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Analysis of the failings of the OLAF investigation

Committee on Budgetary Control

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United in diversity

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I - Overview of the failings of Mr Kessler and/or OLAF staff

- ‘Assessment’, for incrimination purposes, in less than 24 hours, of the basis for the accusation of attempted bribery of former Commissioner Dalli;
- Incorrect legal basis for giving notification of the opening of the investigation;
- Obvious intentional mistake in notifying the correct addressee of the opening of the investigation in that notification was sent to the Secretary-General of the Commission and notification of the President of the Commission was refused;
- Direct involvement of the Director-General in a number of tasks relating to the investigation (interviews; membership of the ‘special team’);
- Loss of impartiality and independence on the part of the OLAF Director-General;
- Broadening the scope of the investigation twice, in five days, in the absence of a legal basis and a proper assessment; in that connection, an obvious lack of strong corroborating evidence, i.e. a lack of sufficiently serious suspicions in support of broadening the scope of the investigation under way;
- Lack of solid evidence in support of a suspected irregularity detrimental to the European Union budget;
- No ex ante or ex post checks at all on the legality of OLAF’s actions;
- Merging of the internal and external investigations without any legal basis for doing so;
- No legal basis or clear grounds for obtaining telephone call records;
- Request to the Maltese authorities for various documents without any basis for this in law;
- Violation of fundamental rights to privacy, respect for correspondence and the right of defence;
- Violation of Regulation No. 45/2001 by failing to give notification that the OLAF investigators had collected personal data relating to persons not connected with no bearing on either the internal or the external investigation;
- Blatant breach of Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights in that, without any specified legal basis, a private telephone conversation was recorded;
- Conflict of interests on the part of the OLAF Director-General and investigators (Director-General lunching with an incriminating witness while being involved in the investigation himself; Ms Schembri, a member of the OLAF Supervisory Committee, taking part in investigation activities, seconded national expert, etc.);

- No notification given to the persons concerned / violation of right of defence;
- Impersonation - in complete ignorance of the right of defence - in order to trick the persons concerned into providing information;
- Violation of Regulation No 1073/1999 by failing to forward the final investigation report to the Supervisory Committee within five working days before it was forwarded to the Maltese judicial authorities;
- Ignorance and violation of Maltese, Portuguese and Belgian national laws;
- Public defamation of Commissioner Dalli at Mr Kessler’s press conference (17 October 2012);
- Breach of professional secrecy by Mr Kessler by referring to, and commenting to the media on, a case subject to investigative confidentiality and, under Article 339 of the TFEU, to professional secrecy;
- Violation of the right to good administration, i.e. an individual's right to have his or her affairs handled impartially, fairly and within a reasonable time, a reasonable time being different from an abnormally short period; the investigation, opened within 24 hours and conducted in four months, in the light of the case’s complexity, is being called into question by the Supervisory Committee, however;
- An investigation conducted, on the face of it, solely with a view to bringing charges and on no proper grounds.

II - Legal framework

A - European law

– Primary legislation

Article 1 of the Charter of Fundamental Rights of the European Union:

‘Human dignity is inviolable. It must be respected and protected.’

Article 7 of the Charter of Fundamental Rights of the European Union:

‘Everyone has the right to respect for his or her private and family life, home and communications.’

Article 8 of the Charter of Fundamental Rights of the European Union:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.’

Article 41 of the Charter of Fundamental Rights of the European Union:

‘1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. ...’

Article 8 of the European Convention for the Protection of Human Rights:

‘Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Article 339 of the Treaty on the Functioning of the European Union:

‘The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy,’

– **Secondary legislation**

Failure to observe Regulation No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

Failure to observe Regulation No 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.

Article 12 of the Staff Regulations of Officials of the European Union:

‘An official shall refrain from any action or behaviour which might reflect adversely upon his position.’

Article 17 of the Staff Regulations of Officials of the European Union:

1. An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public.
2. An official shall continue to be bound by this obligation after leaving the service.’

Article 22 of the Staff Regulations of Officials of the European Union:

‘An official may be required to make good, in whole or in part, any damage suffered by the Union as a result of serious misconduct on his part in the course of or in connection with the performance of his duties.

A reasoned decision shall be given by the appointing authority in accordance with the procedure laid down in regard to disciplinary matters.

The Court of Justice of the European Union shall have unlimited jurisdiction in disputes arising under this provision.’

Article 22a of the Staff Regulations of Officials of the European Union:

1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Union, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.’

Failure to observe the ethical rules in force at the Commission (its code of ethics), in particular as regards conflicts of interests.

Failure to observe the ethical rules for individuals authorised to conduct investigations (see investigations manual for OLAF staff).

B - Belgian, Portuguese and Maltese national law - Legal analysis of the alleged failings

Attempted suborning of witnesses:

This is the criminal offence of obtaining - during a judicial or other investigation - a declaration, attestation or false statement by exerting pressure, by making threats, by committing assault, by carrying out deceitful acts or by exerting authority. Even if suborning is unsuccessful, the offence has been committed. What is involved in this instance is the false

statement as to the existence of the second meeting. At OLAF's request, that statement was maintained. This also covers the call made to a person concerned, in the presence and at the request of OLAF investigators, in order to obtain an attestation to substantiate an accusation at the close of their investigation. According to the OLAF report, that ploy was unsuccessful.

Persons questioned - bribery and attempt to exert influence:

The ingredients are: the existence of evidence of wrongdoing (the fact of having asked, in the interests of the investigation, that a false statement be maintained), the existence of a specific objective (to back up the conclusions in the OLAF investigation report), the making of offers or promises (OLAF's undertaking not to report the testimony as false) and, lastly, the existence of fraudulent intent (deliberately lying to the Maltese judicial authorities, to the Commission and to the European Parliament).

Recording of a private telephone conversation:

This amounts to illegal telephone interception. Telephone interception is strictly regulated in many countries in order to safeguard the right to privacy; that is the case in all developed democracies. Accordingly, telephone interception needs to be authorised by a court; approval is given only where criminal activity cannot be detected in less intrusive ways. To enable interception to proceed, the law often requires an offence to be sufficiently serious. Apart from the fact that OLAF is neither a court nor a police authority, however, it is quite obvious that OLAF was given no authorisation to operate in this way.

Impersonation:

This means interference by any person with no authority to do so in the exercise of a public office by performing an act reserved for the holder of that office - a criminal offence with various distinguishing features. The telephone call by an OLAF staff member pretending to be a Spanish civil servant, in order to obtain information by deceiving the person called, is a case in point. The offence was committed in that the OLAF staff member acted without the necessary authority (conferred, in this instance, by the Spanish State), claimed to discharge a public office (i.e. that of a civil servant) and performed an act reserved to the holder of that office. The definition of the offence requires guilty intent. It lies in the fact that the perpetrator (the investigator) acted in bad faith. That person knew that he or she had no capacity to take on the office concerned and carry out the actions which he or she carried out.

Abuse of authority:

This offence was committed in that the Director-General of OLAF and its staff members involved, in all of whom public authority is vested, operating in their official capacity, took action intended to frustrate the application of national laws. Such action included not only obtaining various documents (telephone records in particular) without any legal basis to do so, and the interviews, searches and on-the-spot checks conducted outside OLAF's legal remit and without national authorities' approval, but also the illegal phone tapping and impersonation (an investigator pretending to be a Spanish civil servant).

Breach of investigative confidentiality:

This offence was committed in that the conclusions of the OLAF report were referred to and commented on at a press conference in Brussels. Mr Kessler, having himself taken part in the investigation, was all the more obliged to maintain confidentiality. The fact is that, as an investigator, he had access to information which, by its very nature, was confidential, and he therefore contributed to the investigation by playing an active role in it. He should therefore have refrained from making any comment. And what are we to make of his occasionally mocking tone of voice?

Public defamation:

This offence was committed in that references were made to allegations included in the OLAF report - a supposedly confidential document - which were harmful to Mr Dalli's reputation and good name, as can be seen by simply looking again at the press conference held by Mr Kessler on 17 October 2012 and reading his statements to the press. It should be pointed out that Mr Kessler took part in the investigation himself and did not simply keep to his supervisory role.