

Complaint to the European Ombudsman



Submitted on 27 March 2013

What is the decision or matter about which you complain? When did you become aware of it?

On 26 October 2012 Corporate Europe Observatory (CEO) submitted a request for access to documents (with reference to Regulation 1049/2001), which included a request for release of the OLAF investigation report that led to European Commissioner John Dalli's resignation. OLAF responded with a letter dated 13 December 2012, stating "OLAF is unable to accede to your request". OLAF made reference to the exception in Regulation 1049/2001 for documents where disclosure would undermine "the purpose of inspections, investigations and audits". OLAF also argued that there is no overriding public interest in disclosure and that "partial access is not possible".

We submitted a confirmatory application 7 January 2013, challenging this decision. We argued that:

- firstly, there is a very clear overriding public interest in giving the public access to the report. The limited information provided by OLAF and the Commission so far has been confusing, at times contradictory and consistently raised more questions than it answers. MEPs, civil society groups, the media and a fast-growing number of concerned European citizens are deeply unhappy with the failure of OLAF and the Commission to clarify the basic facts about the Dalli lobby scandal. As a matter of avoiding the erosion of public trust in the EU institutions, as well as securing transparency and accountability, there is an overriding public interest in releasing details of the circumstances that led to the resignation of a Commissioner, in controversial and contested circumstances.
- secondly, OLAF has not convincingly demonstrated that partial access is not possible. OLAF argues that "there is no part of the report which is severable", but why would it not be possible to release those parts of the report that do not risk impacting on the court proceedings that the Maltese authorities may or may not initiate? The colophon, the table of contents and the description of the complaint submitted by Swedish Match for instance, but also other parts of the report, would surely fall into this category.

OLAF's Director General G. Kessler responded in a letter dated 31st of January. The response is also online here:

http://www.asktheeu.org/en/request/documents_related_to_commissione

OLAF confirms its rejection of our request, referring to seven arguments, some of which are new:

- 1) "The report refers to information related to identification of witnesses as well as to the treatment of the information received from them." OLAF argues that "public disclosure of the identity and information directly related to witnesses would undermine future investigations of OLAF as it would discourage private persons from sending to OLAF information on possible irregularities affecting the financial interests or the reputation of

the EU". Clearly OLAF needs to act with a certain caution to protect witnesses, but this is not, in our view, a convincing argument for rejecting access to the report on the Dalli case. This is because Swedish Match has pro-actively sought publicity to present their views on the Dalli case, and elaborate their role in it, including extensive interviews in Swedish and Maltese media, in which they make far-reaching claims about Mr. Zammit and Mr. Dalli.¹ Representatives of Swedish Match have also spoken at several events in the European Parliament, again presenting their version of the Dalli case.² OLAF argues that they need to "guarantee the confidentiality of whistleblowers and informants' identity", but this is not a convincing argument in this particular instance, as Swedish Match has itself sought publicity and publicly added to the attacks on Mr. Dalli. There is therefore no reason, in this case, to protect the identity of Swedish Match and its representatives. OLAF, moreover, always has the possibility to provide only partial access in specific cases where there are convincing grounds for protecting the identity of whistleblowers.

- 2) "Confidentiality of OLAF investigations and related considerations." OLAF refers to case law that obliges OLAF not to "harm follow up actions being undertaken or be in contemplation by national authorities", but does not elaborate on the specifics of the Dalli investigation report. We do not think OLAF has convincingly shown that the (partial) release of this report would "harm follow-up actions" by the Maltese authorities. OLAF moreover argues that "the transmission of the case to the Maltese authorities only took place relatively recently". It is by now almost six months ago that Commissioner Dalli was forced to resign on the basis of the OLAF report. The non-disclosure of the report and OLAF's refusal to answer questions is a source of major public concern.
- 3) OLAF argues that "transparency requirements and requirements linked to the confidentiality of case documents and data protection must be reconciled in order to create a coherent application of law, as required by the Court." It then continues to claim that "this coherent application of law, in OLAF's case, takes into account the need to ensure that allegations and information given in confidence to OLAF are not made public, but are investigated." OLAF moreover claims that its "future ability to conduct investigations in cooperation with the EU institutions and other services of the Commission would be seriously undermined by such a disclosure." We disagree. This would mean that all OLAF reports (and numerous other documents held by OLAF) are exempted from Regulation 1049/2001, which is clearly unacceptable.
- 4) OLAF also brings in the argument that disclosure of the report would harm "the

1 Swedish Match interviews in the press, see for example <http://www.europolitics.info/institutions/we-never-wanted-a-commissioner-to-resign-art344370-36.html> ; <http://www.timesofmalta.com/articles/view/20121028/local/-Dalli-said-ban-on-snus-was-absurd-.442856> ; <http://www.thelocal.se/43866/20121017/#.UVGF1qpg-Zg> ; <http://www.thelocal.se/43932/20121019/#.UVGFr6pg-Zg> ; etc

2 Swedish Match meeting with Budgetary Control Committee in European Parliament, 26 November 2012, after Mrs Kindstrand Isaksson, Director of Public Affairs of Swedish Match, offered to brief the Coordinators of the Committee about Swedish Match's involvement in the events leading up to the resignation of Commissioner Dalli, see p.8 of <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-500.500%2b02%2bDOC%2bPDF%2bV0%2f%2fEN> and <http://www.eppgroup.eu/press/pdoc12/20121206swedish-match-questionnaire.pdf>

protection of privacy and integrity of individuals protected in accordance with Community legislation regarding the protection of personal data". OLAF claims that regarding disclosure of "specific detail of matters which directly relate to the investigation, such information constitutes personal data and public disclosure of it may have an adverse effect on a persons reputation and, consequently undermine the privacy which the provisions are intended to protect." As mentioned, these considerations cannot apply to the representatives of Swedish Match, since the company has itself, pro-actively, promoted its version of the Dalli case to mass media and to MEPs. This has included claims about Mr. Dalli, Mr. Zammit and other individuals. One could argue that the non-disclosure of the OLAF report is a more serious problem for the reputation of these persons. This is certainly the case with Mr. Dalli: OLAF's director has stated that there is "unambiguous circumstantial evidence" against Dalli, but Mr Dalli has not been allowed to see the report nor has the general public had any opportunity to assess what Mr Dalli is accused or the evidence for these accusations.

- 5) OLAF also presents the new argument that disclosure would harm "the protection of commercial interests of natural or legal persons (Art. 4(2), first indent) of the Regulation." OLAF explains that "the report concerning OLAF investigative activities contain the names of private entities, the disclosure of which would harm the reputation of legal entities and therefore their commercial interests. Public disclosure of the names of legal entities involved in an investigation risks showing them in a negative light and may give rise to misrepresentations about their performance and consequently would harm their reputation and other legitimate business interests." This could be the case for Swedish Match, but as they have taken a very high public profile, promoting their version of the events in the Dalli case, it is a matter of public interest for the public to be able to judge the role the company has played in the investigation that led to Mr. Dalli's resignation.
- 6) OLAF simply repeats its position that it "considers that there are no elements that would show the existence of an overriding public interest in disclosure of the final case report that outweigh the exceptions mentioned above." It does not address the specific arguments that we provided: "The limited information provided by OLAF and the Commission so far has been confusing, at times contradictory and consistently raised more questions than it answers. MEPs, civil society groups, the media and a fast-growing number of concerned European citizens are deeply unhappy with the failure of OLAF and the Commission to clarify the basic facts about the Dalli lobby scandal. As a matter of avoiding the erosion of public trust in the EU institutions, as well as securing transparency and accountability, there is an over-riding public interest in releasing details of the circumstances that led to the resignation of a Commissioner, in controversial and contested circumstances." OLAF states that there must be "clear elements to indicate the existence of an overriding interest". We consider this to be very clearly the case. Both OLAF and the European Commission have since Mr. Dalli's resignation refused to answer key questions of public interest, referring to possible court proceedings in Malta. We would like to mention that a court case in Malta against one or more persons mentioned in the investigation report could take several years before there is a ruling. This would mean that European citizens are denied of their right to know the basic facts about the case for an unacceptably long time, possibly

well after the next European Parliament elections and the installment of a new European Commission team. Regulation 1049/2001 states that “Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.” It is exactly the need for legitimacy and accountability as worded in this principle that is at stake in OLAF's (and the European Commission's) handling of the Dalli case. Indeed, these principles are doubly important in this case, which concerns the integrity of the body charged with investigating breaches of integrity - corruption or serious misconduct - within the European institutions. As long as this remains under question in the public eye – which is currently the case, following concerns expressed by the OLAF supervisory board about procedural issues and breach of rights by OLAF, as well as allegations of illegal wire-tapping and encouraging witnesses to stick to erroneous versions of events,³ the damage to public trust in the EU institutions and their watchdogs is severe.

- 7) Finally, OLAF repeats its rejection of access to a partial version of the report. OLAF argues that “to avoid the risk of distortion and incompleteness cannot be edited in such a way as to present an accurate account of what was investigated, how it was investigated and what was found.” These are arguments that could be applied to any OLAF document, which would rule out the possibility of partial access altogether. Moreover, these are not arguments that have any backing in Regulation 1049/2001. Quite the contrary, Article 4-6 states that “If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.” Considering that other EU institutions routinely provide partial access to documents, we do not see why OLAF would not be able to do so.

What do you consider that the EU institution or body has done wrong?

OLAF has wrongly rejected our request for (partial) access to the investigation report on the Dalli case. In contradiction with Regulation 1049/2001, OLAF has not sought “to ensure the widest possible access to documents” (Article 1). Instead it has developed a line of argument that would practically exempt OLAF from Regulation 1049/2001, not only regarding this investigation report, but also all other similar documents. OLAF's responses to our request are part of a wider problem: OLAF has failed to provide adequate transparency around the

3 For a summary of these allegations, see for example, MEP Inge Gräßle, Press Release, 21 March 2013, http://www.inge-graessle.eu/tl_files/default/usercontent/Pressemitteilungen/2013/130321_PM_OLAF%20GD%20has%20to%20go%20EN_COV2.pdf

Concerns from the supervisory committee of OLAF expressed in this letter from Johan Denolf, Chairman of the OLAF Supervisory Committee, to Mr Theurer, Chairman of the Committee on Budgetary Control, European Parliament, 11 December 2012, pg. 1 <http://www.neurope.eu/sites/default/files/letter1.jpg> and pg. 2 <http://www.neurope.eu/sites/default/files/letter2.jpg>

Allegations that OLAF encouraged Swedish Match to stick to its original story (regarding the two meetings that their intermediary, Maltese lawyer Gayle Kimberly, had said she had with Mr. Dalli) in its engagement with the press and European Parliament, despite now knowing that only one meeting had taken place, stem from an interview between MEP Jose Bove and two Swedish Match representatives Johann Gabriellsson and Cecilia Kindstrand-Isaksson, 20 March 2013 (recorded in accordance with UN WHO Framework Convention on Tobacco Control Article 5.3 and implementing guidelines, regarding transparency over meetings with tobacco lobbyists), <https://soundcloud.com/maltatoday/swedish-match-meeting-jos-bov> culminating in calls from the Greens for a Special Committee to look into these issues, <http://www.greens-efa.eu/transparency-and-lobbying-9498.html>

Dalli case. This has contributed to great public concern about the case and arguably harmed the public trust in the EU institutions, including OLAF.

What, in your view, should the institution or body do to put things right?

OLAF should release “the investigation report into the matter concerning Mr. John Dalli”, in its entirety or alternatively, partial access should be granted. While it is obvious that OLAF needs to reconcile transparency requirements and requirements linked to the potential confidentiality of case documents, OLAF has thus far failed to strike the right balance. OLAF should adopt a far more generous approach to implementing Regulation 1049/2001, seeking “to ensure the widest possible access to documents” while taking the necessary precautions to be able to undertake investigations.

Furthermore, in order to allay suspicions about the conduct of OLAF in the Dalli investigation, or bring any potential misconduct to light, regarding procedural issues or infringement of rights, the OLAF supervisory committee's report on OLAF's handling of the Dalli case should be made publicly available. The European Parliament has previously demanded access to this report, but currently only the Presidents of the EP groups have access to it.⁴ CEO submitted an access to documents request for this report on 22 February [see http://www.asktheeu.org/en/request/supervisory_committee_opinion_on], and as it has been severely delayed, and still an ongoing matter, we appreciate that it cannot come under the scope of this complaint.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes, we submitted a confirmatory application, to which OLAF's Director General G. Kessler responded on 31 January 2013. Mr. Kessler referred to the possible means of redress available against his decision, including filing a complaint with the European Ombudsman.

4 *Inge Gräßle: OLAF Director General Kessler has to go*, 21 March 2013, http://www.inge-graessle.eu/tl_files/default/usercontent/Pressemitteilungen/2013/130321_PM_OLAF%20GD%20has%20to%20go%20EN_COV2.pdf