investigation, including the allegations and the entire investigative process, such as evidence collection methods, witness interviews, and on-site inspections. Disclosing this level of detail, even after investigations are closed, could severely undermine OLAF's ability to fulfil its mandate effectively in the future.

For instance, public disclosure of documents from the case file could expose investigative strategies and techniques, which could be exploited in future cases to avoid detection or hinder investigations. Additionally, even if anonymised, disclosing documents from the case file could risk revealing the identities of individuals involved in the investigation, such as persons concerned²³, witnesses or whistle-blowers, as their identities might be deduced from contextual information. This risk is not merely theoretical, as demonstrated by a recent judgment, where the Court of Justice ruled that OLAF infringed the data protection rules, the principle of the presumption of innocence and the right to good administration by disclosing, in a press release, information which led to the identification of the applicant, who was a person concerned in an OLAF's investigation. Such a disclosure,

¹⁷ Initial reply, pages 2-3.

¹⁸ See to that effect *Strack v Commission*, T-221/08, cited above, paragraph 153.

¹⁹ *Agrofert Holding v Commission*, C-477/10 P, cited above, paragraph 66.

²⁰ Judgment of the General Court of 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 125.

²¹ See to that effect *IMG v Commission*, T-110/15, cited above, paragraphs 33 and 35; *Strack v Commission*, cited above, paragraph 162.

²² Recitals 10 and 35.

²³ See, by analogy with information disclosed by OLAF in a press release, the judgment of 7 March 2024, *OC v Commission*, C-479/22 P, EU:C:2024:215. In that case, the Court of Justice ruled that OLAF infringed the data protection rules, the principle of the presumption of innocence and the right to good administration by disclosing, in a press release, information which led to the identification of the applicant, who was a person concerned in an OLAF's investigation.

should it arise in the context of the handling of a request for public access to documents; apart from constituting a breach of data protection rules or of the principle of the presumption of innocence, would also discourage future cooperation with OLAF. Furthermore, the detailed presentation of evidence, if released, might allow those involved in irregularities to identify weaknesses in investigative findings or prepare defensive measures for future cases.

Protecting the confidentiality of OLAF's case file is therefore crucial not only for safeguarding past investigations but also for preserving the integrity of ongoing and future investigative efforts. Without such protection, OLAF's mission to combat fraud, corruption, and other illegal activities affecting the financial interests of the EU could be severely compromised.

3) The protection of OLAF's strategies and methods (Article 4(3), second subparagraph, of Regulation 1049/2001)

The European Ombudsman preliminary views:

The Ombudsman took the view that OLAF cannot rely on a general presumption of confidentiality to refuse access to the entire investigation file, after the investigation in question has been closed and the follow-up completed. In that regard, the Ombudsman noted that, in refusing public access to the investigation case file, OLAF invoked a general presumption of non-accessibility of its closed investigation files, with reference to the *Strack* ruling²⁴. The Ombudsman observed, that, while the General Court in *Strack* recognised a general presumption of non-accessibility of certain categories of documents in the investigation file so as to protect the effectiveness of OLAF's future investigations, this general presumption does not extend to the entire investigation file. The Ombudsman also noted that, in that case, OLAF granted partial public access to several documents in its investigation file. In addition, the Ombudsman noted that the General Court recently annulled two OLAF decisions refusing public access to the investigation files in their entirety on the grounds that OLAF had not provided "detailed evidence" that disclosure of these files would reveal its methods and strategies.

OLAF's views:

As a preliminary point, OLAF wishes to underline that the question of whether a general presumption may apply to an entire OLAF investigation file, after the investigation has been closed and the follow-up completed, has not been examined by the Court of Justice, which is the authoritative interpreter of EU law. That said, the Court's considerations regarding files in other types of administrative procedures may be applied by analogy.

First, a general presumption may apply to an entire investigation file.

Indeed, the case law does not exclude any category of documents from being protected by a general presumption, as long as the documents are 'of the same nature'. This means that as long as the documents are similar in nature, they can be protected, regardless of whether they relate to an entire file or just a part of it. The case law concerning the Commission's administrative procedures confirms that a general presumption of non-accessibility may be applied to the entire file²⁵.

In an OLAF's investigation file, all documents share, as common features, the fact that they all contain "*information transmitted or obtained in the course of [...] investigations*", the confidentiality of which is protected under Article 10 of Regulation (EU, Euratom) No 883/2013, and the fact that they are preparatory in nature, in the sense that they contain operational information in connection with the investigation, as well as information and evidence collected by OLAF, along with their assessment. As such, they serve to prepare

²⁴ *Strack v Commission*, T-221/08, cited above.

²⁵ See judgments of 2 March 2022, *Huhtamäki v Commission*, T-134/20, ECLI:EU:T:2022:100, paragraph 36; *Hércules Club de Fútbol v Commission*, T-134/17, cited above, paragraph 45; of 14 July 2016, *Sea Handling/Commission*, C-271/15 P, EU:C:2016:557, paragraph 41; of 25 September 2014, *Spirlea v Commission*, T-306/12, ECLI:EU:T:2014:816, paragraph 75.

the adoption by OLAF of its final investigation report and the related recommendations. These common features make them of the same nature. Therefore, they can be subject to a global assessment based on the general presumption of non-accessibility, as there are no significant differences between them that would warrant a separate, individual assessment.

This conclusion is not called into question by the *Strack* judgment.

In fact, in that judgment, the Court's considerations are not limited to the specific documents requested - namely to documents "*containing opinions intended for internal use in the course of deliberations and preliminary consultations within OLAF*", which were under assessment in that case - but rather apply to all documents of the same nature, as indicated by the wording "*in particular*"²⁶. This confirms OLAF's interpretation that a general presumption may apply to an entire investigation file if all the documents in that file are of the same nature.

In addition, account must be taken by the specific circumstances and context of that case, where the applicant sought access to clearly identified individual documents or specific categories of documents. His application pre-dates the development by the Court of a general presumption of non-accessibility of documents from an OLAF's investigation file. It was in fact in the judgment in the *Strack* case that the Court acknowledged, for the first time, the existence of a general presumption of non-accessibility of OLAF's investigative documents. These circumstances explain why, in that case, OLAF performed an individual assessment of a part of the documents or categories of documents requested. By contrast, in the years that followed that judgement, OLAF applied the general presumption and only exceptionally carried out individual assessments of the documents requested.

Second, a general presumption can be used to refuse access to the entire investigation file, even after the investigation in question has been closed and the follow-up completed. In that regard - and with reference to the specific categories of documents requested by the applicant in the *Strack* case - the Court ruled that the general presumption "*must be applied irrespective of the question whether the request for access concerns an investigation procedure which has already been closed or one which is ongoing.*"²⁷ OLAF considers that the same considerations are valid for all the documents in the case file.

Finally, with regard to the cases *Eurecna*²⁸ and *Vendrame*²⁹, the Court merely noted that, OLAF had relied on a general presumption of non-accessibility to the requested documents without providing the necessary information for the applicant to understand the reasons why. The Court did not rule on the possibility of applying, in that case, a general presumption in relation to documents contained in the investigation file or on any time limitations in that regard. On the contrary, the Court clearly stated that it was not in a position to assess whether OLAF was legally entitled to rely on the general presumption of confidentiality to which the documents concerning its investigations may be subject under the third indent of Article 4(2) of Regulation No 1049/2001³⁰. The Court has not ruled that any of the documents from OLAF's case files should be disclosed to the public either.

4) Access under OLAF Regulation and under Regulation 1049/2001

The European Ombudsman preliminary views:

While OLAF Regulation only provides limited and conditional access to the final report for the 'persons concerned' by an investigation³¹, this does not exempt OLAF from complying with Regulation (EC) No 1049/2001, under which the persons concerned, like any member

²⁶ *Strack v Commission*, cited above, paragraph 160.

²⁷ *Strack v Commission*, cited above, paragraph 162.

²⁸ Judgment of 12 July 2023, *Eurecna SpA v Commission*, T-377/21, ECLI:EU:T:2023:398.

²⁹ Judgment of 12 July 2023, *Vendrame v Commission*, T-379/21, ECLI:EU:T:2023:399.

³⁰ *Eurecna SpA v Commission*, cited above, paragraphs 60 and 86; *Vendrame v Commission*, cited above, paragraphs 54 and 79.

³¹ As such access can be given only under the conditions set out in Article 10(3b) of Regulation (EU, Euratom) No 883/2013.

of the public, may obtain public access to at least some files concerning closed investigations. Although OLAF took the view that Regulation (EC) No 1049/2001 would, paradoxically, grant broader access to the public than to the persons concerned, the OLAF Regulation does not prevail over Regulation (EC) No 1049/2001, and both must be interpreted in a coherent way³².

Therefore, it appears unnecessary to have special provisions for access to OLAF's investigation files for persons concerned after the investigation and follow-up activities have been completed, as these individuals, like any other member of the public, can obtain access under Regulation 1049/2001, and given that established case-law requires the widest possible access to EU documents³³.

OLAF's views:

The OLAF Regulation and Regulation (EC) No 1049/2001 do not contain a provision expressly giving one regulation primacy over the other, and therefore, according to the case law, it is necessary to ensure that each of the regulations is applied in a manner which is compatible with the other and enables them to be applied consistently³⁴.

In that regard, OLAF recalls, first, that Regulation (EC) No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the institutions. However, this right is subject to certain limits based on reasons of public or private interest.

Second, the OLAF Regulation lays down very restrictive rules for the use of documents in OLAF's investigation file and confines the access to the file to the persons concerned and to the final report only, under specific conditions. Irrespective of the right provided for in Regulation (EC) No 1049/2001, OLAF is not required to grant to a person concerned access to the documents which were the subject of the investigation or to those drawn up by OLAF itself, as this could compromise the effectiveness and confidentiality of OLAF's mission, as well as OLAF's independence³⁵. Regulation (EU, Euratom) No 883/2013 allows only a limited access to the final report for the persons concerned, under certain conditions³⁶.

In fact, persons concerned may have access to the final report or to other documents in the context of the follow-up proceedings. According to the case-law, the conclusions of an OLAF final report have no effects likely to adversely affect the legal position of the person concerned³⁷. In cases where OLAF transmits information to EU or national judicial authorities for further action, a person concerned by an OLAF investigation may request access to OLAF's final report (or to other documents) from those authorities in accordance with their own procedural rules, if those authorities intend to adopt an act adversely affecting him/her and base their proceedings on elements established during the OLAF investigation^{38,39}. These considerations apply not only during an investigation, but also after the investigation and follow-up activities have been completed.

³² According to the judgment in Case T-517/19, *Homoki v Commission*, cited above, paragraph 56.

³³ *IMG v Commission*, T-110/15, cited above, paragraph 25.

³⁴ *Homoki v Commission*, T-517/19, cited above, paragraph 56.

³⁵ Judgment of 21 May 2014, *Lian Catinis v European Commission*, T-447/11, EU:T:2014:267, paragraph 63; judgment of 19 October 2022, *Sistem ecologica v Commission*, T-81/21, EU:T:2022:641, paragraph 63 and the case law cited.

³⁶ Article 10(3b) of Regulation (EU, Euratom) No 883/2013.

³⁷ Order of 18 December 2003, *Gómez-Reino v Commission*, T-215/02, ECLI:EU:T:2003:352, paragraph 50; judgment of 12 September 2007, *Nikolaou v Commission*, T-259/03, ECLI:EU:T:2007:254, paragraph 245; judgment of 8 July 2008, *Franchet and Byk v Commission*, T-48/05, ECLI:EU:T:2008:257, paragraphs 259 and 260.

³⁸ *Gómez-Reino v Commission*, T-215/02, cited above, paragraph 65; *Nikolaou v Commission*, T-259/03, cited above, paragraphs 242 and 246; *Franchet and Byk v Commission*, T-48/05, cited above, paragraphs 255 to 258; *Catinis v Commission*, T-447/11, cited above, paragraphs 63 and 64; and *IMG v Commission*, T-110/15, cited above, paragraph 36.

³⁹ The complainant was informed about this case law by OLAF's letters: OCM(2017)8543 – 2/05/2017, OCM(2022)31282 – 16/11/2022.

By contrast, third parties, and thus the public, do not have any right of access to the documents in the OLAF's investigation file.

These considerations must be taken into account in interpreting the exceptions set out in Article 4 of Regulation (EC) No 1049/2001. If persons other than those with a right of access under OLAF Regulation, or those who enjoy such a right in principle but have not used it or have been refused access, were able to obtain access to documents on the basis of Regulation (EC) No 1049/2001, the very limited access system introduced by OLAF Regulation would be undermined.⁴⁰

The fact that a person concerned by an investigation, like any member of the public, may request – either during the investigation or after its closure – access to investigation documents/to the entire case file or to a final report under Regulation (EC) No 1049/2001 does not alter the fact that, if such a request is granted, it would result in the public having broader access to these documents than the person concerned would have under Regulation (EU, Euratom) No 883/2013. In addition, as the purpose of Regulation (EC) No 1049/2001 is to give access to documents to the public at large, any document disclosed to an individual under this Regulation enters the public domain and becomes automatically available to any other member of the public.

Regulation (EC) No 1049/2001 cannot be interpreted in a way that contradicts the confidentiality, data protection and professional secrecy requirements of Regulation (EU, Euratom) No 883/2013, nor in a way that goes against the will of the EU legislator to protect the confidentiality of OLAF's final investigation reports and recommendations even after the follow-up activities were completed⁴¹. The exceptions set out in Article 4 of Regulation (EC) No 1049/2001, which aim to safeguard specific private or public interests, should also be applied in a way that ensures compliance with these requirements for as long as necessary, including for an indefinite period, and for all documents requiring protection, including for the entire case file.

5) Transparency and accountability of OLAF

The European Ombudsman preliminary views:

OLAF's view that its investigation files should remain entirely inaccessible to the public for an indefinite period is difficult to reconcile with the principles of transparency and accountability that underpin the EU administration's conduct. The absence of a time limit on the presumption of non-accessibility contradicts the objective of ensuring public access to documents, which enables citizens to effectively monitor the lawfulness of public power⁴². In this case, the public may wish to examine why the criminal court acquitted the complainant despite OLAF's findings.

OLAF's views:

OLAF acknowledges that Regulation (EC) No 1049/2001 and established case-law mandate the widest possible access to EU documents, and it is committed to upholding high standards of transparency within the limits set out in the applicable rules.

However, it is essential to consider that OLAF's documents do not concern legislative processes, with wide impact on EU citizens, but pertain to investigative activities,

⁴⁰ See, by analogy with the access to documents in a case file in a proceeding relating to abuse of a dominant position, judgment of 28 March 2017, *Deutsche Telekom AG v European Commission*, T-210/15, EU:T:2017:224, paragraphs 35-39.

⁴¹ As demonstrated by the fact that, while the European Parliament has tabled, in the first reading of the proposal for a regulation amending Regulation (EU, Euratom) No 883/2013, an amendment proposing to impose an obligation on OLAF to disclose its reports and recommendations after all related national and Union procedures were concluded by the responsible bodies, this amendment was not retained in the final amended version of the Regulation. See, to that effect, the Parliament legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 and the amendment 80, available here: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0383_EN.html.

⁴² *Homoki v Commission*, T-517/19, cited above, paragraphs 61-62 and the case law cited.

concerning specific individuals or economic operators. According to settled case-law, the Commission's administrative activities - and thus, by extension, OLAF's activity pertaining to administrative investigations - do not require the same level of access to documents as legislative activities⁴³. Recognising a general presumption that an investigation file is entirely inaccessible to the public for an indefinite period is consistent with the case law, as the Court has not ruled to the contrary. So far, the Court's rulings limiting the application in time of the general presumption referred only to final reports. In addition, the EU legislator has established alternative mechanisms to ensure transparency and accountability of OLAF, including specific obligations for OLAF to provide information on its activities to EU institutions and the public, thereby striking a balance between confidentiality, on the one hand, and transparency and accountability requirements, on the other hand.

For example, the Director-General of OLAF is required to submit regular reports to the European Parliament, to the Council, to the Commission and to the Court of Auditors⁴⁴, detailing the findings of investigations, actions taken and problems encountered, whilst maintaining confidentiality and respecting the rights of persons concerned and informants, and, where appropriate, national law applicable to judicial proceedings.

Furthermore, the Director-General may also provide information on OLAF's activities to the European Parliament or the Council, upon request, in the context of their budgetary control rights, while ensuring strict confidentiality⁴⁵. In practice, this is done on a regular basis.

In addition, the Director-General shall periodically inform the Supervisory Committee of OLAF's activities, the implementation of its investigative function and follow-up actions. The Director-General shall also report on cases where OLAF's recommendations were not followed; of cases in which information has been transmitted to national judicial authorities or the EPPO; of cases where no investigation was opened or cases were dismissed; and on the duration of investigations⁴⁶.

OLAF's activities are thus subject to scrutiny by the EU institutions and the Supervisory Committee, with the outcome of such oversight being, in principle, publicly accessible⁴⁷. Furthermore, OLAF communicates the results of its activities to the public through annual reports, press releases, and other information published on its website, while ensuring the confidentiality of its investigations is respected. In this regard, the Director-General must ensure that any information provided to the public is neutral, impartial, and respects the confidentiality of investigations and the rights of persons concerned⁴⁸.

In this case, OLAF has carefully examined whether an overriding public interest exists to justify granting access to investigative documents from the case file and to the undisclosed parts of the final report. It has not identified any such interest. Although the complainant, as a person concerned by the investigation, expressed his interest in accessing the documents, the case-law recognises such an interest as a private interest, not a public one⁴⁹. No other person has submitted an application for access to the final report or any other documents related to this investigation, which supports OLAF's view

⁴³ See, to that effect, judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 60; of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 77; and of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 87.

⁴⁴ Article 17(4) of Regulation (EU, Euratom) No 883/2013.

⁴⁵ Article 17(4a) of Regulation (EU, Euratom) No 883/2013.

⁴⁶ Article 17(5) of Regulation (EU, Euratom) No 883/2013.

⁴⁷ See, for instance, the opinions and reports of the Supervisory Committee, published on the Committee's website. The European Court of Auditors also publishes its audit reports, and so does the Parliament with its motions for resolutions.

⁴⁸ Article 10(5) of Regulation (EU, Euratom) No 883/2013. See also, in that regard, the judgment in case *OC v Commission*, C-479/22 P, cited above.

⁴⁹ Judgment of the General Court of 29 September 2021, *TUIfly v Commission*, T-619/18, EU:T:2021:627, paragraph 48, and the case-law cited, judgment of 6 February 2020, *Compañía de Tranvías de la Coruña, SA v Commission*, T-485/18, EU:T:2020:35, paragraph 80 and the case-law cited.

that there was no or limited interest of the public concerning this case.

Regarding the argument that the public may wish to examine why the criminal court acquitted the complainant despite OLAF's findings, it is important to highlight that a national court's decision does not simply transpose OLAF's findings, but is the result of an adversarial process which examines the legality of the decisions adopted in the context of the follow-up procedures, based on evidence collected by an independent public prosecution authority. OLAF's final report is only part of the evidence collected, and the prosecution authorities and national courts are free to assess its evidential value⁵⁰. OLAF is not a party to the national proceedings. Therefore, it is difficult to see how the public can monitor effectively the lawfulness of OLAF's exercise of public power based on reports that national authorities have the discretion to evaluate.

6) Redactions in the final report

The European Ombudsman preliminary views:

The redactions made in the final report disclosed to the complainant, to protect the institution's strategies and methods, appear excessive. The public may reasonably expect that OLAF would undertake this kind of action in its investigations, and it is unclear how disclosure of this information would compromise the effectiveness of its strategies and methods. OLAF could thus review the redactions in the final report to consider granting broader access.

OLAF's views:

OLAF granted the complainant partial public access to the final report, considering the exceptions to the public's right of access under Article 4 of Regulation (EC) No 1049/2001 and while taking into account the provisions of Regulation (EU, Euratom) No 883/2013, Regulation (EU) 2018/1725⁵¹ and the Staff Regulations. Upon reviewing the complainant's confirmatory application, OLAF found no grounds to change its initial decision. The redactions made were justified by the need to protect the privacy and integrity of individuals, commercial interests, and the effectiveness of future OLAF investigations, as per Articles 4(1)(b), 4(2) first indent, and Article 4(2) third indent combined with 4(3) of Regulation (EC) No 1049/2001.

Following your request, OLAF reconsidered the redactions in the final report. It concluded that they are justified by the need to protect the interests set out in Article 4 of Regulation (EC) No 1049/2001, while respecting the data protection, confidentiality and professional secrecy requirements applicable to OLAF. Disclosing more information would contravene these rules and potentially result in legal consequences for OLAF.

This conclusion is not put into question by the argument that the public may reasonably expect OLAF to undertake specific investigative activities.

While the various investigative measures that OLAF may undertake are public⁵², OLAF's

⁵⁰ In that regard, Article 11(2) of Regulation (EU, Euratom) No 883/2013 states that OLAF's final report and the evidence in support and annexed thereto shall constitute admissible evidence in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings in the Member States. They also constitute admissible evidence in criminal 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 and are subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and have the same evidentiary value as such reports. Moreover, the power of the Court of Justice and national courts and competent bodies in administrative and criminal proceedings to freely assess the evidential value of the reports drawn up by the Office is not affected by Regulation (EU, Euratom) No 883/2013.

⁵¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

⁵² in Regulation (EU, Euratom) No 883/2013 and in the Guidelines on Investigation Procedures for OLAF Staff: https://anti-fraud.ec.europa.eu/document/download/3dc10699-df07-4782-ae0d-232cd698286c_en?filename=gip_2021_en.pdf

choice of investigative activities and methods, including the number and timing in a given investigation, are part of its investigative strategy, which must remain protected to ensure the independent conduct of future cases. Disclosure of such information could compromise OLAF's ability to make independent assessments and consult stakeholders on sensitive issues, and could also enable potential fraudsters to anticipate and adapt to OLAFs investigative methods, by adapting or creating new fraudulent schemes and thus rendering OLAFs investigative methods ineffective. This would seriously jeopardise the independent conduct of future OLAF cases and their objectives. It could also create unfounded expectations on the side of the parties involved in the investigation to contest and question individual decisions, acts and processes, which are in full remit of the Director-General, and thus undermine his/her independence.

I hope that the above explanations will prove satisfactory to you.

I remain at your disposal for any further question you may have.

Your attention is drawn to the transmission clause below.

Yours sincerely,

Signed Electronically

Digitally signed by:

VILLE HEIMO ANTERO ITÄLÄ (EUROPEAN COMMISSION)

Reason: Director General

Date: 2024-12-11 15:45:39 UTC

Transmission clause

The transmission of personal data to you is performed under the regime of Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by Union Institutions, bodies, offices and agencies and of the free movement of such data and repealing Regulation(EC)45/2001 and Decision N° 1247/2002/EC. Accordingly, as the Controller of the personal data hereby transmitted, you are responsible for ensuring that they are used only for the purpose for which they are transmitted. Processing in a way incompatible with that purpose, such as transferring it to another recipient where this is not necessary or legally required on important public interest grounds, is contrary to the conditions upon which the data has been transferred to you. Furthermore, according to Article 4(2) of Regulation 2018/1725, you are required as the Controller of the personal data concerned to ensure that all obligations of the Controller are complied with.