

1. The Director General of OLAF (Mr. Giovanni Kessler) has received on the 25/5/2012 at 20:15h a letter from the Secretary General of the European Commission, which claimed that she has received written allegations on the 21/5/2012 of a firm (Swedish Match) about the Commissioner (Dalli). In less than 24 hours the pre-assessment has been concluded and a formal investigation procedure had been opened.
2. The Legal Service, called in by President of the Commission, Mr Barroso, recommended that OLAF shall deal with the case and the President himself asked for a prioritized handling of the case.
3. In the decision to open an OLAF investigation into the case the European Commission (EC) has been specified as information source, albeit the original source was Swedish Match.
4. The responsible "Investigation and Review Unit" in OLAF concluded its assessment procedure concerning the made allegations in less than 24 hours, argued for the opening of an investigation procedure and recommended the commissioning of a specific investigation team.
5. DG-OLAF (Kessler) took the opening decision ("Internal" investigation) on the 25/5/2012, which did not explicitly hint to the internal character of the investigation, but referred to Art. 4 of the regulation 1073/1999.
6. Before, OLAF had solely checked the existence of persons and firms which had been named in the allegation letter of Swedish Match. Except for this, no hints have been found to further checks or to the collection of information with regard to the credibility of the allegations, so that here Article 5(4) of the "OLAF Instructions to Staff on Investigative Procedures" (ISIP) has not been complied with.
7. The approach of the "Investigation Selection and Review Unit" could not have led to an adequate assessment of the factual and legal circumstances, alone for time reasons, so that the independence of the OLAF especially vis-à-vis the Commission was not honored, an instance which is of special significance, since the Commission was an information source.
8. SG has been informed by DG-OLAF about his intention not to inform Dalli about the opened investigative procedure against him.
9. DG-OLAF delegated the investigation in the Dalli case to a special investigation team, without participation of the responsible Head of Unit of the Directorate A.
10. DG-OLAF has been involved personally and directly in several steps during the investigation, among these interviews with witnesses, on the spot checks and hearings of persons concerned. Therewith, he violated the principle of impartiality and enter into a conflict of interest, in which an objective assessment of OLAF's measures was not possible anymore.
11. DG-OLAF did not distinguish in an objective and coherent manner, between internal and external investigations, which, in the light of the fact that OLAF had to extent the scope of the investigation within five days twice and because the application of different legal frameworks, must have had an especially harmful effect. Especially since regulation 1073/1999 does not foresee the extension of the investigations and establishes a clear distinction between internal and external investigations.
12. Although, in the "OLAF Instructions to Staff on Investigative Procedures" (ISIP) the possibility of an extension of investigations has been introduced, the "Investigative Selection and Review Unit", however, is required to conduct a prior legality check, before DG-OLAF takes the respective decision.
13. DG-OLAF has not made recognizable whether he has issued or taken into account a legality check and, if so, which one. Although, this would have been required to legally judge the appropriateness of the extension of the investigation in regard to subject of the investigation.
14. DG-OLAF has taken another decision to extent the investigations regarding to article 3 of regulation 1073/1999 to conduct an on-the-spot check and to interview a person concerned on the basis and in the framework of a alleged "external" investigation and referred thereby to fraudulent behaviour detrimental to the financial interest of the EU, supposedly based on

private recording of a communication by telephone (telephone conversation), albeit DG-OLAF was advised by the “Investigation Selection and Review Unit” that the need for an extension is doubtful, since the ongoing investigation was already based on article 3 and 4 of the regulation 1073/1999, however, the extension was acceptable due to the ostensibly better protection of the fundamental rights.

15. DG-OLAF took the second decision to extent the investigation, though no information at all was available that the firms and companies were related to EU funds and even though he was told about it before taking his decision and that insofar only limited evidence were available.
16. The decision of the DG-OLAF referred to above was not founded on the assessment of the accurateness and reliability of the witnesses’ statements and on the accurate assessment of information in OLAF about a company which was not a recipient of EU funds.
17. DG-OLAF did not make sure that against the background of the possibility to extent investigations provided by the “OLAF Instructions to Staff on Investigative Procedures” (ISIP), the (nevertheless) necessary assessment of the existence of ample causes for suspicion was conducted. An instance that is all the more severe, since the powers of OLAF differ in internal and external investigations, thus a confusion about the legal nature of the ongoing investigations can occur and the accuracy of the OLAF investigation can be damaged.
18. As far as further legality checks with regard to the taken measures have been conducted at all, DG-OLAF did not make sure that they have been conducted within a very tight framework – on the day of the application – so that the complexity of the application could not been assessed by means of a thorough legal analyses.
19. DG-OLAF did not create clarities about his adherence to the provisions for the investigation of the real estate of an “other” economic operator, which, for the protection of the civil liberty rights and for the prevention of an illegitimate involvement, are relatively strict and in the first place, whether irregularities detrimental to the financial interest of the EU on the part of a clearly determined economic operator can be assumed; instead DG-OLAF justified wrongly, in spite of deficient evidence, the execution of a searching, albeit a sufficient foundation for the application of regulation 2185/1996 was missing (extent of a fraud and the volume of the damage done)
20. DG-OLAF did not prohibit, that his staff illegally interviewed a person concerned in the framework of an external investigation on government premises on Malta after an on-the-spot check, while the questions concerned mainly facts, which belong in the framework of an internal investigation, for this purpose, however, the relevant legal foundation (Art. 4 regulation 1073/1999) was not referred to, and albeit the interview of a person concerned has not at been foreseen at all in the framework of an external investigation in article 3 regulation 1073/1999.
21. DG-OLAF requested form the Maltese authorities the transmission of itemized telephone bills or respectively a list of incoming and outgoing telephone calls as well as the holders or users of other telephone numbers, data that has been used for the investigation without prior identification of the legal basis and when indicated examination of the “Investigation Selection and Review Unit”.
22. As far as DG-OLAF in his above mentioned request relied upon article 4 (2) regulation 1073/1999 he “overlooked” ostensibly that the content of this provision („to have access to any information held by the institutions, bodies, offices and agencies by means of inspecting their accounts, by taking copies and obtaining extracts from any document or the contents of any data medium held by them”) by no means allows and justifies the request for transmission of telecommunication data records;
23. With the collection, storage and usage of the wrongly acquired data, DG-OLAF impaired as a public authority, following the standards set by the case law of the European Court on Human Rights, in an unduly manner important fundamental rights and breached therewith

article 8 of the European Convention for Human Rights and article 7 of the Charter of Fundamental Rights of the European Union as well as numerous data protection provisions (regulation 45/2001)

24. DG-OLAF did not make sure that the data concerning persons not related to the investigations as part of the case file have been used and stored in compliance with article 8 of the Charter of Fundamental Rights of the European Union and the relevant provision of regulation 45/2001 on the protection of individuals with regard to the processing of personal data, inter alia by not informing the person not related to the investigations about the storage and usage of personal data, especially the telecommunication data record, which had been included in the case file.
25. DG-OLAF tolerated that the OLAF official leading the investigations prepared a telephone conversation of a witness, which has been led and recorded in his presence in an official room provided by OLAF, whose content, however, has not been included in form of a transcription in the files.
26. DG-OLAF missed to include information in the case file, that an involved investigator has been a seconded national investigator, who had other powers compared to other OLAF staff and investigators and therefore could have been exposed to an conflict of interest.
27. DG-OLAF did not ensure that a person concerned has been advised about his/her rights, who had vainly requested the delivery of a copy of the made allegations.
28. Against the background of the decision of the DG-OLAF about the closure of the investigations on the 15/10/2012 (duration of the investigations: 4 months and 3 weeks), OLAF has not succeeded to inform at least one person clearly and in a comprehensible way about all the facts concerning him/her, before formulating the recommendations.
29. DG-OLAF has drawn three different conclusions with regard to this one person, in the invitation to the interview of this person he only informed him/her about allegations which concerned only the first two conclusions.
30. DG-OLAF did not prohibit that the mentioned person had been interviewed in detail about the first two allegations, however, explicitly no specific questions had been asked on the third allegation.
31. DG-OLAF did not guarantee that the person concerned could make a statement on the third allegation at all by denying or making explanations to the facts.
32. DG-OLAF failed to inform the person concerned about all facts concerning him/her in a clear and exact manner and violated therewith the right to be heard.
33. DG-OLAF granted the authors of the opinion of the ISRU only on the 12/10/2012 access to the final report and the recommendation to the case file. This was also the day of the creation of the contributions and the signature of the head of ISRU has taken place.
34. DG-OLAF decided not to include the recommendations in the final report, but to list them in a separate letter to the President of the EC Mr Barroso and to the Maltese authorities.
35. DG-OLAF made sure that the final report of the OLAF was transmitted around noon of 19/10/2012 to the Attorney General of Malta and prevented therewith that the Supervisory Committee (SupCom) conflicting with existing agreements was not able to carry out its obligation for the delivery of an opinion within the 5 days before the transmission.
36. DG-OLAF abstained from requesting (or offering) the reduction of the 5-day-period, even though the SupCom would have been prepared for an examination in a shorter period of time.
37. DG-OLAF failed to provide the SupCom with sufficient meaningful documents which would have been necessary for the completion of the Supervisory Committee's task.
38. While the chair of the SupCom requested on the 17/10/2012 in writing unlimited access to the files regarding the Dalli case, the Secretariat of the SupCom was informed by an advisor of the DG-OLAF about his intention to sent the case file around noon of the 19/10/2012 to the Maltese judiciary authorities.
39. DG-OLAF granted access to the files only on the evening of the 18/10/12, however, not

according to the conditions which had been requested on the 17/10/2012 by the chair of the SupCom.

40. SupCom has come to the conclusion that DG-OLAF was not authorized to decide on the restrictions under which the access to the files should take place and on which persons from secretariat of the SupCom should (be allowed to) deal with the case, particularly, since the urgency and sensitivity of the case, makes the collaboration of several staff of the SupCom Secretariat undeniable.
41. Also the instruction about the legal situation on the late morning of the 19/10/2012 with the advisor of the DG-OLAF did not restrain DG-OLAF himself from transmitting the final report at around 13h00 to the competent authorities on Malta and having the Secretariat of the Supervisory Committee to be informed only towards 19h00 of the same day by his advisor that the access to the case file will now be granted under the conditions which had been requested on the 17/10/2012 in writing, while the correspondent authorization has only been received by the SupCom on the 22/10/2012