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Subject: Your request for access to documents under Regulation 1049/2001

Dear Mr Hoedeman,

I refer to your requests for access, under Regulation (EC) 1049/2001, to Opinion 2/2012 of the Supervisory Committee (SC) of OLAF on OLAF's investigation concerning, *inter alia*, Mr J. Dalli.

Your request for access to Opinion 2/2012 of 22 February 2013

In your e-mail dated **22 February 2013**, you requested the access to the "*Opinion produced by the OLAF Supervisory Committee on the case concerning Mr Dalli*".

By letter of **27 March 2013** from the SC, you were informed that, at that time, the SC's Opinion could not be publically disclosed. The SC assessed it to determine whether it could be disclosed to the public or whether the exceptions established in Article 4 of Regulation 1049/2011 apply and concluded that the applicable law did not allow for any disclosure at that time.

It was noted in particular that the Opinion 2/2012 was covered by three exceptions to the public access principle:

1) the exception set forth in the second indent of Article 4(2) of Regulation (EC) 1049/2001 (**protection of court proceedings** which could be undermined by the disclosure of the documents) and **2)** the exception set forth in the third indent of Article 4(2) of Regulation (EC) 1049/2001 (**protection of inspections and investigations**), since the Opinion was based on and referred directly to the content of files of a case which was subject to a judicial procedure. It was considered in particular that, although OLAF investigation was closed, information contained in the relevant documents was sent to the competent national authorities to provide them with material which may be used in their investigations and therefore to grant public access to those documents could compromise the effective use of that material by the national authorities



concerned and undermine the mutual trust between national authorities and the EU institutions, necessary for efficient cooperation in on-going and future investigations.

3) the exception of Article 4(1)(b) of Regulation (EC) 1049/2001 (**protection of privacy and integrity of individuals**) since the Opinion 2/2012 contains personal data which would allow identification of persons involved, in different capacities, in an OLAF investigation and its disclosure would have thus undermined the privacy and the integrity of those individuals, as protected by Regulation (EC) No 45/2001 of the European Parliament and of the Council¹ which specifically applies to the processing of personal data by the EU institutions.

Your request for access to Opinion 2/2012 of 17 April 2014

On **17 April 2014** you sent to the SC a new request for public access to its Opinion No 2/2012, in which you referred to the European Ombudsman above recommendation.²

By e-mail of **28 April 2014**, you were informed that your request will "*be discussed by the Supervisory Committee of OLAF in its next plenary meeting on 6-7 May*".

During its plenary meeting of **6-7 May 2014**, being aware of the existence of three judicial (possibly still on-going) proceedings, the SC discussed the possibility of disclosing its Opinion in the light of two other recommendations from the European Ombudsman addressed to OLAF³:

- "*when OLAF refuses access to documents because of on-going national proceedings (...) it should provide reasoning that allows (...) to understand why the release of the documents would specifically and effectively undermine the on-going national proceedings*".

- "*OLAF should seek information and views from the national authorities before refusing access to documents because their disclosure would undermine on-going national proceedings*".

During this meeting, the SC decided to ask, in accordance with the European Ombudsman's recommendations, the relevant judicial authorities whether, in their opinion, there still exist any reasons justifying the confidentiality of the SC Opinion 2/2012. You were informed of this decision by e-mail of **8 May 2014**.

On **16 May 2014**, the SC contacted the three judicial authorities concerned and asked them "*whether the disclosure of its Opinion No 2/2012 could adversely affect [their] judicial proceedings, if still on-going*". The SC informed these authorities that, given that the time limits for

¹ OJ L 8, 12.1.2001, p. 1.

² You requested access to the "*Opinion produced by the OLAF Supervisory Committee on the case concerning Mr Dalli ("Opinion 2/2012")*" and refer to "*the draft recommendation of the European Ombudsman in the inquiry into complaint 257/2013/OV against the European Commission, in which the Ombudsman recommends the release of documents related to the Dalli case*" of 7 April 2014.

³ Decision of the European Ombudsman closing her inquiry into complaint 598/2013/(LP)OV against the European Anti-Fraud Office, 16 December 2013.



its reply to your request imposed by the relevant legislation are very short, it expected receiving the necessary information no later than by 1 July. The SC also informed them that, if by that date, the SC was not informed of any reasons to continue withholding its Opinion, the SC will disclose it.

The SC received replies from all the judicial authorities. The first respondent judicial authority indicated to the SC, by letter of **2 June 2014**, that "*the Court makes no objection to the communication of Opinion No 2/20 12 to Corporate Europe Observatory, which has requested it*". The second respondent judicial authority indicated, by e-mail of **30 June 2014**, that it "*sees no objection to the disclosure or the publication of the Opinion n° 2/2012*" of the SC. The third respondent judicial authority informed, by letter of **1 July 2014**, that it was not "*in a position to approve or to oppose the disclosure of SC Opinion No 2/2012*".

During its plenary meeting of **2 July 2014**, the SC discussed your request in the light of the responses received from the above mentioned authorities. The SC noted that none of the judicial authorities indicated that there might be any reasons because of which the disclosure of Opinion 2/2012 could adversely affect any judicial proceedings.

As a consequence, after having followed the European Ombudsman recommendation to "*seek information and views from the national authorities before refusing access to documents because their disclosure would undermine on-going national proceedings*" and since these authorities did not provide it with any reason "*that allows (...) to understand why the release of the documents would specifically and effectively undermine the on-going national proceedings*", the SC concluded that it had no reasons to believe that the disclosure of its Opinion 2/2012 could adversely affect the on-going proceedings or inspections and investigations. It seemed therefore for the SC that the exception set forth in in the second indent of Article 4(2) of Regulation (EC) 1049/2001 (**protection of court proceedings**) and the exception set forth in the third indent of Article 4(2) of Regulation (EC) 1049/2001 (**protection of inspections and investigations**) do not longer apply (according to Article 4(7) of Regulation (EC) 1049/2001).

Personal data protection

In the letter presented to the SC in its plenary meeting of 2 July 2014, the Director-General of OLAF expressed his concerns that the possible disclosure of SC Opinion 2/2012 may infringe the interests of some data subjects whose personal data might be included in the Opinion. He quoted the statement which he received from the Data Protection Officer of OLAF.

The Supervisory Committee has carefully examined all the personal data which can be identified in its Opinion, in view of the exception of Article 4(1)(b) of Regulation (EC) 1049/2001 (protection of privacy and integrity of individuals) and in view of the relevant legislation (Regulation (EC) No 45/2001) and case law on the personal data protection.



The SC has come to the conclusion all those personal data have been already legally disclosed and they exist in the public domain. Furthermore, having studied the relevant case law, the SC notes that its Opinion does not contain any personal data which could “undermine private life and integrity of the persons”⁴.

Overriding public interest

The SC has considered the existence of an overriding public interest in the disclosure of its Opinion.

In the last months, the SC has been requested by members of EU Institutions, by the civil society, by the persons concerned in the investigation invoking the right of defence and finally by the Director General of OLAF to disclose the SC’s knowledge of the OLAF investigation in question to counter fraudulent, inaccurate or erroneous statements present in the public domain and concerning this investigation.

The SC confirms that, in the public domain, various persons and parties have made different claims on the OLAF investigation which are not supported by the findings of the SC. The findings of the SC are in the Opinion.

Until 1 July 2014, the SC was considering the principle of transparency as outweighed by the principle of protection of judicial proceedings. At the moment, however, when the three relevant judicial authorities confirmed that they did not indicate any reason why the disclosure might jeopardise their judicial proceedings, the SC has decided that, without prejudice to any previous considerations in this letter, there exists also an overriding public interest to disclose its opinion, which includes the public interest in the defence of OLAF independence, in the principle of openness and access to information balanced with the right to private life as well as in the proper administration of justice and the SC’s obligation to ensure that procedural guarantees are respected in OLAF investigations.

Therefore, the SC has decided unanimously to grant public access to the text of its Opinion 2/2012.

Annexes

The SC has, however, decided that it cannot grant public access to annexes I and II of the Opinion, because they contain a list of documents in the OLAF case file (annex I) and quotes from the

⁴ Cf. Bavarian Lager case



documents in the case file (annex II). Therefore the SC does not consider itself competent to decide on disclosing texts originating from OLAF and therefore the SC asks you to refer this part of your request to OLAF. On its side, the SC has no objections to the disclosure of those two annexes.

Confirmatory application

If you would like this initial decision to be reviewed, you may, pursuant to Article 8 of Regulation (EC) No 1049/2001, address an application to the Director General of OLAF at the address below, confirming your initial application, within 15 working days from receipt of this decision.

The Director General of OLAF will then inform you of the result of the review within 15 working days from the registration of your confirmatory application. There you will be informed also of further action you may take.

Your further correspondence should be sent to the following address:

Director General, OLAF
European Commission
Rue Joseph II, 30
B-1000 BRUSSELS

Your attention is drawn to the privacy statement below.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Johan Denolf". The signature is stylized with a large, sweeping horizontal stroke at the bottom and a vertical stroke extending downwards from the right side.

Johan DENOLF

Chairman of the OLAF Supervisory Committee



Privacy statement

In accordance with Regulation (EC) 45/2001, OLAF takes special care to ensure that all relevant data protection requirements are met in conducting investigations. Information on Data Protection in OLAF is available at www.ec.europa.eu/dgs/olaf.

Pursuant to Articles 11 and 12 of Regulation (EC) 45/2001 *on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data*, please be informed that your personal data are stored in OLAF's electronic and paper files concerning this matter for the purposes of carrying out OLAF's investigative activity. The categories of your personal data being processed are identification data, professional data, and case involvement data. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. Your data will be stored for a maximum of 20 years.

You have the right to access those data and to correct and complete them. On request and within three months from the receipt of your request, you may obtain information concerning your personal data which we have processed. Any such request should be addressed to the Controller (OLAF-FMB-data-protection@ec.europa.eu). You may lodge a complaint concerning the processing of your personal data with the European Data Protection Supervisor (edps@edps.europa.eu) at any time.