

*José Manuel Barroso*  
*President of the European Commission*

Brussels, 29 OCT. 2014

**Subject: Complaint by Mr Olivier HOEDEMANN,  
ref. 852/2014/LP**

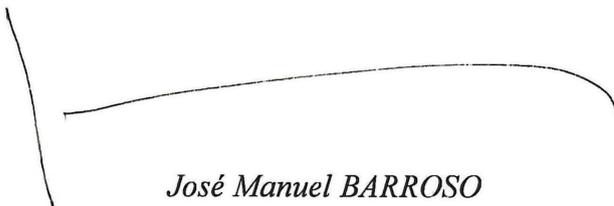
*Dear Ms O'Reilly,*

*Thank you for the letter of 10 October 2014 regarding the above-mentioned case.*

*I am pleased to enclose the comments of the Commission on this complaint.*

*Naturally, the Commission remains at your disposal for any further information you may require.*

*Yours sincerely,*

A handwritten signature in black ink, consisting of a vertical line on the left and a long, sweeping horizontal line that curves upwards at the end.

*José Manuel BARROSO*

*Enclosures*

*Ms Emily O'REILLY*  
*European Ombudsman*  
*1, avenue du Président Robert Schuman*  
*B.P. 403*  
*F-67001 STRASBOURG Cedex*

**Comments of the Commission on a request for further information from the European Ombudsman**

**- Complaint by Mr Olivier HOEDEMANN, Corporate Europe Observatory, ref. 852/2014/LP**

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**I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY**

The European Union acceded, on 30 June 2005, to the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC).

Article 5(3) of the FCTC reads as follows: "*In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.*"

Subsequently, the conference of the parties in decision FCTC/COP3(7) adopted "guidelines" in order to assist Parties in meeting their obligation under the provisions of the FCTC, including Article 5(3) of the FCTC.

Regarding Article 5(3) of the FCTC, these guidelines contain the following "guiding principles":

*"Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests. The tobacco industry produces and promotes a product that has been proven scientifically to be addictive, to cause disease and death and to give rise to a variety of social ills, including increased poverty. Therefore, Parties should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the greatest extent possible.*

*Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent. Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.*

*Principle 3: Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent. The tobacco industry should be required to provide Parties with information for effective implementation of these guidelines.*

*Principle 4: Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses. Any preferential treatment of the tobacco industry would be in conflict with tobacco control policy."*

On the basis of these principles, the guidelines contain the following "recommendations":

*"The following important activities are recommended for addressing tobacco industry interference in public health policies:*

*(1) Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties' tobacco control policies.*

*(2) Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.*

*(3) Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.*

*(4) Avoid conflicts of interest for government officials and employees.*

*(5) Require that information provided by the tobacco industry be transparent and accurate.*

*(6) Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility".*

*(7) Do not give preferential treatment to the tobacco industry.*

*(8) Treat State-owned tobacco industry in the same way as any other tobacco industry."*

The guidelines for the implementation of Article 5(3) of the FCTC are not legally binding.

## **II. THE COMPLAINT**

On 7 May 2014 the complainant submitted a complaint to the European Ombudsman.

The European Ombudsman decided to open an inquiry into the allegation and claim reproduced below:

*"Allegation:*

*1. The Commission failed properly to implement Article 5.(3) of the WHO Framework Convention on Tobacco Control (the "WHO Convention) and the accompanying guidelines.*

*Claims:*

*The Commission should:*

*a) undertake a thorough assessment of how to implement the WHO Convention rules across*

*all of its departments;*

*b) publish online lists of all meetings with tobacco industry representatives and minutes of such meetings;*

*c) implement a code of conduct on relation with the tobacco industry amending where necessary the relevant provisions of the Code of Conduct for Commissioners and the Staff Regulations;*

*d) ensure registration and disclosure of the identity and activities of tobacco industry lobbyists via the EU's Transparency Register."*

On 30 September 2014 the Commission transmitted its comments on the complainant's arguments (hereafter "the Commission comments of September 2014").

On 10 October 2014 the European Ombudsman followed up on the Commission opinion with a request for a supplementary opinion on a number of issues where the European Ombudsman considered that the complainant's points had not been addressed. The European Ombudsman noted in particular that according to the complainant, a number of undisclosed meetings had taken place with representatives from the tobacco industry, and that the complainant had alleged that the Commission had failed properly to implement Article 5(3) of the Framework Convention on Tobacco Control.

### **III. THE COMMISSION'S COMMENTS TO THE COMPLAINANT'S ARGUMENTS**

The complainant has argued that the Framework Convention on Tobacco Control (FCTC) and the guidelines adopted by the conference of the Parties mean that the Commission should "publish online lists of all meetings with tobacco industry representatives and minutes of [...] meetings" with the tobacco industry.

The Commission does not share this interpretation. The Commission is fully committed to implementing the FCTC. However, neither the (legally binding) FCTC, nor the (legally non-binding) guidelines, stipulate that the EU institutions should act in the way suggested by the complainant. Moreover, the guidelines clearly state that "[w]ithout prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement these guidelines to the extent possible in accordance with their national law".

In the light of these rules the Commission considers, as explained in the Commission comments of September 2014 that its ethical framework, its practical implementation and enforcement, as well as its rules on access to documents and transparency, constitute the framework within which the implementation of the FCTC and its guidelines must be seen and together ensure that the FCTC and its guidelines are respected in full.

The European Ombudsman has raised in particular the issue of meetings held with representatives of the tobacco industry which the complainant has characterised as "undisclosed". But the fact that the Commission has not set out these meetings in the manner

preferred by the complainant does not make these meetings "undisclosed". On the contrary, the Commission has been fully transparent in responding to questions as regards its meetings with representatives of the tobacco industry:

- The Commission has granted access on numerous occasions to documents in relation to such meetings, in accordance with the applicable EU legislation on access to documents (Regulation 1049/2001).
- The Commission has also answered all questions from the European Parliament concerning meetings in this area. These questions related in particular to meetings of the Secretariat-General and the Legal Service with the tobacco industry (annexed). All documents in relation to these meetings (in total nine) as well as all other meetings are subject to the aforementioned rules on access to documents: where minutes were drawn up, these have been provided. However, meetings with no concrete outcomes (for example meetings where the visitors simply present themselves, or meetings where policy positions are repeated which are already widely-known and well understood) do not necessarily require minutes. The questions from the European Parliament covered a wide variety of issues and the responses are therefore naturally broader in scope than those covered by the specific route of access to documents requests.

It appears that the meetings which have been described by the complainant as "undisclosed" are in fact those which have been disclosed, in the usual way, by the Commission through these two routes.

The other point raised was the fact that DG Health and Consumers (DG SANCO) has decided to go beyond the legal obligations of the FCTC and develop a more proactive system of transparency. As explained in the Commission comments of September 2014, the Commission does not consider it unusual that Directorates-General choose to put in place specific rules for areas for which they have a specific responsibility. As the Directorate-General responsible for the development and the implementation of the Tobacco Products Directive, DG SANCO has decided to develop specific guidelines for its staff working in the area of tobacco control. As set out in the Commission comments, this is in line with the FCTC guidelines, which refer to the desirability of supplementary measures "*when adapting ... to their specific circumstances*".

The complainant also claims that DG SANCO did not pro-actively publish online information on all meetings with the tobacco industry, referring to meetings held on 24 October 2008, 26 January 2010 and 3 March 2010. Again, the complainant has received the documents in relation to these meetings through the access to documents policy of the Commission. These meetings are not listed on DG SANCO's website since they took place before DG SANCO decided on a specific policy on this matter. This policy was not applied retroactively.

The Commission welcomes that the European Ombudsman has published its comments of September 2014 on the relevant website, and would be grateful if these supplementary comments could also be made available in the same way.

#### **IV. CONCLUSIONS**

The Commission continues to believe that it complies in full with its obligations under the FCTC and does not therefore consider that further steps are necessary.

#### **Annexes:**

Annex 1: Replies of 30 November 2012 to a questionnaire from the Committee on Budgetary Control of the European Parliament (ARES(2012)1426620) and follow-up letter by Secretary-General DAY to the Chair of that Committee of 13 March 2013 (ARES(2013)328462)

Annex 2: Replies of 13 June 2013 to a questionnaire from the Committee on Budgetary Control of the European Parliament (ARES(2013)2078522)



EUROPEAN  
COMMISSION



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# REPLIES TO THE QUESTIONNAIRE

from the Committee on Budgetary Control of the European Parliament

concerning the resignation of the former Commissioner John Dalli

## Questions to OLAF

1. Who in the Commission issued the instructions to OLAF to investigate Commissioner Dalli? How? Was there any verbal communication? If so, by whom, and when?

On 24 May 2012, the Secretary General wrote to the Director General of OLAF transmitting the complaint from Swedish Match and asking him to deal with the issue.

2. What were the concrete instructions to OLAF?

The OLAF Director General acted independently on the basis of Regulation (EC) No 1073/1999 (hereinafter "the OLAF Regulation") following information received by the Commission from an economic operator and forwarded to the Office by the Secretary General of the Commission. Under Article 5 of the OLAF Regulation, an investigation is opened by a decision of the OLAF Director General.

3. Was the investigation into Commissioner Dalli carried out in accordance with the rules of an external investigation (Article 3 of Regulation (EC) 1073/1999) or an internal investigation (Article 4 of Regulation (EC) 1073/1999)?

The investigation was carried out in accordance with Article 3 (External Investigations), and Article 4 (Internal Investigations) of the OLAF Regulation and Article 1 of the Interinstitutional Agreement of 25 May 1999 between the EP, the Council and the Commission concerning internal investigations by OLAF.

4. Was the investigation carried out by OLAF regarding the activities which led up to the resignation of Commissioner Dalli conducted as an internal or as an external investigation? How does the application of rules in each case apply when the person concerned is not Staff Member of the EU?

The investigation was carried out in accordance with Article 3 (External Investigations), and Article 4 (Internal Investigations) of the OLAF Regulation and Article 1 of the Interinstitutional Agreement of 25 May 1999 between the EP, the Council and the Commission concerning internal investigations by OLAF.

5. Was there a written communication from the firm of Swedish Match to the Commission? Was this forwarded to OLAF? What documents accompanied this written communication from the Swedish firm?

Swedish Match sent a letter to the Commission which was received on 21 May 2012. The letter was accompanied by a summary of the facts that the company felt obliged to bring to the attention of the Commission. The letter and the summary were transmitted to OLAF on 24 May by the Secretary General.

6. Who in OLAF received the instructions, and when? To whom were the instructions the sent?

OLAF did not receive any instructions. The Director General received information from the Secretary General on 24 May 2012. In line with OLAF's instructions to staff on investigative procedures, unit 01 (Investigation Selection and Review) was given the task to provide the Director General with an opinion on whether to open an investigation or not.

7. There were two telephone communications between OLAF and the government of Malta, one on October 15 at 10:01:26 hours and the other one on October 21 at 19:52:43, could OLAF explain who contacted who and what was the content of the conversation, are these conversations recorded ?

Without further information, OLAF is unable to identify these telephone calls.

### Assessment Phase

8. When did the assessment phase in the Dalli case begin?

24 May 2012.

9. When did the assessment phase end?

25 May 2012.

10. How long does an average assessment phase in OLAF take?

Since the entry into force of the Instructions to Staff on Investigative Procedures (ISIP) on 1 February 2012, the average duration of the selection process, during which the information received is assessed, is 1.7 months. Since 1 February 2012 there have been 48 cases in which the Selection and Review Unit (Unit 01) completed its selection in 1 or 2 days. In this case the assessment of the competency of OLAF, the sufficiency of the suspicions and the identification of the persons involved allowed for a rapid selection.

11. Why was the assessment phase in the Dalli case so short?

The duration of the selection process in this case was not so short.

12. What clear evidence did the Director-General see that justified the shortening of the assessment phase?

There is no requirement to have conclusive evidence at the stage of the opening of an investigation. There has been no shortening of the selection process. The Director General asked the Selection and Review Unit (Unit 01) to prioritise this selection.

13. Which other persons carried out the assessment?

The Director General gave the information received in this case to the Head of Unit of the Selection and Review Unit (Unit 01) for assessment.

### Opening of the procedure

14. On what date did OLAF open the investigation?

On 25 May 2012.

15. What were the allegations of criminal conduct underlying the OLAF investigation?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

16. In what ways has the opening of the investigation concerning the case of Commissioner Dalli led OLAF to pursue other traces or suspicions of misconduct and/or fraud? Has the investigation been focused on this single case, or has it been allowed an open approach?

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know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

17. When OLAF notified the relevant national authority of the interviews:

- a. what alleged violations of the Code of Conduct for Commissioners underlay the OLAF investigation?
- b. What alleged violations of the Tobacco Convention underlay the OLAF investigation?
- c. What other allegations underlay the OLAF investigation?

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18. Did OLAF obtain support from public prosecution services in the Member States for judicial decisions? If so, what support did it receive, and from where?

OLAF did not ask for the support of any public prosecutor. OLAF sent the final report to the Attorney General of Malta on 19 October 2012 for consideration of further investigation and/or prosecution as appropriate.

19. On what legal basis were itemised bills for private phone calls by the 'persons concerned' evaluated? How did OLAF obtain these data?

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20. Did OLAF have access to Mr Dalli's private e-banking account?

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## Interviews

A. *'Persons Concerned'*

21. On what dates were the 'persons concerned' interviewed by OLAF?

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know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

22. Who interviewed each of the ‘persons concerned’? Were all the ‘persons concerned’ interviewed by the same person? If not, what changes of interviewer took place? What was the reason for changing interviewers?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

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23. Who else was in the room during each interview? On what legal basis were these persons in the room?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

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24. How long did each interview last?

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25. Where were the interviews held? In what language?

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26. Were the interviews recorded on tape?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

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27. Was the length of each interview noted in a report of proceedings signed by all participants?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

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28. Has this report already been distributed to all participants? If not, why not?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

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29. Is it customary at OLAF to produce only incomplete transcripts and reports of these interviews, even when the questioning takes several hours?

As foreseen in the OLAF Instructions to Staff on Investigative Procedures (ISIP) (Art 16) the records of the interviews were reviewed, completed, approved and signed by all the parties present during the interviews

30. What were the criteria on which verbal passages were selected for transcription?

As foreseen in the OLAF Instructions to Staff on Investigative Procedures (ISIP) (Art 16) the records of the interviews were reviewed, completed, approved and signed by all the parties present during the interviews.

31. Was it the case for all interviews that only part of the interview was recorded in writing?

As foreseen in the OLAF Instructions to Staff on Investigative Procedures (ISIP) (Art 16) the records of the interviews were reviewed, completed, approved and signed by all the parties present during the interviews.

32. What instructions for selection are given by the Director-General for OLAF staff?

As foreseen in the OLAF Instructions to Staff on Investigative Procedures (ISIP) (Art 16) the records of the interviews were reviewed, completed, approved and signed by all the parties present during the interviews.

33. Were any additional or different instructions given for the interviews of the 'persons concerned'?

Instructions for carrying out the interviews are given by the Director General of OLAF in accordance with Article 16 of the OLAF Instructions to Staff on Investigative Procedures (ISIP).

#### *B. Witnesses*

34. Were there any other interviews other than those with the 'persons concerned', for example with witnesses?

- a. How many interviews of this nature were carried out? On what dates? Where? In what language?
- b. Who was / were the interviewer(s)? Who was / were the observer(s)? Why were they allowed to be present?
- c. Were the interviews recorded on tape?

- d. Was the total length of each interview recorded in a report of proceedings signed by all participants?
- e. Is it customary at OLAF to produce only incomplete transcripts and reports of these interviews, even when the questioning takes several hours?
- f. What are the criteria for selection?
- g. Was it the case for all interviews that only part of the interview was recorded in writing?
- h. What instructions for selection were given by the Director-General of OLAF?

The modalities of the interviews with the witnesses were those set out in Article 16 of ISIP with no further instructions given.

35. What mitigating details were pursued in the investigation?

According to Article 8.4 of the ISIP "all the information or evidence gathered in the course of investigation or coordination cases must be collected and recorded in due and proper form, including inculpatory and exculpatory evidence. All evidence collected should be relevant to the matter under investigation and collected for the purpose of the investigation."

This has happened in this case.

36. In the course of its investigations, did OLAF also consider the possibility that the Maltese consultant of Swedish Match might have been pursuing here own interests? If so, what form did this consideration take?

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37. At his press conference the Director-General replied as follows to a journalist's question about the possible entrapment of the Commissioner:

*'We obviously asked ourselves during this investigation, as we always do, whether the initial allegation was true and genuine, whether there was an agenda behind it but it was still true, or whether there was an agenda and it was false and defamatory – or in other words a trap. Of course we asked ourselves this, as we have done in a host of other cases. We also arrived at an answer, at the end of a very precise, detailed and exhaustive investigation, which is that it is quite clear to us that illicit requests were made for sums of money to change Commission decisions, and that the Commissioner's name was used illegally. That is an absolute certainty. There is also, as we have said before, serious, corroborating and unambiguous evidence that the Commissioner was at least in the know. Of this we are certain.'*

How was the possible existence of a plot investigated?

OLAF has conducted a thorough and independent investigation. During the investigation all the options were considered including the possibility that the persons at the origin of the allegations or the persons concerned were pursuing vested interests. All the evidence collected was analysed and taken into consideration to prove or disprove the existence or otherwise of the fraud or the wrongdoing.

38. How did OLAF respond to the evidence from 'persons concerned' of a trap or plot?

OLAF has conducted a thorough and independent investigation. During the investigation all the options were considered including the possibility that the persons at the origin of the allegations or the persons concerned were pursuing vested interests. All the evidence collected was analysed and taken into consideration to prove or disprove the existence or otherwise of the fraud or the wrongdoing.

39. Did any confiscations take place during the OLAF investigations? On what legal basis did this take place?

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illegal activity.

### Press conference

40. On 17 October 2012 the Director-General took part in a Commission press conference. At this point the report had not yet been forwarded to the Maltese authorities.

- a. Why did the Director-General take part in a press conference at this point?
- b. What were the Director-General's reasons for participating in a Commission press conference which concerned internal investigations?

In a press statement on 16 October, the European Commission stated that it had received a report from OLAF and that "after the President informed Mr Dalli about the report received from OLAF, Mr Dalli decided to resign in order to be able to defend his reputation and that of the Commission. Mr Dalli categorically rejects these findings."

OLAF expected that this statement, which made the public aware of the OLAF investigation, would raise questions on the matter. As OLAF conducts and communicates on its investigations independently, it was clear that OLAF would have to answer questions on its investigation, which was of interest to the public. OLAF decided that a press conference with the Director-General Mr Giovanni Kessler would be the most efficient way to reply to these questions.

OLAF's press conference was held in the press room of the Commission Berlaymont building for practical reasons after the Commission's daily midday briefing and was chaired by OLAF staff. OLAF's press conference started when the Commission one ended.

41. During the press conference on 17 October 2012 the Director-General was confronted with an e-mail from ESTOC to the Maltese entrepreneur, dated 16 March 2012, which had reached the public. In reply to the question about this e-mail the Director-General said:

'You know that the investigation started, we received the information from the Commission on the 24th of May, so any investigative activity of OLAF dates from that moment and forward. No prior activity from OLAF before that moment. I don't know, I mean, what this email refers to, so I cannot comment.'

- a. Was this e-mail part of the OLAF investigations?
- b. Why did the Director-General, shortly before the end of the investigations, know nothing of this e-mail?
- c. What does the Director-General mean when he says, specifically in reply to the question about the e-mail, that the investigations began on 24 May 2012 and that there was no prior activity by OLAF?
- d. Were contacts with Swedish Match confined solely to the collection of information?

- e. What form did investigations into Swedish Match take?
- f. What other avenues of investigation were followed up?

The Director General was not aware to which email the journalist was referring.

The contacts between OLAF and witnesses and informants were only of an investigative nature following the rules of Regulation 1073 and the provisions of the OLAF Instructions to Staff on Investigative Procedures (ISIP).

### Conclusion of the investigation

42. The date for the meeting between the President of the Commission and Commissioner Dalli was set on 11 October 2012. How was it clear at this point that the report would be completed on 15 October 2012?

Approximately 10 days before closing of the investigation, the Director General of OLAF informed the Commission that the Final Report was about to be sent to it.

43. When was the OLAF investigation into Commissioner Dalli concluded? Can OLAF confirm the date of 17 October 2012 cited before Parliament by Director-General Kessler?

The investigation was closed on 15 October 2012 as has been stated publicly by the Director General of OLAF.

44. When was the Commission report handed over? To whom?

The Final report was handed over to the Secretary General of the Commission on 15 October 2012.

45. Did OLAF receive from the Commission a mandate to forward the concluding report to the Maltese judiciary? From whom, and when?

OLAF did not receive any mandate from the Commission but acted on the basis of Articles 9 and 10 of the OLAF Regulation which gives the Office a clear mandate to forward the final report and all related documents and information to the national judicial authorities of the Member State concerned.

46. Was there a letter from OLAF to the President of the Commission concerning the forwarding of the report from which the Commission President read out? What is the wording of this letter?

OLAF sent the report to the President of the Commission accompanied by a letter. In that letter the President was informed, as already quoted by the OLAF Director General at the press conference, that the results of the investigation are referred to him for possible actions in light of the provisions laid down by the Code of Conduct for the Commissioners, C(2011) 2904.

47. When was the OLAF concluding report forwarded to the Maltese judiciary?

On 19 October 2012 at 13h00

48. When was it received there?

On 19 October 2012 at 13h00

49. What might be the classification of the alleged offence under Maltese law?

This is a matter to be decided by the Maltese authorities.

50. What concrete evidence does OLAF have that Health Commissioner John Dalli was aware of a possible interference by third parties in respect of a current legislative procedure?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

51. Why, and according to what procedures, was the OLAF report, on the basis of a complaint which did not concern Mr Dalli, forwarded to the President of the Commission?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions

of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

52. Which authority received the report? Does OLAF formulate, for the Maltese judiciary, the description of the criminal offence in question?

OLAF sent the report to the Institution concerned, the Supervisory Committee, and to the Maltese authorities. It is up to the Maltese judicial authorities to take decisions on the judicial follow up.

53. Does OLAF recommend the disciplinary measures to be taken by the institution? Does OLAF recommend any other measures?

OLAF sent the report to the President of the Commission. In the accompanying letter it is said that the results of the investigation are referred to him for possible actions in light of the provisions laid down by the Code of Conduct for the Commissioners, C(2011) 2904.

54. Before the investigation report was sent to the Maltese public prosecution service, was the Commissioner given a final chance to make a statement (i.e. after all stages of the investigation had been completed)?

The rules concerning the opportunity to comment are as follows:

Art 4 of the Commission Decision 1999/396 concerning the terms and conditions for internal investigations provides that "conclusions referring by name to a Member ... may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him."

Art 18 ISIP requires that " prior to drawing conclusions referring by name to a person concerned, the investigation unit must inform him of facts concerning him and invite him to comment on those facts"

The European Court of First Instance in the Franchet and Byk case (T 48/05 of 8 July 2008, paragraph 256) held that "Art 4 of Decision 1999/396 does not require OLAF to give access to the documents forming the subject-matter of an internal investigation or to those drawn up by OLAF itself, in particular ... because to do so would undermine its work" - ...

These rules were followed in this case. Mr Dalli was provided with all the facts concerning him and given the opportunity to comment on them. His comments on the facts concerning him were taken into account by OLAF in drawing its conclusions.

## **Involvement of a member of the Supervisory Committee as OLAF interlocutor**

55. At what point, on what date was the Maltese member of the Supervisory Committee informed about the investigations into Mr Dalli?

According to standard procedures, OLAF requests the assistance of the local AFCOS before carrying out investigation activities. The Head of the Maltese AFCOS (Anti-fraud Coordination Service), who happens to be a Member of the Supervisory Committee, was informed by OLAF about the investigation before carrying out its investigative acts in Malta.

56. How was the Maltese member informed (directly or via the secretariat of the Supervisory Committee)?

On the basis of the standard procedures she was informed directly so as to be able to provide the necessary assistance.

57. Why was the Maltese member informed? What was the purpose of doing so? Did she give her own assessment of the case?

She was not asked to give any assessment on the case.

58. What investigative steps in Malta were initiated by the Maltese AFCOS?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

59. Which other authorities in Malta were informed before the submission of the investigation report? On which specific investigations were they informed / questioned?

No other authorities in Malta were informed by OLAF before the final report was forwarded to the Attorney General.

60. Can the committee receive a list of the communications between Ms Schembri and the other Supervisory Committee members about OLAF activities linked to Malta from May 2012 onwards (or since the beginning of 2012?) with the indication of the subjects covered?

This question has been forwarded to the OLAF Supervisory Committee.

61. What is the response to allegations suggesting that Ms Schembri, Head of Internal Audit & Investigations in Malta, used her government office in Valletta, to discuss an investment proposal by the Far East Entertainment Group (FEE) PLC to acquire a significant stake in the Casinò di Venezia, of Birgu in Malta? Such information would suggest unapproved use of a public office for a private business matter, so has there been any failure to declare a possible financial or other interest in FEE's casino bid or breach of any code of ethics?

OLAF has no comments on these matters.

62. During the public meeting of the Committee on Budgetary Control of 6 November Ms Schembri, head of the Maltese Prime Minister's internal audit and investigations department mentioned 'possible insinuations about the mismanagement of structural funds by an economic operator in Malta'

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

63. Does the case having caused Mr Dalli's resignation also include a dimension of possible mismanagement of EU-funds?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form,

shall be protected by the relevant provisions.

2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

### **The OLAF Supervisory Committee**

64. How is Recital 18 of the current OLAF Regulation interpreted and implemented, particularly in relation to the OLAF Supervisory Committee?

Recital 18 of the OLAF Regulation refers to the principle of independence of the Office and states grounds in relation to the provision of Article 12(3) and the second subparagraph of Article 11(1) of that Regulation. The investigations are opened and carried out independently. The Supervisory Committee is informed of cases referred to Article 11(7) of the OLAF regulation in accordance with the arrangements between OLAF and the Supervisory Committee attached to the answers to this questionnaire and without prejudice to Article 8 of the OLAF Regulation and Regulation (EC) No 45/2001 concerning personal data protection.

65. What Data Protection rules apply to OLAF dossiers which are examined by the OLAF Supervisory Committee? How are the requirements of the relevant rules complied with and what limitations, if any, does this place on the material transmitted, both in general, and in the specific instance of the Dalli dossier?

OLAF is subject to the requirements of Regulation (EC) 45/2001 for all processing of personal data. All transmissions of personal data to the Supervisory Committee, including personal data in case files, must respect the requirements of Art. 7 of that regulation. This article provides that data may "only be transferred within or to other [EU] institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient" and "the Controller [here OLAF] shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data." Accordingly, OLAF must ensure that any access to its case files is in accordance with these provisions.

In 2007, the EDPS issued an opinion on this matter recommending the development of a methodology for granting the Supervisory Committee access in different stages to personal data in OLAF case files. The opinion stated that "access to the whole CMS [Case Management System, where all the records of the investigation are kept] should be avoided, in principle, as a first step. Only when the knowledge of the [non-personal] data . . . of the file proves to be insufficient to conduct the monitoring tasks. . . the SC can

have access to the whole file.

In September 2012, the SC accepted a proposal made by OLAF the previous June for working arrangements to implement the EDPS opinion. The arrangements provide a three step approach for SC access to OLAF case files.

In this case, the SC was granted access to the whole case file following receipt of its motivated request, in accordance with the above mentioned regulation, the EDPS opinion and the working arrangements.

66. Can the committee receive copies of agreement(s) between the Director General and the Supervisory Committee on working methods regarding dossiers covering investigations?

Please find attached a copy of the joint Working Arrangements.

67. When, in what form and by whom was the Supervisory Committee contacted in connection with the OLAF concluding report and on sending it to the national authorities?

On 16 October, the OLAF Director General informed the President of the Supervisory Committee of the investigation and of the possibility that the case would be transmitted to the judicial authorities in less than 5 working days. On 17 October 2012, the OLAF Director General transmitted a shortened and anonymised version of the Final Report to the Supervisory Committee. On 17 October the Supervisory Committee requested access to the case files. On 18 October full access to the entire case file was granted until the end of November.

68. Why did the OLAF Supervisory Committee not have access to the file before the finalisation of the report in order to assess whether the investigation procedures had in fact been complied with?

Art 11(7) of Regulation 1073 requires the Director General to inform the Supervisory Committee of cases requiring information to be forwarded to the judicial authorities. OLAF complied with this obligation by informing the President of the committee on 16 October of the investigation and the intention to transmit the case to the judicial authorities and by sending the shortened and anonymised Final Report on 17 October.

The working arrangements agreed between OLAF and the Supervisory Committee provide that access to the case files is to be granted on a motivated request of the committee. In this case on 17 October OLAF received a request from the committee for access to the case files and this was granted on 18 October.

69. What documents were submitted to the Supervisory Committee? Who received the documents?

The documents that were transmitted to the Supervisory Committee included a shortened and anonymised version of the Final Report and the opinion of the Selection and Review Unit (Unit 01) on the closure of the investigation. The secretariat of the Supervisory

Committee took delivery of the information transmitted. On 18 October full access to the entire OLAF case files was granted in accordance with the request made by the Supervisory Committee. Access to the case files was provided in a secure room.

70. Why was a second set of documents sent? When? To whom?

The documents were not sent again.

71. What were the Director-General's reasons, in the Dalli case, for forwarding only a blacked-out, redacted version of the OLAF report to the Supervisory Committee, while the Commission received an unamended version? Who ordered the blacking-out? Who carried it out?

The legal requirements with respect to transmissions to the Commission and to the Supervisory Committee are as follows. Regarding transmission of information to the Commission, Art 9(4) of Regulation 1073 provides that "reports drawn up following an internal investigation ... shall be sent to the institution... concerned". Regarding transmission of information to the Supervisory Committee, Art 11(7) of Regulation 1073 provides that "The Director shall inform the [Supervisory] committee of cases requiring information to be forwarded to the judicial authorities of a Member State". Furthermore, the European Court of First Instance in the Franchet and Byk case (T 48/05 of 8 July 2008, paragraph 164) held that the [Supervisory] committee must be informed before the information is sent to the national judicial authorities.

These different rules reflect the Commission's need for information in order to allow it to take measures or actions whereas the Supervisory Committee's need is for monitoring purposes only.

Furthermore, in 2007, the EDPS issued an opinion in which he recommended that "access [by the Supervisory Committee] to the whole CMS [OLAF Case Management System, where all the records of the investigation are kept] file should be avoided, in principle, as a first step. Only when the knowledge of the [non-personal data] ... of the file proves to be insufficient to conduct the monitoring tasks... the Supervisory Committee can have access to the whole file." The legal framework prevents OLAF from giving direct and unauthorised access to OLAF's case files as the Supervisory Committee requested.

On 12 September 2012 the Supervisory Committee agreed to joint working arrangements with OLAF which set out a structured 3-step approach for access to OLAF case files, in full compliance with the EDPS opinion and the legal requirements. Point 3 of the Working Arrangements provide that OLAF will send the Supervisory Committee "a shortened and anonymised version of the Final Report [and] the opinion of [Unit] 01 [Selection and Review Unit] on the closure of the investigation comprising a review of legality and procedural guarantees. This information is to be provided in general 5 working days before the transmission is made to the judicial authorities." Where

necessary, the Supervisory Committee can under Step 3 “submit a request to the Director General of OLAF for either partial or full access to the CMS.”

Following the Regulation, the opinion of the EDPS and the provisions of the Working Arrangements, a shortened and anonymised version of the Final Report was prepared by the investigator in charge and was sent to the Supervisory Committee on 17 October 2012.

72. According to the Rules of Procedure of the Supervisory Committee (Article 13 V) a rapporteur must be appointed, a report drawn up and the report adopted in plenary. When and how were these rules complied with?

OLAF is not involved in the procedures for appointing a rapporteur or the presentation of the report at a plenary given that these are internal procedures of the Supervisory Committee in which OLAF does not participate.

73. According to the German newspaper Frankfurter Allgemeine Zeitung from 09.11.12 the new chairman of the OLAF Supervisory Committee Johan Denolf has complained about the fact that the General Director of OLAF has withheld important information on the case of Mr. Dalli. Is that allegation true?

This allegation is unfounded. As stated in the answer to question 67 above, on 18 October the Supervisory Committee was granted full access to the entire case file until the end of November.

74. Also Mr. Christiaan Timmerman from the Supervisory Committee claimed that OLAF sends information in a censored manner to the Committee. It is therefore hindered to fulfil its tasks. Is the claim correct?

In accordance with the EDPS opinion and the Working Arrangements, OLAF sends shortened and anonymised versions of the Final Report to the Supervisory Committee as a first step. At the request of the Supervisory Committee, OLAF grants access to the case files in the terms requested by the committee. The Supervisory Committee has been given full access to every case requested.

75. Is the Supervisory Committee sufficiently staffed according to your opinion to fulfil its task?

Yes. From 1999 to 2006 the Supervisory Committee secretariat consisted of no more than 6 people. On 1 January of each of the following years the number of staff working in the secretariat was: 2006 - 5; 2007 - 4; 2008 - 7; 2009 - 7; 2010 - 5; 2011 - 7; 2012 - 6. This illustrates a certain stability in staffing which in the present circumstances is already a favourable situation.

76. According to the OLAF Supervisory Committee it is necessary to give the Committee free access to a case like this five days before sending the dossier to the national authorities. Do such rules exist? Are there common written rules at all how to handle the right of the Committee to get access to dossiers of OLAF? And what has been the practise in former cases?

As you can see from the attached Working Arrangements, the agreed procedure is that OLAF will send the Supervisory Committee “a shortened and anonymised version of the Final Report... This information is to be provided in general 5 working days before the transmission is made to the judicial authorities.” Where necessary, the Supervisory Committee can “submit a request to the Director General of OLAF for either partial or full access to the CMS.”

Since December 2008, the practice of the office has been in accordance with Mr Bruener's letter of 1 December 2008 which provides that in cases requiring information to be transmitted to judicial authorities, the Supervisory Committee would be informed 5 working days prior to the transmission. The letter further provides that in urgent cases it was not necessary to respect the 5 day requirement. Since that date, OLAF has always complied with this commitment.

77. OLAF has sent the dossier on Mr. Dalli on 19.10.12 to the authorities of Malta only four days after it informed Mr. Barroso about it. Why OLAF did this in such a hurry?

Generally OLAF transmits the Final Report to the judicial authorities 5 working days after information on the case has been provided to the Supervisory Committee. Due to the importance and sensitivity of this case, it was considered to be inappropriate to delay the transmission in this case for 5 working days.

78. Is that true that the resigning member of the Committee, Mr. Christiaan Timmerman, has been informed already on 16.10.2012 about the intention of OLAF to send the dossiers immediately to Malta?

Yes this is correct as stated in the answer to question 67.

79. Is it true that the OLAF Supervisory Committee had access to the documents of the case of Mr. Dalli for the first time on 22.10.2012?

As stated above, on 17 October the Supervisory Committee requested access to the case files. On 18 October full access to the case file was granted until the end of November. The Supervisory Committee did not avail of the access until 22 October 2012.

80. The internet service ‘Malta Today’ has cited a spokesman of OLAF that the dossier has been sent in such a short term because of ‘personal reasons’ of the case. Can you confirm this? And what kind of ‘personal reasons’ could be meant?

The OLAF spokesperson has not made such a statement.

## Staff changes at OLAF

81. The Head of the Cigarette Smuggling Department, an expert in this area, was replaced in Summer 2012, exchanging posts with another staff member .
- What was the reason for this exchange?
  - On the basis of what selection procedure was the post filled?
  - Where was the post advertised? How many applicants were there?
  - What qualifications does the new holder of this post have for the job?

On 16 June 2012, the Head of Unit moved to a post with responsibilities for coordinating policy issues related to cigarette and tobacco smuggling, including the WHO negotiations towards a Framework Convention on Tobacco Control. This move aims at making full use of his expertise in the policy area and is in line with the recent re-organisation of OLAF which, inter alia, aimed at more clearly separating OLAF's investigative and policy functions. The post of Head of Unit responsible for investigations relating to tobacco and counterfeit goods was published on an inter-institutional basis on 13 July 2012. The vacancy notice contained the criteria for selection. Since the procedure is ongoing, OLAF cannot comment on the details of the applications. Pending the appointment of a new permanent Head of the Unit, a senior investigator - with many years' experience as an investigator in this field and in this unit - is acting as Head of Unit.

## Cooperation with the tobacco industry

82. What official journeys have been made in connection with OLAF tasks on the topic of tobacco since 2010? How long did these journeys take? What was the reason for these journeys? Where were they to? Who participated? Who paid for the journeys?

In so far as OLAF has been able to establish in the time available, since 2010 OLAF has undertaken 12 missions relating directly to cooperation with the tobacco industry. The missions ranged from 1-3 days and were in most cases undertaken by staff below senior management level. The missions in question were necessary to implement the legally binding cooperation agreements which the EU and Member States have with tobacco manufacturers, for example to meet the requirement that OLAF be represented at the compliance training of the tobacco manufacturer at least once a year. All missions were paid for from the OLAF budget.

83. In the cooperation agreements with the tobacco industry, annual meetings of the tobacco concerns with OLAF and the Commission are scheduled. Where did these meetings take place? What topics were discussed? Who were the participants in these meetings? What positions did they hold? Who paid for the meetings?

The Agreements provide for annual meetings with all the parties (the European Commission, the Member States and the companies)(PMI Article 6, JTI Article 9.4, BAT Article 7.1, ITL Article 8.1). Each of the 4 agreements also provides for annual bilateral meetings between representatives the companies and the European Commission (PMI Article 6, JTI Article 9.3, BAT Article 6.1 and ITL Article 8.1).

The annual meetings with all the parties, including the Member States, are held on the Commission's premises, usually in the Berlaymont. The annual bilateral meetings take place on the companies' premises.

At the annual meetings with all of the parties, the parties discuss the companies' progress in tracking and tracing of their products and the functioning of the agreements. At the annual bilateral meetings, the companies' progress in tracking and tracing of their products, new technology and functioning of the agreements are discussed

Representatives of all the parties attend the annual meeting on the Commission's premises. Representatives of OLAF and representatives of the companies who are involved in the implementation of the agreements attend the bilateral meetings. Members of the US legal team of law firms retained by the Commission also attended some of the meetings.

The meeting with all the parties are organised by the Commission. Each party assumes its own costs of attending these meetings. The bilateral meetings are organised by the companies. Representatives of the European Commission who attend the bilateral meetings declare any costs that they incur on their mission statements.

84. In connection with the Hercule programme, OLAF organises seminars at which the tobacco industry appears with its firms' logos and the OLAF logo together.
- a. How does the Director-General explain this closeness of OLAF to the tobacco industry?
  - b. What events have been carried out in cooperation with the tobacco industry or related interest groups?
  - c. Who paid the costs of these events?

OLAF has not held any events in cooperation with the tobacco industry. OLAF fulfils its obligations under the tobacco Agreements. As a matter of policy, OLAF would not print the logos of tobacco manufacturers alongside its own logo on documents for which OLAF is responsible.

Part of the Hercule II Programme is used to provide grants to Member States to fund training, conferences, e-learning, round tables, staff exchanges, seminars, symposiums and working groups. Some of the events that have been funded by OLAF under this part of the Hercule II Programme relate to the illicit trade in tobacco products. Grant

recipients are required to put the OLAF and Hercule logos on materials relating to events funded by OLAF. OLAF is not aware of any event funded from the Hercule II Programme where tobacco industry logos have appeared together with OLAF's logo. However, OLAF cannot rule out the possibility that a Member State authority, which has received a Hercule II grant, may have used OLAF's logo and a tobacco company logo on the same conference material. Art II.5.2 of the Grant Agreements states:" Any communication or publication by the beneficiary, in any form and medium, shall indicate that sole responsibility lies with the author and that the Commission is not responsible for any use that may be made of the information contained therein."

The costs related to the participation of OLAF staff in the events are met from the OLAF budget. OLAF's independence is therefore not called into question.

85. How does OLAF ensure that its independence is not endangered by these close relations?

OLAF has not held any events in cooperation with the tobacco industry. OLAF fulfils its obligations under the tobacco Agreements. As a matter of policy, OLAF would not print the logos of tobacco manufacturers alongside its own logo on documents for which OLAF is responsible.

Part of the Hercule II Programme is used to provide grants to Member States to fund training, conferences, e-learning, round tables, staff exchanges, seminars, symposiums and working groups. Some of the events that have been funded by OLAF under this part of the Hercule II Programme relate to the illicit trade in tobacco products. Grant recipients are required to put the OLAF and Hercule logos on materials relating to events funded by OLAF. OLAF is not aware of any event funded from the Hercule II Programme where tobacco industry logos have appeared together with OLAF's logo. However, OLAF cannot rule out the possibility that a Member State authority, which has received a Hercule II grant, may have used OLAF's logo and a tobacco company logo on the same conference material. Art II.5.2 of the Grant Agreements states:" Any communication or publication by the beneficiary, in any form and medium, shall indicate that sole responsibility lies with the author and that the Commission is not responsible for any use that may be made of the information contained therein."

The costs related to the participation of OLAF staff in the events are met from the OLAF budget. OLAF's independence is therefore not called into question.

86. What contacts did OLAF have with Swedish Match?

OLAF only had contacts with Swedish Match of an investigative nature and only after the opening of the investigation.

## OLAF's positions on the draft Tobacco Directive

87. In what form was OLAF involved in the review of the Tobacco Directive?

The Commission Directorate General for Health and Consumers (DG SANCO) is the Commission service responsible for the revision of the Tobacco Directive. OLAF will be consulted on the Directive when the inter-service consultation is launched.

88. At a hearing of the OLAF Director-General before the Italian Parliament's investigation committee on 'Contraffazione e pirateria in campo commerciale' [Counterfeiting and piracy in the commercial field], the Director-General made the following comments on 'plain packaging':

*'... Our viewpoint – which is not a health viewpoint, as health is outside our remit – is that removing the brand name and packaging which make a packet unmistakable can facilitate the counterfeiting of tobacco products, even if they might all the same be counterfeited even when the brand name is there (the brand name, in fact, provides no guarantee in this respect). However, we have not yet adopted an official stance on this matter. We are still considering what to do.'*

- a. What is OLAF's position on this issue?
- b. What position did OLAF take up in the discussions on the Tobacco Directive?
- c. In his first sentence the Director-General takes up one position, but then immediately adds that OLAF has not yet taken a formal position. In view of this contradiction, whose view was the Director-General stating to the Italian Parliament in his first sentence quoted above, OLAF's or his own?

On 10 January 2012 the Director-General stated, in a meeting with a French delegation, that 'plain packaging' does not favour cigarette smuggling and counterfeiting, on the contrary; the Director-General stated that plain packaging could even have a positive effect in controlling 'cheap whites'. The French General Inspector of Social Affairs, a member of the French Parliament and a French MEP were part of the delegation. From OLAF the Head of the Cigarette Task Force was present.

- d. Whose position was the Director-General representing on this issue, OLAF's or his own?
- e. In view of the contradiction between the statement made in January 2012 and that made in June, how does the Director-General explain this change of mind?

The Director General of OLAF made clear twice in the hearing in the Italian Parliament that OLAF did not yet have a position on the Directive. The Director General of OLAF commented in answer to a question from a member of the Italian Parliament on plain packaging that there were two aspects at stake, namely reduction of consumption and avoiding counterfeiting. There is no contradiction in this position.

89. Was a letter written by OLAF to the President of the Commission concerning the forwarding of the report from which the Commission President read out? What is the wording of this letter?

This question is identical to question 46. Please see the reply to that question.

90. Was the Commission aware of the fact that a possible adoption of the directive might have as a consequence that 4 large tobacco companies might unilaterally end the agreements with the Commission and the Member-States under which they will pay into the budget a total of 2,3 billion over the years? If not, would he not be asking an opinion from the legal service and send Parliament a copy?

The Commission is not aware that a possible adoption of the Tobacco Directive might have as a consequence that the 4 tobacco manufacturers with which the EU and Member States have concluded legally binding Cooperation Agreements might unilaterally end these Agreements. The Agreements are concluded for a specified duration and can be terminated only in specific circumstances. A revision of the Tobacco Directive is not amongst those.

### **Swedish Match**

91. Who checked if the draft directive had been changed since the moment the first contacts were established between Swedish Match and the entrepreneur in Malta and what were the findings?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

92. At what moment in time and by who was the Commission informed of the fact that an official investigation involving the Commissioner had started by OLAF?

The Commission was informed on 25 May 2012 as soon as the investigation had started.

93. Did OLAF cooperate with ESTOC and /or Swedish Match in gathering more evidence after or on July 4.

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
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94. When and by whom was the commission informed that OLAF would not finalise its investigation before the summer holiday, who in the Commission asked for this information?

The Secretary General of the Commission asked the Director General of OLAF immediately before the summer break if the investigation would be closed during the summer. The Director General of OLAF replied that the investigation would not be closed before September.

95. As we can read from the press several persons mentioned were formerly employed by either the Commission or Council, what were their functions in the European Institutions and during with time frame were they employed under which type of contract?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

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of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

96. According to OLAF Swedish Match not only filed a 'complaint' but also provided evidence of a possible bribe including taped conversations, did OLAF check if these recorded conversations were made/obtained in a legal way being admitted as evidence in a possible court case in Malta or under Swedish and Belgium law?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
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97. Are there any conversations recorded after July 3 either by OLAF or ESTOC or Swedish Match which were used for the investigation?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
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98. In the press it is mentioned that the total sum involved was 60 million Euro did OLAF check if any plans were made how to transfer, received and 'launder' this 'illegal' money?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.

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#### **Other investigations against the Commissioner**

99. Can OLAF say, that this it without any doubt the first and only case where OLAF is investigating Commissioner Dalli for a suspected case of bribery?

This was the first and only investigation by OLAF concerning Mr DALLI.

100. If so, what proof or documentation can OLAF provide to support such a position?

This can be checked in the OLAF Case Management System (CMS).

101. Does OLAF feel it has been given sufficient time and financial resources to conduct a thorough report into this affair?

OLAF is not given a time frame nor human or financial resources for a specific investigation, but manages its own time and resources. OLAF applied its usual standards in this case.

#### **Other investigations by OLAF**

102. Which was the total amount of damages paid out by the Commission to persons who were accused of wrongdoing by OLAF who contested in Court the way OLAF handled their case, including OLAF's organized press coverage?

The research carried out indicates that the total amount of such damages represents 108.000 euros:

- 56.000 euros in case T-48/05, Franchet and Byk;
- 3.000 euros in case T-259/03, Nikolaou;
- 10.000 euros in case T-309/03, Camós Grau, and
- 39.000 euros in cases F-5/05 and F-7/05, Violetti e.a.

103. How many complaints were filed against OLAF since it replaced UCLAF by individuals, in how many of those cases was the complaint found justified?

Approximately 15 actions more or less directly related to measures adopted by OLAF have been introduced before the jurisdiction of the Union. In one third of the cases the actions were found entirely or partially justified and led to the (partial) annulment of Union acts and/or to the condemnation to pay damages. In all other cases the actions were rejected as inadmissible or unfounded.

104. Did meetings involving Commissioner Dalli comply with the spirit of the World Health Organization (WHO) Framework Convention on Tobacco Controls and in particular the Guidelines for implementation of Article 5.3 of that Convention?

The Final report of the investigation was sent to the Maltese Attorney General. The matter is now under judicial investigation. OLAF cannot reveal any information related to the content of the investigation.

Article 8 of Regulation 1073/1999 on confidentiality and data protection provides that:

1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.

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# QUESTIONS TO THE COMMISSION

## Questions to the Commission Secretariat

### The role of the President of the Commission

1. When (at which moment in the procedure) did Mr Barroso decide that Mr Dalli had to leave?

Mr Dalli resigned as a member of the Commission on 16 October having agreed with the President that his position had become politically untenable.

2. It is stated that Mr. Dalli did in no way financially benefit: What exactly did he do so wrong as to impel the Commission to encourage him to resign?

Please see the reply to question 1. Mr Dalli's resignation was a political decision without prejudice to the legal presumption of innocence.

3. Was the President of the Commission given legal advice on the basis of the report from OLAF before deciding that Mr. Dalli would be requested to resign? If yes, can we get a copy?

Please see the reply to question 1. Mr Dalli decided to resign during a meeting with the President of the Commission in which the President informed him of the final report on the OLAF investigation. No legal advice was given to the President on the basis of the report from OLAF.

4. Why was the decision of resignation of Mr. Dalli taken without granting him the right to legal advice?

As already stated in answers to questions 1 and 2, Mr Dalli agreed with the President that his position had become politically untenable and he decided to resign..

5. Did Barroso's cabinet make copies of the dossiers that were sent by the company Swedish Match (containing the allegations against Mr Dalli and certain proof like taped conversations) before the dossier was sent three days later to OLAF?

President Barroso and his Head of Cabinet received a copy of the letter sent by Swedish Match to the Secretary General. No tapes were received by the Commission.

6. For which urgent reasons Mr Dalli was not granted the time (the requested 24 hours) a) to be informed on the content of the report and the allegations against him and b) to reflect on his situation or to consult a legal advisor?

President Barroso agreed that Mr Dalli should have time to inform his family and staff of his resignation. He also informed Mr Dalli that he would inform the European Parliament and the Council of the resignation since he felt they should hear it from him and not from other sources. He also informed Mr Dalli that he would subsequently issue a press statement.

7. Did Mr Barroso ask for any clarifications before October 16th, on the question of whether OLAF had made any procedural errors during and/or after the inquiry on Dalli? If yes by whom? If not, why not?

There was no reason for the President to enquire about possible errors. OLAF conducts its investigations in full independence from the Commission and the Commission is not allowed to interfere in any way in the conduct of its investigations.

8. Can Mr Barroso guarantee the Committee of Budgetary control that neither he nor his cabinet ever discussed the content of this case with members of the Maltese government or high level civil servants in Malta, before October 16th?

Yes.

9. When did Mr Barroso or his assistants have formal contacts with the Maltese governments or any representatives of this government concerning the Dalli-case?

The President telephoned the Prime Minister of Malta on 16 October to inform him that Mr Dalli had resigned and to ask him to nominate a new Commissioner.

10. What are the precise problems or objections that Secretary-general Catherine Day and the legal service of the EC have with the text of the new Tobacco Directive as proposed by Mr Dalli? Why did the Secretary General propose to postpone the inter service consultation on this Directive?

The Secretariat General and the Legal Service proposed to postpone the inter-service consultation on the basis of doubts about the compatibility of the proposed actions with the proposed legal base as well as proportionality and subsidiarity concerns, also in the light of a revised opinion by the Impact Assessment Board.

11. When (at which exact moment) did Barroso's services express some reservation against the organisation of a press conference for announcing the resignation of Mr Dalli?

The Commission issued a press statement on the resignation on 16 October and organised a press briefing on 17 October.

### **Links to the tobacco industry**

12. What contacts were there between Swedish Match and the Commission Secretariat in the run-up to, and during, the work on reviewing the Tobacco Directive? Who were the contact persons at Swedish Match and at the Commission Secretariat? When did these contacts take place? What form did they take? What meetings took place? With whom?

Mr Nymand-Christensen (Secretariat-General) met former MEP Ms Riis-Jørgensen and Ms Kindstrand-Isaksson from Swedish Match on 16 March 2011 and on 6 March 2012.

Messrs Sleath and Ferrière (Secretariat-General) together with Mr Maunu (DG Health and Consumers) met Ms Kindstrand-Isaksson and Mr Gabrielsson from Swedish Match on 18 September 2012. The contact was made via an email of Ms Kindstrand on 29 August 2012 to Mr Sleath. A response was made on 13 September 2012 offering a half an hour meeting on 18 September.

Swedish Match sent a letter to the Secretary General on 12 October 2012 asking for a meeting. A response was provided on 22 October 2012 declining the request.

13. What contacts were there between other firms and/or associations and the Commission Secretariat in the run-up to, and during, the work on reviewing the Tobacco Directive? Who were the contact persons at these firms and/or associations and at the Commission Secretariat? When did these contacts take place? What form did they take? What meetings took place? With whom?

Ms Klingbeil and Mr Watson (Secretariat-General) met Messrs Lefranc and Doms (Philip Morris International) on 3 May 2010. Mr Watson met again with Mr Lefranc on 15 June 2010 and received a phone call from Mr Lefranc on 9 June 2010. There was an exchange of correspondence between Messrs Doms and Watson on 5 July 2010 (reply sent on 19 July). Mr Doms wrote again to Ms Klingbeil and Mr Watson on 27 October 2010; Mr Gremminger (successor to Mr Watson) replied on 17 November 2010.

On 10 June 2011, Mr. Ferrière (Secretariat General), at the request of the cabinet of the President, attended a meeting between the Mr Klaus and Philip Morris (Messrs Doms and Wenning)..

On 20 December 2011, Mr. Ferrière (Secretariat General), at the request of the cabinet of the President attended a meeting between Mr Klaus and the cigarette industry (Mr. Peter Wörmann Vorsitzender BdZ (Bundesverband der Zigarrenindustrie), Marcel Crijnen Geschäftsführer ECMA (europäischer Zigarrenverband); Bodo Mehrlein Geschäftsführer BdZ ( Bundesverband der Zigarrenindustrie).

Mr Bowles from British American Tobacco wrote on 11 January 2011 to Ms Klingbeil, who replied on 26 January.

On 27 March 2012, Mr. Ferrière (Secretariat General), at the request of the cabinet of the President attended a meeting between Mr Klaus and Ms Delfosse from ESTOC (European Smokeless Tobacco Council) and Mr Pappas lawyer working for ESTOC.

The Confederation of European Community Cigarette Manufacturers (CECCM) wrote on 1 June 2011 to Ms Klingbeil, who replied on 9 June.

Mr Doms (Philip Morris) sent an invitation to a presentation on 14 June (no specific addressees).

There was an exchange of emails on 7 and 11 July 2011 between Mr Doran from Bell-Pottinger Public Affairs and Mr Gremminger.

Mr Doms wrote again to Ms Klingbeil on 21 May 2012; she replied on 25 June.

Finally, Mr Hildingsson from the European Smokeless Tobacco Council (ESTOC) had an exchange of emails with Mr Gremminger on 18/19 June 2012.

Most correspondence consists of requests for meetings, which were declined as Ms Klingbeil wanted to safeguard the objectivity and the independence of the Impact Assessment Board, which she chairs.

For the record, please note that besides the contacts with the tobacco industry, the Commission also had contacts with organisations campaigning in favour of stricter tobacco control.

14. What contacts were there between Swedish Match and the Commission Legal Service in the run-up to, and during, the work on reviewing the Tobacco Directive? Who were the contact persons at Swedish Match and at the Legal Service? When did these contacts take place? What form did they take? What meetings took place? With whom?

There were no such contacts. Given its special mission, the Legal Service's customary outside contacts are not with industry representatives (companies or associations) on policy matters, but with legal experts (be they from other institutions, Member State authorities, academia or legal practice). These contacts are typically limited to issues of EU law.

15. What contacts were there between other firms and/or associations and the Commission Legal Service in the run-up to, and during, the work on reviewing the Tobacco Directive? Who were the contact persons at these firms and/or associations and at the Legal Service? When did these contacts take place? What form did they take? What meetings took place? With whom?

There were no such contacts. Given its special mission, the Legal Service's customary outside contacts are not with industry representatives (companies or associations) on policy matters, but with legal experts (be they from other institutions, Member State authorities, academia or legal practice). These contacts are typically limited to issues of EU law. In the latter context, and for the sake of completeness, two brief conversations took place between Legal Service officials and Mr Michel Petite (former Director-General of the Legal Service until 2007, and now an Avocat in Paris). The conversations were with Mr Patrick Hetsch in September 2011, and with Mr Marc Van Hoof in September 2012. Mr Petite mentioned that his law firm provided legal advice to a tobacco company (Philip Morris International) and set out his views on some legal issues of tobacco legislation. After having been informed about these conversations, Director-General Luis Romero asked to be personally updated by Mr Petite of his legal counsel activities in this area. That meeting took place on 14 November 2012.

16. At least one former Commission employee works for Swedish Match/ESTOC. What family relationships existed in Summer 2012 between staff of Commission Secretariat and Legal Service and employees of Swedish Match /ESTOC? Were these employees directly or indirectly involved in the work on the review of the Tobacco Directive? If so, in what way? Was the Commission aware of these family relationships? Could it have known about them? Were these employees directly or indirectly involved with handling the complaint by Swedish Match?

The Commission is not aware of any close links. The only person in the Secretariat General who was aware of the complaint from Swedish Match was the Secretary General. Likewise, the only person in the Legal Service who was aware of the complaint from Swedish Match was the Director General.

17. What contacts have existed, and exist now, with the manufacturers and distributors of nicotine replacement patches or other nicotine substitutes? With whom? When? Via whom? What conclusions did the Commission Secretariat and/or the Legal Service draw from these contacts?

Apart from the contacts listed above, the Secretariat General and/or the Legal Service had no contact with producers and distributors of nicotine patches or other nicotine substitutes.

18. What contacts have existed, and exist now, with the distributors of tobacco products? With whom? When? Via whom? What conclusions did the Commission Secretariat and/or the Legal Service draw from these contacts?

Apart from the contacts listed above, the Secretariat General and/or the Legal Service had no contact with distributors of tobacco products.

19. In the cooperation agreements with the tobacco industry, annual meetings of the tobacco companies with OLAF and the Commission are scheduled. Have representatives of the Commission Secretariat taken part in these meetings in the past five years? Where did these meetings take place? What topics were discussed? Who were the participants in these meetings? What positions did they hold? Who paid for the meetings?

The Secretariat General did not participate. Please refer to the answer given to question 83 addressed to OLAF.

### **Complaint by Swedish Match**

20. Swedish Match's complaint concerning demands for money in connection with the review of the Tobacco Directive were submitted to the Secretariat.
- To whom was the complaint addressed? What form did it take? When? Who received it there? What further steps did this person instigate?
  - Who else was involved with the handling of this complaint?
  - Who else could have known about the complaint?

The complaint was submitted by Swedish Match in writing to the Secretary General. It was received by courier on 21 May. The complaint was registered as a confidential document and the Secretary General informed the Head of the President's Cabinet on 21 May that it had been received. The complaint was shared with the Director General of the Legal Service. On 24 May it was referred to OLAF as provided for in Regulation 1073/1999 art 2 (OJ L 149 16.6.1999).

21. What are the expected benefits for the Swedish company, which produces chewing tobacco, by mentioning its product into a European Regulation? What kind of Regulation would be needed to make it possible for them to sell their chewing tobacco in the whole EU?

Products produced by Swedish Match are oral tobacco products (known as "snus") which are banned in the EU under Article 8 of the Directive 2001/37/EC (also known as "Tobacco Product Directive") except in Sweden which has a derogation under its Accession Treaty. Such a ban can only be lifted by an amendment to the Directive via the ordinary legislative procedure.

22. Does the Commission receive many complaints on Commissioners which it forwards to OLAF?

No, the Commission has not received any complaint against an individual Commissioner concerning allegations of fraud, corruption, or irregular conduct qualifying for transmission to OLAF.

23. Could the Commission provide a complete time table of decisions taken in the framework of the preparation of the tobacco directive from November 1 2011 till October 12 2012? Including when the directive was ready to be send out for the interservice consultation. What were the objections made by Mrs. Day and the legal service in July against an interservice consultation in August. Can we get a copy of this letter?

DG SANCO launched the process of the revision of the Tobacco Product Directive on 27 February 2009 with a note to other relevant services inviting them to participate to the Impact Assessment Steering Group.

The revision of the Directive was subsequently included in the Commission long-term planning of the Commission Work Programme for 2010 and 2011 and in the annual work programme for 2012.

November 2011: invitation by the Council to revise the Tobacco Products Directive

20th April 2012: first opinion of the Impact Assessment Board

30th May 2012: Eurobarometer survey (February 2012 results)

12th July 2012: favourable opinion with comments of the Impact Assessment Board.

Regarding the last part of the question, please refer to the answer given to question 25 below. In accordance with Regulation 1049/2001, the Commission cannot release a full copy of this letter as it has not yet adopted its proposal for the revision of the Tobacco Products Directive, and public disclosure would undermine the protection of legal advice and the Commission's decision-making process. Please note that such material as can be released was already sent to Mr Welle, Secretary General of the European Parliament on 26 November 2012.

### **The Tobacco Directive**

24. The Commission Secretariat (with or without the Commission Legal Service) has at least twice called for interservice consultation on the review of the Tobacco Directive to be postponed: on 25 July 2012 (ARES (2012)906255) and on 23 September 2012.
- a. When were other attempts made to postpone the review of the Tobacco Directive? To whom were the requests for postponement made?
  - b. What were the reasons and arguments used?

In addition to comments on substance (see the replies to questions 10 and 25), the Secretariat General invited DG SANCO not to launch the interservice consultation on the Tobacco Products Directive until after the October European Council. It is not unusual for the Commission to adjust the timing of presentation of proposals to take account of meetings of the European Council or Plenary Sessions of the European Parliament – this can mean acceleration or short postponements. It was agreed at the time between DG SANCO and the SG that the proposal would be tabled before the end of 2012 to respect the commitment given in the 2012 work programme.

25. On 25 July 2012 the Commission Secretary-General Catherine Day and Head of the Legal Service Luis Romero, in a note to the Director-General of SANCO, Mr Coggi, intervened to delay the proceedings and criticised the fact that ‘the general ban on smokeless tobacco products’ raises ‘serious concerns about the proportionality (absence of analysis of the possibility to impose less restrictive measures) and subsidiarity issues’.
- a. Why are the Commission Secretariat and Legal Service making this intervention in favour of snus at a point when the accusations of Swedish Match against the Commissioner must have been known to the Secretariat and the Legal Service?

The Secretariat General and the Legal Service did not intervene to lift the ban of oral tobacco which has been in place since the adoption of Directive 89/622/EEC (the predecessor of the current Tobacco Products Directive). DG SANCO considered the introduction of a ban with derogation of other smokeless tobacco products (which are

currently not banned in the EU) and which raised concerns in terms of legal basis and proportionality.

- b. Does the Commission agree that this intervention, at this time, show that the Secretariat and Legal Service did not consider the complaint by Swedish Match and the accusations of Swedish Match and the OLAF investigations particularly important?

The Commission does not agree.

- c. What was DG SANCO's reaction to this intervention? What action did the Directorate-General take to weaken the proposal for a directive as a result of the intervention by the Secretariat and the Legal Service?

DG SANCO agreed to postpone the inter-service consultation and share its draft proposal with the Legal Service and the Secretariat General to discuss the issues at stake.

- d. Why did the Secretariat and the Legal Service intervene in the ongoing procedure for review of the Tobacco Directive in favour of the tobacco industry and of snus?

Neither the Secretariat General nor the Legal Service intervened in favour of the tobacco industry.

- e. What further interventions took place to delay the review of the Tobacco Directive? By whom? What were the reasons?

Please see the reply to question 24.

- f. Does the Commission agree that the delay in tabling the draft directive brought about by the resignation of the Commissioner was exactly the result wished by the Secretariat and the Legal Service?

No, the only purpose of the Secretariat General and the Legal Service was to resolve issues related to the legal base as well as proportionality and subsidiarity, also in the light of comments received from the Impact Assessment Board.

26. In other communications the reason given for wishing for a delay was to enable the summit of Heads of State and Government, on 18 October 2012, to run 'smoothly'.

- a. Can the forced resignation of the Commissioner on 15 October also be interpreted as an 'emergency brake', ultimately seeking to achieve a delay in submitting the proposal?

No, it cannot. Please see the reply to question 1 concerning the resignation of Mr Dalli.

- b. What meetings took place between the Secretariat and/or the Legal Service and the tobacco lobby after the complaint was lodged?

Information on meetings between the Secretariat General, the Legal Service and the

tobacco industry are listed above in answers to questions 12 to 19.

c. What communications were there with Swedish Match after the complaint was made?

Please see the replies to questions 12, 14, 16, 18 and 19.

d. What representatives of Swedish Match were received at the Commission Secretariat after the complaint was made? When, and by whom?

Please see the replies to questions 12 and 16.

e. What representatives of Swedish Match were received at the Commission Legal Service after the complaint was made? When, and by whom?

Please see the replies to questions 14 and 16.

### **OLAF report**

27. The date for the meeting between the President of the Commission and Commissioner Dalli was set on 11 October 2012. How was it clear at this point that the report would be completed on 15 October 2012?

Please see reply to question 42 addressed to OLAF. A date for a meeting between the President and Mr Dalli was set for 16 October 2012. As the President informed the Parliament, he had already met with Mr Dalli on 25 July 2012 to discuss the ongoing investigation.

28. What is the Commission's view of the fact that only a blacked-out, redacted version of the OLAF report was sent to the Supervisory Committee, while the Commission received an unamended version?

The legal obligation to inform the Supervisory Committee is provided by Article 11(7) of Regulation 1073/99. According to this Article, the Committee shall be informed of cases requiring information to be forwarded to the judicial authorities of a Member State. As far as this case report is concerned, the Commission has been informed by OLAF that the Supervisory Committee first received a shortened and anonymised version of the final report on 17 October, and that following a request from the Committee a complete version of the report was promptly made available by OLAF on 18 October.

29. On what basis did the President of the Commission have access to the OLAF report?

According to Article 9(4) of Regulation 1073/99, the institution, body, office or agency concerned must receive the report drawn up following an internal investigation. It is

therefore a legal obligation for OLAF to send the final report to the Commission President, if it concerns a Commissioner.

30. What individuals within the Commission, not members of OLAF, have read the investigation report? When did they read it?

The report was read by the President, his Head of Cabinet, the Secretary General and the Director General of the Legal Service on 15 October 2012.

31. On what legal basis and in what capacity did the Head of the Commission President's Private Office read the report?

The role of the Head of Cabinet is to assist the President in all matters, including in particular the handling of sensitive or confidential files.

32. For what reasons did the Commission refer to the possibility of Mr Dalli's resigning?

Please see the reply to question 33.

33. What circumstances caused the resignation of Mr Dalli?

Please see reply to question 1.

34. Are violations of the Commissioners' Code of Conduct normally investigated by OLAF?

According to the Interinstitutional agreement of 25 May 1999 concerning internal investigations by OLAF, OLAF's investigations shall serve the purpose of: fighting fraud, corruption and any other illegal activity detrimental to the financial interests of the Union; and bringing to light serious situations relating to the discharge of professional duties which may constitute a failure to comply with the obligations of officials or other servants of the Communities liable to result in disciplinary or, in appropriate cases, criminal proceedings or a failure to comply with the analogous obligations of the members, managers or members of staff not subject to the Staff Regulations.

35. The original reporting on misconduct and bribery was made by an independent company. Can the Commission guarantee that there are no other examples, from the Tobacco Products Directive or relating to other legislative acts, of misconduct or suspected bribery involving Commissioner Dalli and/or the Maltese businessman engaged in this case?

Please see the reply to question 36.

36. Referring to the above question, can the Commission guarantee that there are no other examples of this behaviour, by Commissioner Dalli and/or the Maltese businessman, that were never reported?

The Commission is not aware of any further allegations of misconduct or suspected bribery involving Commissioner Dalli and/or the Maltese businessman concerned in this case. As for guaranteeing that no examples of such a kind of behaviour have remained

unknown, the Commission believes it unlikely but cannot prove a negative. The Commission is not aware of any examples of misconduct or irregularities involving either Commissioner Dalli or the Maltese businessman beyond what was covered by OLAF in its investigation report.

37. The Commission has stated that the incident connected to Dalli's resignation has not in any way affected the legislative process of, particularly, the Tobacco Products Directive. This is stated even though the incident led to such an extraordinary event as the resignation of a European Commissioner. Can the Commission prove that the process has not affected its work? Which report or internal investigation, if any, has shown this, and do the Commission intend to make such documents available to Parliament?

This assessment was given by OLAF at the press conference following the resignation of Mr Dalli. Please see the reply to question 91 addressed to OLAF.

From the Commission's perspective, it can be said that on the substance the legislative process has not been affected, and that the Commission intends to keep to its work programme.

38. It could be stated that the process has not been affected, since the potential bribes mentioned in this affair were never paid out, and that the purpose of these bribes (the legalisation of the Swedish oral tobacco product known as snus) were not achieved. However, inaction is not by itself a proof of a clean process. The fact that bribes originally were involved, but never paid out, could be viewed as that the legislative process was in fact affected. Would the Commission agree to the above view of bribes in the legislative process, or would it state that the offering, mentioning and/or involvement of bribes could never affect legislation, as long as no real, financial transaction is executed?

The Commission cannot answer hypothetical questions. However, after verification in this particular case, it is clear that it did not (see the replies to questions 23-25).

39. Regardless of the views of how this affair has affected the legislation, the process, in the eyes of the general public, is infected by suspicions of bribery, corruption and wrongdoings. What would this mean for the reputation of the Commission as an institution, and in what ways to the Commission intend to meet such a challenge to its reputation?

The Commission always strives to protect neutrality, objectivity and impartiality in its pursuit of the general interest. The Commission considers that this case, however regrettable, doesn't call into question the integrity and reputation of the Institution. The Institution has acted swiftly to deal appropriately with the situation by referring the complaint to OLAF.

40. Do the Commission consider it reasonable to push forward with the legislative proposal of the Tobacco Products Directive before the juridical procedure in Malta has been completed?

The Commission considers that the preparation of the proposal on the revision of the tobacco directive should continue and should be finalised without delay when the new Commissioner for Health and Consumers takes office. Dr Borg has stated in his hearing in the European Parliament that this will be one of his first priorities.

## Reaction

41. There are claims that the Commission, in light of these events, cancelled all subsequent meetings with representatives of the tobacco industry. Can the Commission confirm or refute these claims?

As far as the Commission is aware, no special meetings with the tobacco industry were planned and therefore no meeting has been cancelled.

42. There are also claims that the Commission intends to further strengthen the rules regarding the involvement of tobacco companies in the legislative process. Can the Commission confirm or refute these claims?

The Commission has no plan to review its rules related to the consultation of stakeholders in the tobacco industry in the policy-making process. These rules apply to all industry, including the tobacco industry and are compatible with the obligations laid down under the Framework Convention on Tobacco Control.

43. If the above rumours are confirmed, this is clearly an example of how this affair has affected the legislative process. Would the Commission, even then, stand by its statement that the process has not been affected?

The rumour is not correct. Please see the replies to questions 37, 41 and 42.

44. If one or both of the above claims are true, what risks do the Commission see to create a situation where individual companies, in the future, will be more unwilling to report cases involving bribery or questionable ethical standards?

Please see the reply to question 45.

45. If individual companies become more unwilling to report cases of corruption and/or misconduct, what do the Commission intend to do in order to strengthen incentives for individual companies to report such cases, since such reports serve an important function in creating checks and balances for exercise of political power?

The Commission would point out that private-sector informants have now become the principal source of the information which OLAF uses to launch investigations and that this case illustrates the seriousness with which the Commission and OLAF follow up the information which they receive. The Commission sees no need to provide additional incentives for companies.

46. Were documents relating to the review of the Tobacco Directive destroyed in DG SANCO following the resignation of John Dalli? Who ordered them to be destroyed? What documents were destroyed?

No instruction was ever given to destroy documents connected with the revision of the Tobacco Directive. The allegation is not true.

### **Sanctions**

47. If the subsequent legal investigation in Malta were to show that Commissioner Dalli in fact has been directly involved in bribery, would this entail any sanctions for the Commissioner from the Commission's part, such as intended or reduced pension?

Please see the reply to question 48.

48. If the subsequent legal investigation in Malta were to show that Commissioner Dalli in fact has been involved in ethical misconduct, would this entail any sanctions for the Commissioner from the Commission's part, such as intended or reduced pension?

Articles 245 and 247 of the TFEU taken together provide that it is for the Court of Justice to decide whether any Member of the Commission has been guilty of serious misconduct, and to decide on any sanction on a Member or former Member of the Commission.

### **Olaf supervisory committee**

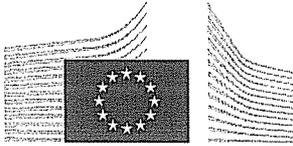
49. Have all rules been adhered to in respect of independence of the Members of the OLAF Supervisory Committee and any potential conflict of interests regarding the Commissioner Dalli case? It is the Budgetary Control Committee's understanding that Mrs. Rita Schembri, a member of the OLAF Supervisory Committee, has simultaneously been in charge of Governance and Internal Auditing in Prime Minister's Office in Malta, whilst heading Malta's Anti-Fraud Co-ordinating Service (AFCOS) which cooperates with OLAF. As such she was apparently aware of the OLAF investigation in Malta with regard to the Dalli case from the moment it started, or early summer. What scrutiny has taken place regarding these relationships and what conclusions have been reached? Does the Commission Secretary General now believe that some scrutiny of that Mrs Schembri's is now necessary and useful?

As regards the involvement of members of the OLAF Supervisory Committee, please see the replies given to question 55 and subsequent ones addressed to OLAF.

As regards whether the Commission believes that some scrutiny is necessary and useful, the Commission notes that Mrs Schembri immediately stepped back from this file as a member of the supervisory committee of OLAF, the Commission considers that any risk of a conflict of interest has been correctly dealt with.

50. What declarations of interest are submitted by OLAF Supervisory Committee Members after appointment and how frequently are updates required? Are these up to date and available publicly?

The members of the committee are appointed by common agreement between the Commission, Council and the European Parliament. The committee consists of five independent personalities possessing adequate qualifications required in their respective countries. Although no declaration of interest is foreseen by the Regulation (n° 1073/1999), it is worth noting that their curricula are obviously well known by the appointing authority. Since the nature of future OLAF operations by definition cannot be known, it is not useful to establish in advance a list of possibly conflicting interests.



EUROPEAN COMMISSION  
SECRETARIAT GENERAL

The Secretary General

Brussels,  
SG/B4/DCB/LCR/ARES(2013)

Mr Theurer  
Member of the European Parliament  
President of the Budgetary Control  
Committee  
Rue Wiertz 47  
B-1047 Brussels

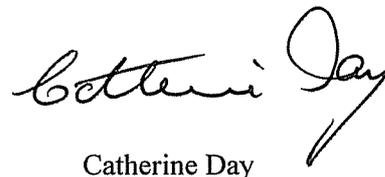
Dear Mr Theurer,

On 30 November 2012, I sent you the Commission's replies to the 154 questions from the Committee on Budgetary Control concerning the resignation of former Commissioner John Dalli [ARES(2012)1426620]. Every effort was made to ensure that the replies were accurate and complete. However, in preparing a reply to a recent request for access to documents we have discovered that one element was inadvertently omitted from that reply. It concerns the reply given to the question 13 concerning contacts between the Secretariat General of the Commission and firms and/or associations in the framework of the work on reviewing the Tobacco Directive. I have only recently learned that Mr Ferrière from the Secretariat General of the Commission also participated in a meeting organised on 18 November 2011, between the President's Cabinet and the Confederation of European Community Cigarette Manufacturers (CECCM), its three member companies and Philip Morris. Having learned of this information I felt it necessary to inform you about it.

I also take this opportunity to inform you that on 26 February 2013 a Brussels' based firm in the field of national and international transport communicated to me that on 4 February 2010 it had transmitted to the Commission information concerning possible irregularities allegedly committed by a former Commissioner, and that the answer to question 22 of the abovementioned questionnaire could be erroneous.

This information was sent to the Commission in the context of a competition case, currently sub judice, and transmitted to DG COMP for the competition aspects and to OLAF as regards the accusations of irregularities which were related to facts allegedly committed by a former Member of the Commission during the period 2004-2009. I have already replied to this company that the answer to question 22 of the questionnaire correctly covered the current Commission and was not related to former Commissioners.

Yours sincerely,



Catherine Day

Copy: Mr Kessler, Director General of OLAF  
Mr K. Welle Secretary General, European Parliament

13.06.2013

## **OLAF ENQUIRIES**

### **QUESTIONS TO THE OLAF SUPERVISORY COMMITTEE**

#### *Transmission of the OLAF SC opinion 2/2012 to the institutions*

1. What are the differences between the Supervisory Committee's Opinion 2/2012 on case OF/2012/0617 that the Director General received from the Supervisory Committee and the report 2/2012 that was sent to the Institutions?

2. Has the Supervisory Committee received additional documents from the Director General of OLAF concerning the report 2/2012 sent to the Institutions?

3. Could the Supervisory Committee provide the Budgetary Control Committee with all correspondence between the Director General and its Secretary concerning the opinion 2/2012?

#### *OLAF investigations*

4. During the investigations, in the night from the 03/07/2012, 22h00, till 04/07/2012, 3h30, OLAF searched the offices of John Dalli and his personal assistant Frank Zammit and carried out IT forensics on their personal computers. OLAF has also requested telephone traffic data for the professional fixed and mobile telephones of John Dalli and Frank Zammit.
  - a) In the view of the Supervisory Committee, how did OLAF obey to the principles such as proportionality and selectivity in its request for access to information held by the European institutions, bodies, offices and agencies and to their premises?

- b) In the view of the Supervisory Committee, has the search been in line with the principal of proportionality?
- c) In the view of the Supervisory Committee, has the request to obtain an image of the entire e-mail traffic and messages been sufficiently selective and proportionate?
- d) In the view of the Supervisory Committee, has the request to obtain telephone traffic data been sufficiently selective and proportionate?
- e) Have the hand written documents and the “rental contract” that have been copied and added to the case file been related to the purpose of the investigation?
- f) How have the rights and procedural guarantees of Frank Zammit, who was neither a witness nor a person concerned, been followed and guaranteed?

5. Has the Supervisory had access to all files related to the case file OF/2012/0617?

6. How many tranches of documents did the Supervisory Committee receive? When?

7. Can the Supervisory Committee state with absolute certainty that all documents relevant to the case OF/2012/0617 and collected/created during the investigations had been made available and accessible to the Committee?

8. Has the Supervisory Committee asked itself the question whether all documents regarding this case had been registered in the CMS (Case Management System)? If so, what was the impact of this reflection on the legality of the case? In how many other cases has the Supervisory Committee observed the same shortcomings regarding the registration of documentation in the CMS?

9. The Budgetary Control Committee would like to reiterate its request to the OLAF Supervisory as in question 60. (ARES(2012)146620 - 30/11/2012) that the Budgetary Control Committee would like to receive a list of the communications between Ms Schembri and the other Supervisory Committee members about OLAF activities linked to Malta from May 2012 onwards (or since the beginning of OLAF) with the indication of the subjects covered.

10. In paragraph 58 of its report to the institutions the Supervisory Committee points out that "access to the file was granted by the Director General of OLAF in the evening of 18.10.2012 but in conditions that did not conform to those requested by the SC."

- a) Under which conditions had the OLAF Supervisory Committee asked for access to the all documents and the case file of OLAF case OF/2012/0617?
- b) Under which conditions did the OLAF Director General grant access on October 18, 2012?

11. Did the SC have access to the written advice by the EC Legal Service? To whom was it addressed, to the Secretary General of the Commission or the President of the Commission?

## **QUESTIONS TO OLAF**

### *General Questions*

12. Why is the OLAF Director General not mentioned as investigator on page 3 of the OLAF investigation report?

The OLAF Director-General was not one of the investigators in charge.

13. Any instructions from the Commission? In the reply to question no. 6 (ARES(2012)146620 - 30/11/2012) the OLAF Director General responds that OLAF has not received any instructions from the Commission. According to the Supervisory Committee report, a letter of the Secretary General accompanying the note of Swedish Match conveyed the Commissions Presidents request to deal with this issue as a matter of priority.
- a) Why did OLAF in its answer to the EP concerning question no. 6 not mention the letter from the Secretary General and the instruction to deal with the case "as a matter of priority"?
  - b) The letter of the Secretary General to OLAF mentions a note of the Legal Service of the Commission with the recommendations concerning the complaint of Swedish Match. Is this note from the Legal Service part of the case file?
  - c) What is the date of this note of the Legal Service?
  - d) When was this note received and registered by OLAF?
  - e) When was the letter of the Secretary General registered to the file by OLAF?
  - f) How, when and in which manner did OLAF inform the European Commission, especially the President and the Secretary General, in the course of this investigation about the state of play?
  - g) Was this question discussed in the clearinghouse meeting between the OLAF and the Commission?
  - h) Have there been any other requests, instructions, demands or alike been expressed vis-à-vis OLAF by Commission services or third parties orally or in written concerning the investigations into the Dalli case?
  - i) What was the content of these requests, instructions, demands or statements alike?
  - j) What was the apparently existing „work assignment“ of the Secretary General to the Director General of OLAF?

a) OLAF would refer to the replies given to the questionnaire of November 2012, in particular the reply to question 6 which is exhaustive. The indication contained in the note dated 24 May 2012 from the Secretary General of the Commission asking to deal with the "*issue as a matter of priority*" could in no way be considered as an instruction. OLAF autonomously decided to deal urgently with the matter because of its sensitivity linked to the particular position of the person called into question,

the seriousness of the allegations and their potentially heavy impact on the reputation of both the Commissioner and the EU.

- b)-c)-d) OLAF did not receive any such note.
- e) The Director-General of OLAF received the note on the evening of 24 May. It was registered on 25 May 2012.
- f) OLAF informed the European Commission about the opening of the investigation by note to the Secretary General dated 25 May 2012.
- g)-i) No.
- j) No such "working assignment" of the Commission Secretary General to the Director-General of OLAF exists.

14. In the opinion 2/2012 of the OLAF Supervisory Committee regarding case OF/2012/0617 it is written:

*„It must be noted that the ,Opinion for a Decision [of the Director General of OLAF] to open a case’ indicates the ,EU Commission’ as the source of information. However, the Commission was not the genuine source of the information (...)" – 2.1 (8)*

- a) Why has OLAF not specified Swedish Match/Michèl Petite as the source of the information, but instead the Commission respectively the Secretary General which, after all, has let elapse 3 days before the information was transmitted to OLAF?
- b) Did OLAF try to find out what happened during these three days?
- c) Has the Commission added further documents or material to the information received from Swedish Match? If yes, which documents or materials are these?
- d) Why has the Secretary General as source of the information been above all doubts and why has further evaluation been spared?
- e) Why has OLAF exempted the source of the information from the case file?
- f) Why was the note received by the Commission from Swedish Match not included in the documents sent to the Maltese Judicial Authorities?
- g) In how far can OLAF guarantee its independence when the Director General blindly trusts all information received from the Commission?

a) and e) OLAF considers the body / institution/ person which transmitted the incoming information to be the source. In the opinion concerning the opening of the investigation the origin of the information was clearly explained.

b) No

c) The Commission attached two transmission notes.

- d) There was no reason for OLAF to question the fact that the Commission transmitted the information received from Swedish Match.
- f) The note received by the Commission from Swedish Match was sent to the Maltese Judicial Authorities.
- g) Any new information received by OLAF is thoroughly assessed by ISRU in accordance with the selection procedures set out in the ISIP.

15. Why did OLAF not transmit the case to the Maltese authorities, at the very beginning of the case as a third person not belonging to the EU institutions was concerned and no EU funds were at stake?

The allegations fell under the remit of competence of OLAF (Art 1 Regulation 1073/99 and Art 2.1.(b) of Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999). Therefore OLAF was entitled to carry out its own investigation on all the persons concerned.

OLAF transmitted the final report of the investigation to the Maltese Attorney General as soon as, in its independent view; it considered that all the necessary investigation steps falling under its competence had been accomplished. In doing that evaluation it also consider for which investigations steps the Maltese authorities were better placed to deepen the investigation also in the light of their more incisive powers. Particular care was paid in order not to jeopardise possible further initiatives by the Maltese authorities. The latter decided on this basis to open a criminal investigation into the matter which is still ongoing.

16. Can OLAF give a detailed description of the "Open Sources Intelligents searches" done on the 25/05/2102 in order to make the decision to open the case? Did OLAF verify the allegations made by Swedish Match?

As in all such cases, OLAF checked internal and commercial databases and general open sources.

The allegations can only be verified during the investigation. The selection phase is aimed at verifying whether or not the information received falls under OLAF's competence, is sufficient and fulfils the investigative policy priorities.

17. Who has taken the decision about the "matter of priority" of the case, the OLAF or the President of the EC? Why OLAF understood that "matter of priority" is "matter of urgency"?

See the reply to question 13 (a).

The OLAF Director-General asked the Selection and review unit to prioritise this selection.

18. Who has decided and why that the Director of Directorate A was not going to participate in the investigation? Why the Director General himself participated directly in the investigation activities on site even at the risk of conflict of interest (art.90 (1-2) of the Staff Regulation?

The Director-General of OLAF decided to establish a "special investigation team" (SIT) in accordance with article 6.3 of the OLAF Instructions to Staff on Investigative Procedures (ISIP). The acting Director of Directorate A was aware of the investigation but was not part of the SIT. Contrary to allegations made, there is no conflict of interests.

Please also refer to the reply to Parliamentary Question no. E-11642/12

19. Who in OLAF and on what legal basis has taken the decision not to notify the person investigated? And who, why, when and on what legal basis was decided to notify the persons involved in the investigation?

In order not to jeopardise the ongoing investigation and in line with normal procedures, the OLAF Director-General decided on 25 May 2012 to defer the information of Commissioner Dalli as a person concerned by the OLAF investigation on the basis of Art 4 of the Commission Decision 1999/396/EC, ECCS, Euratom of 2 June 1999.

Persons concerned were notified at a later stage in accordance with Art 4 of Commission Decision 1999/396 and Council Decision 1999/394/EC of 25 May 1999.

20. What legal status (hierarchy) has the ISIP relative to the Staff Regulation, OLAF Regulation and Charter of Fundamental Rights or any other Regulations applied to the full legality of the acts performed by any institution or body of the EU, including OLAF?

As stated in the preamble of the ISIP, the Instructions to Staff on Investigative Procedures (ISIP) is an internal document of OLAF issued by the Director-General and addressed to OLAF staff. It has therefore the character of a set of internal instructions which are subsidiary and complementary to EU primary law (including the Charter of Fundamental Rights) and secondary law (including the OLAF Regulation and the Staff Regulations). Indeed, one of the main objectives of the ISIP is to ensure compliance with the Charter of Fundamental Rights, which did not yet exist at the time of adoption of the OLAF regulation in 1999 (whereas the pending revision of that regulation takes the Charter into account). . The effect of the adoption of the Director General's instructions to his staff is that he binds OLAF by the rules

laid down in the instructions. The instructions adopted by Director General's decision replace previous instructions (the OLAF manual on operational procedures).

21. When and who has requested the authorization to extend the scope of the investigation? Who took the decision? Why was decided to extend it to better protect the fundamental rights if the legal basis only covers aspects related to possible frauds detrimental to the EU budget?

The decision to extend the scope of the investigation was first made by the OLAF Director-General to enable a person who was under investigation to have the same right as a person concerned. Subsequently, the scope was further extended on the basis of the request made by the SIT to enable the investigation of possible abuse of EU funds following the opinions of the Investigation Selection and Review Unit.

22. On what specific legal basis ("external investigation" or "internal investigation") did the OLAF interview the "person concerned"? and when was he informed of his rights?

Depending on the case, the persons concerned were interviewed on the basis of Art 3 and/or Art 4 of Regulation 1073/99. They were all informed of their rights both in the invitation letter and in the introductory stage of their interview. This is reflected in the written record of the interviews.

It is worth noting that, the adoption of the revised OLAF regulation will strengthen the procedural rights of persons concerned (art 9 of the compromise text) and that they will apply both to external as well as to internal investigations.

23. What legal basis was used to request the private telephone extracts to the Maltese authorities? What was done with these extracts and on which legal basis?

Under Art 7(2) of Regulation 1073/99, OLAF may request Member State authorities to provide it with any information they hold which relates to a current internal investigation. The competent national authorities are responsible for ensuring the legality of any activity they have undertaken following a request for information received from OLAF on the basis of Art 4 and Art 7 of Regulation 1073/99.

The main objective of Anti-Fraud Coordination Services (AFCOS) is to ensure effective cooperation with the Commission (OLAF) and Member States, as required by Article 325 of the TFEU.

The Maltese AFCOS is placed within the Internal Audit and Investigation Department of Malta. An Administrative Cooperation Arrangement (ACA) was signed by OLAF with this service and has been applicable since 1 June 2003. This arrangement provides details, inter alia, of the assistance to be provided by AFCOS Malta to OLAF agents during their missions in Malta, including during on-the-spot checks. AFCOS

Malta should ensure cooperation between national administrative, investigation and prosecution authorities and OLAF.

All information received was analysed to establish its relevance to the investigation.

### ***Opening of the procedure***

24. When were the opening documents registered into the OLAF archives?

The Opening Decision signed by the Director General was registered on 25 May 2012.

25. Article 5.4 of the ISIP stipulates:

*“... In evaluating whether the information is sufficient to open an investigation or coordination case, consideration must be given to the reliability of the source and the credibility of the allegations. In addition, all information collected during the selection process must be taken into account in justifying the opening of an investigation or coordination case.”*

- a) Could OLAF provide the Parliament with the opinion of ISRU concerning the opening of the case?
- b) How far and in which form has OLAF evaluated the reliability of the source and credibility of the allegations?
- c) What were the reasons for the reduced scope of the selection and review procedure?

- a) The opinion of ISRU is part of the OLAF investigation file, which in the light of ongoing judicial proceedings cannot be disclosed.
- b) Since 1 February 2012, the ISRU evaluates the incoming information according to the criteria laid down in Article 5.4 of OLAF Instructions to Staff on Investigative Procedures (ISIP). The selection takes into consideration the sufficiency of the information for the opening of an investigation. Particular consideration is given to the reliability of the source and the credibility of the allegations.

In the conduct of its selection, ISRU does not undertake investigative activities, which can only be done after the formal opening of the investigation. On the basis of the elements collected during the selection process, the Director-General decided that there existed sufficient suspicions to justify the opening of an investigation.

c) The scope of the selection procedure was not reduced. A selection is not an investigation of the facts in a case. The purpose of a selection is to evaluate whether the information received is sufficient to open an investigation and whether OLAF is competent to act. In this case, the available elements allowed for a quick selection process.

26. In the opinion 2/2012 of the OLAF Supervisory Committee regarding case OF/2012/0617 it is written:

*„The SC notes that the assessment and selection process was carried out by the Investigation Selection and Review Unit (ISRU) in less than 24 hours" The jurisprudence of the European Court has established that a decision by OLAF's Director General to open an investigation cannot be taken unless there are „sufficiently serious suspicions“ relating to acts of fraud (...) „It seems that the Investigation Selection and Review Unit (ISRU) was given a short timeframe within which to carry out the assessment of the incoming information – 2.1 (9) and 2.2. (12) - box*

- a) What were the indications at that very stage that Mr Dalli knew about requested bribe - the condition to open the case against Mr Dalli?
- b) What was the "sufficiently serious suspicion" against Mr Dalli to open a case that the Court of Justice requested more than once from OLAF?
- c) What was the reason for the obvious hurry to open a case?
- d) What happened in the selection and assessment phase from the receipt of the information from the Commission to OLAF on the 24th May 2012, 20h15, until the opening of the investigation on the 25th May 2012?
- e) How many cases have been opened after one day assessment phases in 2010, 2011 and 2012?

a), b) and d) In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

c) There has been no "*obvious hurry*", See reply to question n° 25

e) Following the adoption of the ISIP on 1 February 2012, new selection procedures have been introduced and a dedicated unit (ISRU) has been established; consequently, the selection has been considerably shortened. It is therefore to be expected that the number of selections completed within one day is higher than in the previous years.

The number of cases opened within one day of the beginning of the selection is as follows:

year 2010:	0
year 2011:	2
year 2012:	9

27. What was the initial reason for which OLAF started its investigations against Mr Dalli and when has the DG OLAF been aware of it?

The investigation concerning Mr DALLI was opened on the basis of art. 4 of Regulation 1073/99 in relation to possible failure to discharge obligations on the part of a Member of the Commission. The Director General of OLAF received the documents containing the initial allegation on 24 May 2012.

28. The note of the opening of the OLAF investigation to Secretary General of the Commission had been hand delivered.

- a) When has the appointment with the Secretary General been fixed?
- b) Where did the hand delivery take place?
- c) Who participated in the meeting?
- d) Has OLAF also informed Commission President Barroso in writing? When?
- e) Why has the Commission President not been the initial addressee of the information?

The note was hand-delivered to the Secretary General by the investigator in charge on the 25 of May 2012. Thereby the European Commission was informed. The appointment with the secretariat of the Secretary General was done by telephone some minutes before the delivery. There was no formal meeting.

29. Article 5.1 c) of the ISIP provides ISRU with the possibility to take statements or to carry out fact finding missions.

- a) Why has ISRU not used this possibility?
- b) Why has ISRU not interviewed the initial informant and information source i.e. Swedish Match?

a) – b) The elements provided by the source were considered sufficient for the delivery of an opinion on the opening of an investigation and further activities could have jeopardized subsequent investigation activities (that could have been carried out with all the powers and procedural guarantees provided for by Regulation 1073/99).

30. In the reply to question no. 10 (ARES(2012)146620 - 30/11/2012) the OLAF DG mentions 48 cases since February 2012 in which the ISRU concluded its assessment in less than 2 days.

- a) In how many of those cases has the Commission forwarded information to OLAF?
- b) How many of those 48 cases resulted in OLAF investigations (without coordination cases)?
- c) In how many cases in total since 1. February 2012 until 30th November 2012 did the Commission forward information to OLAF?
- d) In how many cases did OLAF specify the Commission as information source? In how many of these cases has the Commission received the information originally from a third party?
- e) When has the Commission President been informed about the allegations concerning the Commissioner? By whom?
- f) When has the Commission President been informed about the opening of the investigation against the Commissioner? By whom?

- a) & c) The Commission was the source of the incoming information in 2 out of the 48 cases.
- b) OLAF opened 10 of the 48 cases as investigations.
- d) In both cases in which the Commission was the source of the incoming information, the Commission had received the information from a third party.
- e) see answer to question 111 to the Commission
- f) See reply to question no. 112 to the Commission.

31. The case has been assigned to a special investigation team by the Director General.

- a) Can a “special team” be used according to the OLAF Regulation? If so, by which criteria? How many “special teams” have been used in the past?
- b) Why has the Director of Directorate A not been involved in the assignment?
- c) Why has the Director General assigned himself to the special investigation team?
- d) Has it happened before? In which cases?

- e) Along which criteria have the investigators been selected by the Director General?
- f) Which past events led the Director General to believe that his staff might have been intimidated by a Commissioner as he stated in an interview with the dpa on the 3rd May 2013? Why does he believe that his staff is unable to professional conduct?

a) Article 6(1) of Regulation 1073 stipulates that the Director of the Office shall direct the conduct of the investigations. There are no further rules in Regulation 1073 concerning the internal organisation of the investigative activity. The rules concerning the establishment of 'special investigative teams' are set out in the ISIP (Article 6(3)).

Following the entry into force of the ISIP, 5 special investigation teams have been established. Special investigative teams may be established where the special nature of the case so requires or where special resource needs exist.

b) & d) See reply to question no. 18.

c) The Director-General does not appoint himself as a member of special investigation teams. The decisions establishing special investigation teams provide for specific reporting lines.

e) Members of SITs are selected on the basis of their specific skills and the special needs of the investigation.

f) The Director-General believes that his staff is fully able to conduct professional investigations. As stated in the interview, he participated as a matter of respect for the Commissioner and to avoid putting his staff in a situation in which they might feel intimidated

32. In how many cases has the OLAF Director General participated directly in investigational activities (such as interviews, searches etc.) since his appointment?

Case no. OF/2012/0617 is the only case so far. The OLAF Director-General decided to participate in this specific case because of its sensitivity linked to the particular position of the person called into question, the seriousness of the allegations and their potentially heavy impact on the reputation of both the Commissioner and the EU.

33. A Swedish seconded national expert has been involved and appointed to the special investigation team for the case OF/2012/0617. Has OLAF conducted verification whether any former contacts and potential conflict evolved from the participation of a Swedish seconded national expert in the investigative activities of OLAF? If yes, why has it not been included in the case file?

OLAF fully complied with its obligations under Commission Decision C(2008)6866 concerning seconded national experts (SNE).

We would also refer to the reply to Parliamentary Question no. E-11677/2012.

**Interviews:**

34. The following table shows the interviews conducted by OLAF during its investigations:

<b>Interview Ms Delfosse</b>	02 June 2012	09:30 – 12:00h (2h 30min)	2 ½ pg	<b>Jaretoft, Romera</b>
<b>Interview Mr Peyron</b>	02 June 2012	13:10 – 13:30h (20min)	1 pg	<b>Jaretoft, Romera</b>
<b>Interview Mr Gabrielsson</b>	02 June 2012	10:30 – 14:00h (3h 30min)	4 pg	<b>Kessler, Romera, Potenza</b>
<b>Interview Mr Hildingsson</b>	02 June 2012	13:30 – 14:15h (45min)	1 ½ pg	<b>Romera, Jaretoft</b>
	06 June 2012	15:15 – 15:50h (35min)		
<b>Interview Ms Kimberley</b>	14 June 2012	10:15 – 16:30h (6h 15min)	4pg	<b>Kessler, Romera, Cholakova</b>
<b>Interview Mr Zammit</b>	04 July 2012	13:30 – 17:00h (3h 30min)	4 1/2pg	<b>Kessler, Romera, Cholkaova, Schembri, Debono</b>
<b>Interview Mrs Testori-Coggi</b>	??	??	??	??
<b>Interview Mr Dalli</b>	16 July 2012	18:00 – 20:15h 2h 15min	3 ½ pg	<b>Kessler, Romera, Cholakova</b>
<b>Interview Mr Zammit</b>	05 July 2012	10:30 – 12:45h 2h 15min	3pg	<b>Kessler, Romera, Cholkaova,</b>

				<b>Schembri, Debono</b>
<b>Interview Ms Kimberley</b>	07 Sept. 2012	09:30 – 14:10h (4h 40min)	4pg	<b>Kessler, Romera, Chokalova, Schembri, de Marco – Lawyer</b>
<b>Interview Ms Kimberley</b>	15 Sept. 2012	09:50 – 15:00h (5h 10min)	4 1/2pg	<b>Kessler, Romera, Chokalova, Schembri, de Marco – Lawyer</b>
<b>Interview Mr Dalli</b>	17 Sept. 2012	16:15 – 18:55h (2h 40min)	3 1/2 pg	<b>Kessler, Romera, Cholakova, Lowell – Lawyer</b>

- a) What was the reason to change the interviewers?
- b) For each of the interviews, why has the OLAF Director General directly participated in the respective interview?
- c) How can the same interviewers interview different people at the same time?
- d) On what legal basis were the above mentioned persons present in the room of the interviews?
- e) Were the interviews recorded on tape?
- f) Is it customary at OLAF to produce only incomplete transcripts and reports of these interviews, even when the questioning takes several hours?
- g) What were the criteria on which verbal passages were selected for transcription?
- h) What instructions for selection are given by the Director-General for OLAF staff?
- i) Were any additional or different instructions given for the interviews of the 'persons concerned'?

- j) Why has Frederik Peyron, the General Legal Counsel of Swedish Match, not signed the protocol of the interview with Johan Gabrielsson? Was he present in the interview? Why?
- k) Why has Rita Schembri, at that time member of the Supervisory Committee, participated in the investigations? How was her involvement evaluated beforehand?
- l) What was the exact location of the interview conducted with Gayle Kimberley in Troia, Portugal?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

#### Interview with Gayle Kimberley

35. According to the statement Gayle Kimberley gave in a Maltese court an OLAF-official had called her impersonating an official from a Spanish Ministry.
- a) Is it common practice during OLAF investigations that investigators pretend to be someone else?
  - b) Is it common practice during OLAF investigations that investigators impersonate other public authorities?
  - c) In how many cases has OLAF used this "method" to collect information?
  - d) How does OLAF assess the legality of the approach, in particular during an administrative investigation?
  - e) In a note to OLAF staff (OLAF C2 DF I 2013) the Director General attaches importance on the recognisability of staff on external work. How does this fit to deliberate false statements in contacts with witnesses, where the Office acted as "an official from a Spanish Ministry dealing with lotteries and gaming" or in a different case as the "works doctor of the Commission"? Which disciplinary consequences had this assumption of authority?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

36. OLAF has interviewed Gayle Kimberley in Troia, Portugal during a conference of the Gaming Regulators European Forum (GREF).
- a) How did OLAF know that Gayle Kimberley was present at the conference in Troia?
  - b) Does the waylaying of witnesses and persons concerned belong to standard procedures of the OLAF?
  - c) Is this procedure in line with the ISIP?
  - d) Why has the witness not been invited for a questioning?

- e) Where did the interview take place exactly, at which hotel - in a sleeping or a conference/meeting room of the hotel?
- f) Has the Portuguese AFCOS been informed?
- g) Have the persons indicated in the protocol of the interview been present the whole time?
- h) Has the Director General or the investigators been alone with the witness? If yes, why?
- i) Why was the interview not recorded?
- j) Why and on which legal basis was the witness Ms Kimberley in this interview instructed, "to abide to strict confidentiality on the fact and the content of the interview" (page 5 of the written record of the interview with the witness)?
- k) Why has the witness not received a copy of her statements? Is that the normal procedure in OLAF investigations?
- l) For which boat trip, due to which the Director General hurried the witness along, did the Director General have to leave?
- m) Which investigational steps were undertaken on the grounds of these statements (which were not entirely confirmed by the witness)?
- n) The witness, respectively the person concerned, states in front of the Maltese court that later on, when she re-read the statement, soberly, she would have liked some things to be changed, since they did not reflect her statements correctly. Which statements were these?
- o) According to the witness's description of the reaction of the Director General: Why did he react angrily/excitedly when the witness, respectively the person concerned asked for the changes of her statements?
- p) What did the Director General imply when he spoke about his "experiences" in Italy regarding the potential threat from inter alia the Health Commissioner Dalli?
- q) How much did the mission cost?
- r) Have meeting rooms been rented?
- s) Could OLAF provide the Parliament with the mission statements and all related costs of the involved staff?

It is standard practice of any investigative service to offer an interviewee a break and the possibility to eat and drink in the course of a long interview.

In addition, reference is made to the reply to Parliamentary Question no. P-004614/2013.

As far as the concrete circumstances referred to in the questions above are concerned, OLAF is under a duty to refrain from commenting on its investigative actions in the light of ongoing judicial proceedings.

37. After the interview with Gayle Kimberley in Troia, Portugal, the OLAF Director General went for a late lunch with the witness.

- a) Why was the Director General of the opinion that he and the witness needed a "recreational" break (together)?
- b) Where did the lunch take place (name of the restaurant)?
- c) Who was present at the lunch?
- d) How long did the lunch take?
- e) How much wine or alcoholic beverages have been drunk? By whom?
- f) Who paid for the lunch?
- g) Has the case been discussed?

See also reply to EP P- 4614/13.

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

### ***Investigations***

38. Why has the AFCOS in Malta been informed which is attributive to the Prime Minister's office. Why have neither the Maltese judiciary nor the police been informed?

See reply to question N° 23.

### **Strategy of the investigation**

39. At his press conference on the 17th October 2012 the Director-General replied as follows to a journalist's question about the possible entrapment of the Commissioner: *'We obviously asked ourselves during this investigation, as we always do, whether the initial allegation was true and genuine, whether there was an agenda behind it but it was still true, or whether there was an agenda and it was false and defamatory – or in*

*other words a trap. Of course we asked ourselves this, as we have done in a host of other cases. We also arrived at an answer, at the end of a very precise, detailed and exhaustive investigation, which is that it is quite clear to us that illicit requests were made for sums of money to change Commission decisions, and that the Commissioner's name was used illegally. That is an absolutely certainty. There is also, as we have said before, serious, corroborating and unambiguous evidence that the Commissioner was at least in the know. Of this we are certain.'*

- a) Since the OLAF report does not provide any hints on how OLAF can with certainty exclude the possibility of an agenda of the initial allegations: How was the possible existence of a plot investigated?
- b) Have persons involved from Swedish Match been investigated?
- c) In case that this has been investigated, why does the OLAF report provide nothing on these investigative steps?
- d) Did OLAF investigate who really profits from a possible liberalisation of snus?
- e) Is OLAF aware of the existence of an agreement made in the framework of a Joint Venture between Philip Morris and Swedish Match concerning the market shares after a liberalisation of the European market for Snus?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

40. Frederic Peyron, the General Counsel of Swedish Match, stated that Swedish Match had contacted the State Secretary of the Swedish Prime Minister. However, having asked the Swedish Government on the note in the register which was made when Swedish Match informed the Government, it replied that there is no such entry in the register.
- a) Can the Director General of OLAF provide without any delay the “precise, detailed and exhaustive investigation” on the possible entrapment of the Commissioner?
  - b) What was the outcome?
  - c) What form did investigations into Swedish Match take?
  - d) Had the Director General lunch or dinner with Swedish Match representatives?
  - e) Did OLAF find out that no registered contact between Swedish Match and the government take place?
  - f) How has OLAF checked the validity of the statements of Swedish Match representatives in general?

g) What other avenues of investigations were followed up?

The aim of the OLAF investigation was to prove or disprove the initial allegations. OLAF collected evidence and did not establish any hint of entrapment of the Commissioner.

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

The OLAF Director General did not have either lunch or dinner with representatives of Swedish Match.

41. Has OLAF been aware of the relationship between Gayle Kimberley and Iosif Galea?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

42. Has OLAF been aware of any financial transactions between You Rock Ltd. and Silvio Zammit? If yes, what was the purpose of these transactions? Why did OLAF not ask the persons concerned about those transactions in the report?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

43. How has OLAF checked whether the persons concerned or other involved parties had undertaken steps to transfer, receive or launder the asked 60 Mio. EUR they allegedly had asked?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

44. Who provided OLAF with the document "Meeting Review & Report" written by Mr. Hamnergren? When was it transmitted to OLAF? How did OLAF check its validity?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

45. The scope of the investigation has been modified several times.

- a) On what legal basis?
- b) When?
- c) Why?
- d) Did different rules apply to different persons concerned/involved?
- e) Which persons were investigated under the rules for internal investigations?

- f) Which persons were investigated under the rules for external investigations?
- g) Why did OLAF not conduct a coordinated investigation with the Maltese authorities?
- h) Before extending the scope of the investigations, has OLAF evaluated if “sufficiently serious suspicions” covering the extended scope of the investigation?
- i) Why has the extension decision been made in such a short time frame and therewith prevented a thorough legal analysis?
- j) How many extension decisions have been taken during the investigations into other cases in the years 2010, 2011 and 2012?
- k) What has been the mean duration for the conduct of the “legality check” in advance to an extension decision?
- l) How did the OLAF Director General face the conflict of interest as investigator and supervisor of the investigations when extending the scope of the investigations?

Questions a) –c): see also reply to question n°21.

Regulation 1073/99 does not preclude any extension of the scope of a case. The appropriateness of the extension was verified by the ISRU. There is nothing unusual in conducting an on-the-spot-check or an interview in the context of an extended investigation. Art 12 (3) of the ISIP sets out the procedural rules for an extension of the scope of the investigation.

Under Article 6(1) of the OLAF Regulation, "the Director of the Office shall direct the conduct of investigations". No major investigative activity in any investigation can be performed without the Director-General's authorisation. The legislation in force neither prohibits nor excludes the direct participation of the Director-General in investigation activities. The OLAF Director-General has the same obligations and same general duty of impartiality as all staff.

Article 12.3 of ISIP adopted on 1 February 2012 introduced the obligation of the investigation units to request a decision to extend the scope of investigation whenever they envisage conducting an investigative activity outside the existing scope of the investigation. Prior to the adoption of ISIP, it would have been necessary to open a separate but complementary investigation. Since 1 February 2012, 15 decisions to extend the scope of a case have been taken by the Director-General of OLAF. Prior the adoption of the ISIP no such decisions were necessary.

The participation of the OLAF Director-General in the investigation does not create a conflict of interest (see also reply to Parliamentary Question-11642/12).

46. What mitigating facts were pursued in the investigation?

In the light of ongoing judicial proceedings, OLAF is under a duty to refrain from commenting on its investigative actions.

47. Why saw OLAF no need to question Mr. Hammergren, Mr Saliba and/or Mr Bajada about the content of their meeting on the 20/08/2010 with the Commissioner?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

48. Why saw OLAF no need to interview Mr Matthew Kimberley, founder and director of You Rock Ltd., the firm that billed Swedish Match for the consultancy services of Mrs. Kimberley?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

49. In her interview Inge Delfosse mentions that Mario Merciera and Ms Rupini Bergstrom attended the meeting with Silvio Zammit in Stockholm. Why saw OLAF no need to interview the two persons mentioned?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

50. Why saw OLAF no need to question Iosif Galea, a key person as the Maltese proceedings revealed, by OLAF?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

51. During the lunch with Inge Delfosse, Rupini Bergstrom and Mario Merciera on the 21st October 2011, Silvio Zammit received a lot of phone calls. According to Maltese sources, Mr Zammit is an extensive user of its mobile phone.

- a) On which legal basis did OLAF request the telephone toll records?
- b) Did OLAF verify who called Mr Zammit during the lunch on the 21st October 2011?
- c) Did Gayle Kimberley call or did Silvio Zammit call her?
- d) Did Iosif Galea call or did Silvio Zammit call him?

- e) Why has OLAF not taken the entire telephone traffic of Mr Zammit and the fact that Mr Zammit is a very active telephone user into account?
- f) Why did OLAF not report other telephone traffic in the report that might have had an exculpatory effect for Mr Zammit?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

52. OLAF bases the findings of its report on the correlation of telephone contacts between Mr Zammit and Mr Dalli. In the report on its investigations in the case OF/2012/0617, only information on phone calls between the persons concerned is reported. Why have other phone calls of the persons concerned and witnesses not been included in the report in order to provide a broader picture?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

53. In her second interview Mrs. Kimberley asks 12 times for clarifications to her first interview amidst one time she admits to have only been speculating in her first interview.
- a) Which investigational steps have been undertaken on the bases of her first interview which have been corrected afterwards in her seconded interview?
  - b) Does the Director General firmly reject her version given in the Maltese court: too much wine with the Director General after the first interview?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

54. Why did the Swedish Seconded National Expert interview the representative of Swedish Match in September 2012? Why was he alone? Why was the interview only included with a kind of note into the case file and not with a proper protocol of the interview?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

55. What was the legal basis for the interview conducted with Silvio Zammit?

Art. 3 and Art 4.3 of Regulation 1073/99.

56. Why has the OLAF Director General asked/urged/forced Silvio Zammit not to leave the room during the interview with him?

On 4 July 2012 the interview with Mr Zammit was interrupted upon his own initiative and resumed on the day after.

57. Why were the questions and the subject in the interview with Silvio Zammit mainly related to the internal investigations, even though the interview was conducted on the basis of article 3 of the regulation EC no.1073/1999?

See reply to question 55.

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

58. Has Silvio Zammit been informed about his rights in investigations under article 4 of EC no. 1073/1999 before of the interview?

Yes he was, as it was stated in the record of the interview. See also the reply to question 22.

#### Taping a phone conversation

59. When did the preparation on taping the conversation start. How many other calls were taped before and during the investigations?

OLAF does not engage in phone tapping.

OLAF's Final Report on the case gives a full account of the taping of phone conversations.

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

60. Have recordings of private telephone conversations been produced in other cases?

The OLAF Director General is not aware of any recordings of private telephone conversations that have been produced in other cases.

61. What legal base or regulations does OLAF refer to as regards the phone call recording as apparently applied in the course of the OLAF investigation in the case of the former

Commissioner Dalli? Why does OLAF see no violation of fundamental rights when it comes to the mentioned phone call recording in the case Zammit/Dalli

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

62. Has a legal analysis been issued in advance to the recording of the telephone conversation between Mrs Delfosse and Silvio Zammit on 3rd July 2012? If yes, is it in the case file?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

63. Can OLAF provide the Budgetary Control Committee with this legal analysis which pretends that this recording was legal according to Belgium law?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

64. Which instructions and information did this OLAF staff receive for conducting the legal analysis on the planned recording of the above mentioned telephone conversation?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

65. Why was the transcript of the recording not included into the case file?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

66. Has Mrs Delfosse been told that recording of the telephone conversation with another person and the usage of that recording without the consent of that other person is a offense according to Article 259a. of the Belgian penal code as an OLAF investigator was once present when she recorded the phone call (see OLAF report on case OF /2012/0617 section 2.6 page 31)?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

67. What disciplinary measures have been taken against the OLAF agent being present at the recording of the telephone conversation for the violation of the Belgium law and violation of European Fundamental Rights Charta?

No disciplinary measures have been taken.

68. Did OLAF ask Silvio Zammit who else was present when he made the phone call to Mrs Delfosse? If not, why not?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

69. Has OLAF checked the admissibility of the records/transcripts of telephone records in possible court cases in Malta/Sweden/Belgium? If yes what were the conclusions?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

70. Can OLAF provide us with the tapes?

No.

### Telephone toll records

71. What has been the concrete legal basis for the measure to request telephone toll records from the Maltese authorities?

See reply to question 23.

72. OLAF has requested the transmission of telecommunication data records from the Maltese governments. Since these data are not held by any European Institution but by private companies in the Member State, this request for access is not covered by Article 4(2) of the regulation 1073/1999 which the OLAF Director General mentioned in his request to the Maltese authorities.

- a) What disciplinary measures have been taken against the concerned OLAF staff, including its Director General, for this violation of regulation 1073/1999?
- b) Have the Maltese authorities been informed that obtaining those data (not for their own purpose) and transmitting it to OLAF might be considered an offense?
- c) Referring to article 7(2) 1073/1999 which neither covers the OLAF proceedings. Since the requested data were not held by the Authorities of the Member State. What disciplinary measures have been taken for this violation of EC No. 1073/1999? What disciplinary measures have been taken for the violation of Maltese law?

See reply to question 23.

No disciplinary measures have been taken

73. Has OLAF informed other persons unrelated to the investigation whose names appear in the file about the usage and storage of their personal data undertaken by OLAF?

All the relevant data subjects have been notified in accordance with Article 7 of the OLAF Instructions to Staff on Data Protection for Investigative Procedures. The data subjects not relevant to the investigation whose names appear in the case file do not receive a personalised privacy statement, as agreed with the European Data Protection Supervisor (EDPS). Notably, the EDPS states in a letter dated 4 June 2008 to the OLAF Director General that among the persons whose name appears in a case file - excluding persons concerned, informants, whistle-blowers, witnesses and staff of OLAF partners - only those persons "who have a particular relevance to the matter under investigation" need to be directly informed.

#### Investigations into Mr Zammit

74. Which databases of the Commission did OLAF access to check the pretext that Silvio Zammit had received EU funds? Which other information sources did OLAF use to check whether the company Silvio Zammit referred to in the telephone conversation with Inge Delfosse in March 2012 exists?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

75. What was the result of the evaluation of several information sources, concerning the connection of Silvio Zammit to financial interest of the European Union?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

76. Has Silvio Zammit been considered a person concerned in an external investigation, if yes what was the connection with the financial interest of the European Union?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

77. Has Silvio Zammit been considered a person concerned in an internal investigation? If yes, why? How is that possible?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

78. After the second interview, Mr. Silvio Zammit accused the present OLAF investigators, including the DG, that "OLAF is manipulating the conversation, the documentation and the evidence" (Point 4, "Closing statement to the written record of the interview with the person concerned"). How was this accusation addressed?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

79. How did Mr Zammit react in the interview? Was he cooperative during both interviews?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

80. On which legal basis has OLAF interviewed Silvio Zammit?

See reply to question N° 55.

81. On which legal basis has OLAF searched the premises of Silvio Zammit's firm?

OLAF performed an On-the-spot check in Malta on the basis of the Art 3 of Regulation 1073/99 and Regulation 2185/96.

82. The Maltese judicial proceedings revealed that Silvio Zammit has already been informed by Iosif Galea during his stay with Mrs Kimberley in Troia, Portugal.

- a) Has OLAF been aware of this information?
- b) Has OLAF been aware that Iosif Galea had forwarded the note "Meeting with the Commissioner" of Mrs. Kimberley to Silvio Zammit?
- c) Has OLAF been aware that Gayle Kimberley drafted an email for Silvio Zammit on the 5th March 2013 that he sent to Inge Delfosse offering apparently his lobby services?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

83. In the conclusion of the OLAF report section 5.1.5 (page 39), OLAF states that "Commissioner John Dalli stated in his first interview with OLAF that he did not meet with Silvio Zammit on 10/02/2012". Actually, Commissioner John Dalli stated in his

first interview that he could not remember what he had done on the 10th February 2012 and he did not remember if he had met Mr Zammit (page 3 of the written record of the interview). After having checked his notes and schedule in Malta, he confirmed having met Silvio Zammit on the 10/02/2012.

- a) Is the written record of the first interview with John Dalli incomplete?
- b) Why has OLAF included this obviously wrong conclusion in the report?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

84. In one of the interviews/calls Silvio Zammit refers to the fact he has to share the money with others, did OLAF investigate further who these persons were?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

85. Which presents, benefits did Silvio Zammit receive from Swedish match since their first contact? Did OLAF investigate who paid his travel and hotel costs when he met representatives from Swedish Match?

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

***OLAF's recommendations and conclusion of the investigation***

86. Why have the recommendations concerning the Commissioner not been included in the report and were sent in separate letters to the President of the EC and the Maltese authorities?
87. Why has OLAF not sent any recommendations to the Council and therewith has not been following the recommendation of the ISRU opinion on the final report?
88. Why has OLAF not made any concrete recommendations regarding Gayle Kimberley? Were there any arrangements made between the Director General and Gayle Kimberley? If so, which ones?
89. What have been the recommendations concerning the Commissioner that were enumerated in the letter to the Commission President?

Joint reply to questions 86 to 89:

Recommendations are made by the OLAF Director-General on the basis of Article 9 of Regulation 1073/1999 as also specified in Article 2 of the ISIP.

OLAF forwarded the Final Report to the Council and the Commission for their consideration of possible action.

See also reply to Q 113 – Q 115 to the Commission

90. Why could the OLAF Director General not answer the question no. 48 (ARES(2012)146620 - 30/11/2012) although the OLAF report contains a whole section on which legal provisions might be “applicable to the facts described in the present report” and he speculated during his press conference on the 17/10/2012 on possible criminal offenses?

A reply was given to question no. 48 of the earlier questionnaire.

91. Why has OLAF not confronted one person concerned with each and every fact concerning him?

OLAF confronted all the persons concerned with all the facts concerning them and gave full possibility to comment on those facts.

92. Why had ISRU only access to the case files on the 12.10.2012? What was the reason for the hurry?

In accordance with Art 21 of the ISIP, once the special investigation team had finalised its investigation activities, it submitted the Final Report and the proposed Recommendations to the Investigation Selection and Review Unit for review.

The Investigation Selection and Review Unit carried out the final legal review laid down in Art 21.2 of ISIP and issued an opinion for the Director-General.

***Involvement of a member of the Supervisory Committee as OLAF interlocutor***

93. According to Maltese press coverage about the internal investigations concern the Maltese member of the Supervisory Committee and former head of the Maltese AFCOS, Mrs. Schembri told her superiors that she acted on third party orders in the case of the investigations concerning John Dalli.

- a) What was the role of the Maltese member of the Supervisory Committee involved in the investigations into Mr Dalli?
- b) Which orders did OLAF give to Mrs Schembri?
- c) How could her behaviour have affected the investigations?
- d) What investigative steps in Malta were initiated by the Maltese AFCOS?
- e) There have been interviews as well as on-the-spot-checks in Malta and the request to obtain telephone data from the Maltese authorities. Which role did the Mrs Schembri play in the organization, legal evaluation of the legitimacy, conduct and assessment of the investigative measures undertaken?
- f) Could OLAF provide the Parliament with all correspondence with the head of the Maltese AFCOS?

- a) OLAF requested the cooperation of the Maltese AFCOS. AFCOS premises were used for the 3 interviews. Mrs Schembri cooperated as head of the Maltese AFCOS.
- b) OLAF did not give Ms Schembri any order.
- c) She was not present at the interviews. She played no role in the OLAF investigation.
- d) See replies to questions no. 23.
- e) OLAF requested the cooperation of the Maltese AFCOS in this investigation.
- f) In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

94. According to Maltese press coverage about the internal investigations concern the Maltese member of the Supervisory Committee and former head of the Maltese

AFCOS, Mrs. Schembri has ordered her staff to remove documents from audits also concerning projects receiving EU funds.

- a) Which cases are involved?
- b) Have OLAF investigations been launched in these cases?
- c) How does OLAF intent to follow-up?

OLAF has opened a selection on this issue.

In the light of ongoing judicial proceedings OLAF is under a duty to refrain from commenting on its investigative actions.

### *Transmission of the report*

95. Did OLAF provide the Maltese government and AFCOS with a copy of the OLAF report? Why?

In accordance with Art 10 (2) of Regulation 1073/1999 and following the specific request of the Attorney General of Malta, OLAF provided a copy of its Final Report to the Maltese AFCOS, on the same day OLAF transmitted the report to the Attorney General of Malta.

See reply to question n° 23.

96. Why has OLAF not transmitted the pages 15 and 16 of the OLAF report to the Maltese judicial authorities?

OLAF sent to the Maltese judicial authorities the complete final report together with all the annexes quoted therein.

97. Why has OLAF not transmitted the interview with Mrs Testori Coggi?

See reply to question 96.

98. According to the cover letter of the OLAF Director General to the Maltese judicial authorities as well as in his reply to question 45. (ARES(2012)146620 - 30/11/2012) , the transmission to the national judicial authorities has been based on Article 9 and 10.

- a) Was the investigation an external or internal investigation?

- b) Could OLAF elaborate why it chose to refer to both Article 9 and Article 10? Which specific provisions in those Articles are meant?
- c) How does OLAF evaluate the fact that Article 9(4) foresees that the relevant institution follows up to the report drawn up following internal investigations?
- d) Was OLAF independent in handling the follow-up and in forwarding the case to the Maltese judicial authorities?
- e) According to Article 10(2), following an internal investigation, the documents obtained by the Office during the investigation shall be submitted to the national judicial authority. Have all documents be submitted to the Maltese authorities?
- f) Why has OLAF not included the initial documents and information obtained from Swedish Match?
- g) Has OLAF considered the simultaneous transmission to the Commission and the Maltese authorities? What were the reasons for the dismissal of this option?

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| <ul style="list-style-type: none"> <li>a) See reply to question 3 of the previous questionnaire CONT questionnaire</li> <li>b)-c) Under Article 9(3) of Regulation 1073/99, OLAF Final Reports following an external investigation are to be sent to the competent authorities of the Member State in question. Under Article 10(2) of that Regulation, OLAF is obliged to forward information obtained during internal investigations into matters liable to result in criminal proceedings to the judicial authorities of the Member State concerned and shall simultaneously inform the Member State concerned. Moreover, under Article 10(1) of that Regulation, OLAF may at any time forward to the competent authorities of the Member States concerned information obtained in the course of external investigations. By forwarding its Final Report to the Attorney General of Malta and to the Maltese AFCOS, OLAF acted, at the same time, under all those provisions.</li> <li>d) See reply to question no 15.</li> <li>e) See replies to previous paragraphs b) and c) and to question no. 96.</li> <li>f) See reply to question no 96.</li> <li>g) Art 9 of Regulation foresees that every report drawn up following an internal investigation shall be sent to the Institution, body, office or agency concerned. When transmission of information to national judicial authorities is required, Article 11(7) of Regulation 1073/1999 provides that the Supervisory Committee shall be informed. This has been interpreted, in one judgment of the Court of first instance (in case <i>Franchet &amp; Byk</i>), as meaning that OLAF is obliged to inform the Supervisory Committee prior to forwarding information to the judicial authorities. Therefore, OLAF informed the Supervisory Committee and forwarded the Final Report to the Attorney General of Malta three days after informing the Supervisory Committee.</li> </ul> |
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*Administration of the files*

99. In the opinion 2/2012 of the OLAF Supervisory Committee regarding case OF/2012/0617 it is written:

*„The case file documents were not numbered, documents were not organised in a chronological order and there was no list of documents contained in each file“ - 1.1(5)*

- a) Who had access to the case file within OLAF between May 25, 2012, and October 15, 2012?
- b) Who had access after October 15, 2012?
- c) Who administered the documents related to the case file?
- d) How can OLAF guarantee that the files are complete and registered in the chronically correct order? Which measures have been taken to guarantee this?
- e) How are the files of other cases administered? How does OLAF guarantee the completeness of the files and the proper and chronically correct registration of the files in other cases?
- f) Which organising principles apply to the administration of files?
- g) Why were the files in the way how the Supervisory Committee described it?

- a) The 4 members of the Special Investigation Team (SIT), the OLAF Director-General, one selector and two reviewers of ISRU (under the Special Handling procedures).
- b) The same persons described under point a) above as well as 3 members of the Secretariat of the Supervisory Committee (SUPCOM), the Rapporteur (Member of SUPCOM) and the Chairman of SUPCOM (under the Special Handling procedures and until lifting of these procedures).
- c) The members of the SIT.
- d)-g) The documents were registered according to the needs of the case file in OLAF's Case Management System (CMS), in compliance with the "Special Handling" procedures. OLAF case files are maintained in the order that reflects the individual needs of the specific case file.  
  
In other cases where "Special Handling" procedures do not apply, the documents are chronologically registered, scanned, and put into the dedicated informatics system (CMS).

100. Can OLAF guarantee that the Supervisory Committee has received all files related to the case OF/2012/0617?

The Supervisory Committee has received all the files it requested in relation to this case. After the Supervisory Committee having had full access to the OLAF case file for an initial period of one month starting on 18 October 2012, OLAF then agreed to extend the deadline for a further 10 days. More recently following another request from the Supervisory Committee, full access was again granted for an additional period of 1 month on 18 April 2013.

### ***Missions of the Director General***

101. Can OLAF provide Parliament with a detailed list of all missions undertaken in the years 2010 until 2012 by the Director General and other OLAF staff in the investigation against Commissioner Dalli, with information on the costs incurred, the purpose of the trips and the destination of the missions?

In the light of ongoing judicial proceedings, OLAF is under a duty to refrain from commenting its investigative actions.

### ***Cooperation Agreements with the Tobacco Industries***

102. In question no. 82. and 83. OLAF Director General mentions 12 meetings since 2010 on the premises of the Tobacco companies with OLAF officials to fulfil the annual bilateral meetings provided in the cooperation agreements.
- a) Where exactly have the meetings taken place?
  - b) When did the meetings take place?
  - c) What costs incurred to the officials?
  - d) What costs were declared on the mission statements?
  - e) What costs were covered by OLAF?
  - f) How many officials have been on the missions?
  - g) How often and where has the OLAF Director General participated?
  - h) Can OLAF provide the Parliament with all documents related to the missions of the staff, including invoices and mission statements, as well as the agendas concerning these bilateral meetings?
  - i) With which services did the Tobacco companies provide OLAF in relation to the organisation of the bilateral annual meetings?

Reference is made to the reply to question 82 of the previous questionnaire. Question 82 refers to "official journeys" [...] "made in connection with OLAF tasks on the topic of tobacco since 2010".

The twelve "official journeys" or meetings referred to in OLAF's reply to question 82, their location, dates and number of participants are listed in Annex 1.

For the OLAF officials, regular mission costs occurred and were covered by OLAF. For reasons of protection of privacy, further details cannot be given. The OLAF Director-General did not participate in any of these meetings.

The twelve meetings, the places, number of participants, and dates are listed in Annex 1.

For the OLAF officials, regular mission costs occurred and were covered by OLAF. The OLAF Director-General did not participate in any of these meetings.

The tobacco manufacturers did not provide OLAF with any service other than organising the meetings.

It should be noted that the annual meetings referred to in question 83 of the previous questionnaire are not included in the twelve meetings, since they took place in Brussels and did not necessitate "journeys".

It should also be noted that OLAF was tasked by the Commission to perform the activities mentioned in this question in order to comply with legal obligations which the Commission, representing the EU and participating Member States, has assumed when it concluded the cooperation agreements with the companies concerned.

103. Which contacts and meetings did OLAF have in the years 2010 until 2012 with tobacco companies or associated firms or their representatives in OLAF premises? Who attended in those meetings? What was the purpose of the meetings?

Reference is made to the letters of Commissioner Šemeta to the CONT of 6 November 2012, 20 December 2012, and 27 March 2013. It was offered that CONT can view the documents listed in the annexes, which include the minutes of the annual meetings with the four cigarette manufacturers with which the EU and the Member States have concluded agreements, in a secure reading room. In addition to the meetings mentioned in these letters, the meetings listed in Annex 2 took place in OLAF's premises. The purpose of these meetings was the implementation of the agreements with the cigarette manufacturers.

104. How many meetings between OLAF and the Tobacco Industry or associated firms or their representatives took place in other premises (excluding OLAF premises and premises of the Tobacco industry)? In how many of these meetings did the OLAF Director General participate?

The annual meetings with the tobacco manufacturers and Member States, which require larger meeting rooms, took place in other Commission buildings. The OLAF Director-General participated in the annual meetings of 2012, in total four.

OLAF also refers to its reply to question 83 of the previous questionnaire.

105. Based on OLAF's information, may any initiative by the CONT committee or some of its members have jeopardized the institution of legal proceedings or the judicial procedures in the case against Mr. Zammit or Mr. Dalli?

OLAF is concerned about the risk that partial and selective disclosure of content from the case file and its frequent misrepresentation in the public domain could interfere with the ongoing judicial procedures in Malta. This may well result in undue advantage or damage to persons concerned by these proceedings. Furthermore, the independence of the competent authorities dealing with this case might be affected by the constant exposure to the sensationalist and sometimes contradictory information concerning OLAF's investigation.

## QUESTIONS TO THE COMMISSION

106. Did the President of the Commission make sure that the Supervisory Committee was heard before the file was sent to the Maltese judicial authorities?

According to article 10 of Regulation 1073/1999 the Director General of OLAF is responsible for forwarding information to the judicial authorities of the Member States. Regulation 1073/1999 does not assign any role to the President of the Commission in this respect or with respect to the communication by OLAF to its Supervisory Committee pursuant to Art 11.7. of Regulation 1073/1999.

107. If the President of the Commission had known the content of the Supervisory Committee's opinion concerning the OLAF investigation regarding Mr Dalli, would he have dismissed him?

The former Commissioner was not dismissed, he resigned.

108. Why did the EC Secretary General decide not to inform the President of the Commission on the opening of the investigation?

Contrary to what has been alleged, the EC Secretary General did not take any such decision. She informed the President.

109. Taking into consideration the statement by Pia AHRENKILDE HANSEN, EC Spokesperson, on the resignation of John Dalli, Member of the EC in charge of Health and Consumer Policy on 17/10/2012 and the press briefing by Giovanni KESSLER, Director General of OLAF, on the resignation of John Dalli, Member of the EC in charge of Health and Consumer Policy on 17/10/2012, the question is:
110. What is the reason for information disclosure concerning the case, the investigation being closed? How a person involved could protect itself in the ``court of public opinion'', when information are partially public by official services, without access to the file as a whole, for reason related to the investigation procedures applied by Member States?

It was inevitable that the press corps would have questions the morning after the resignation. It was therefore necessary to provide appropriate and limited information to avoid speculation. In the press briefing the Spokeswoman insisted on the necessity to protect the presumption of innocence.

As regards the access to the file as a whole by the former Commissioner, it should be recalled that the current Regulation does not provide for this and that the Commission had the obligation not to prejudice the national criminal procedure.

Should the current revision of the OLAF regulation be adopted, the rights of the individuals would be improved, (see Art 9 of the common position).

111. When has the Commission President been informed about the allegations concerning the Commissioner? By whom?

The President of the Commission was informed by the Secretary General upon receipt of the letter from Swedish Match.

112. When has the Commission President been informed about the opening of the investigation against the Commissioner? By whom?

The Secretary General of the Commission informed the President when she received the note from OLAF announcing the opening of the investigation.

113. Can the Commission provide Parliament with the cover letter of the OLAF Director General sent with the OLAF investigation report to the Commission President?
114. What was the content of this cover letter?
115. Have suggestions/recommendations been made to the Commission President in this cover letter?

Q 113 - Q 114 – Q115: joint answer:

OLAF has informed the Commission that, given that the OLAF report has now been made public and, following that, the Maltese judicial authorities have confirmed having no reason to object to OLAF lifting the confidential status of the report, OLAF no longer has any objection to the cover letter being provided to Parliament through the appropriate agreed channels so as to ensure respect for the ongoing legal proceedings.

As foreseen in Regulation 1073/1999, reports drawn up following an internal investigation and any useful related documents are sent to the institution concerned. It is for the Institution concerned to decide on the appropriate follow up and to inform OLAF thereon.

116. Apparently, the Legal Service drafted the letter of resignation for the Commissioner.

- a) When was the Legal Service given the instructions to draft such a letter?
- b) When did the Legal Service start to draft the letter?
- c) When had the Legal Service finished?

These questions touch an argument raised by Mr Dalli in his application against the Commission (pending case T-562/12, Dalli v. Commission). The Commission will therefore refrain from comment at this stage as the matter is *sub judice*.

117. Apparently, two drafted press releases have been presented to the Commissioner during the meeting on October 16, 2012, when the Commission President asked the Commissioner to resign.

- a) When were those press releases drafted?
- b) What was the content of the not published press release?

No reply can be provided since this question touches on an argument raised by Mr Dalli in his application against the Commission (pending case T-562/12, Dalli v. Commission). The Commission will therefore refrain from comment at this stage as the matter is *sub judice*.

118. Could the Commission provide Parliament with the original files (Word, PDFs, etc.) including the unchanged metadata of the letter of resignation drafted by the Legal Service for the Commissioner, as well as the Press Release?

No reply can be provided since this question touches on an argument raised by Mr Dalli in his application against the Commission (pending case T-562/12, Dalli v. Commission) and is thus *sub judice*. Indeed, the draft resignation letter was submitted by Mr Dalli to the General Court in annex of his application in case T-562/12, Dalli v. Commission.

119. On-the-spot checks according to Article 1 and 2 of the EC regulation no. 2185/96 in connection with recital 13 as well as recital 14 and Article 7 as well as with regard to Article 1 (2) of the EC regulation no. 2988/95 have to be related to an irregularity concerning a specific item of Union expenditure.

- a) How does the Commission assess the legality of an on-the-spot check on the premises of an economic operator on the grounds that the economic operator states in a private telephone conversation that it had established a firm to receive EU funds?
- b) Additionally, how does the Commission assess the legality of an on-the-spot check in a Member State (EC No. 2185/96) in the above mentioned situation if after checking with Commission databases and further information sources, no linkage can be established between the economic operator or any associated firm or company and the financial interest of the Union?

In order to respect OLAF's independence as enshrined in article 12 of Regulation 1073/1999 and article 6 of the Commission decision establishing OLAF and in the light of ongoing national judicial procedures, the Commission is under a duty to refrain from commenting on the legality of OLAF's investigative action. The Commission recalls that the legality of OLAF's investigative actions is subject to judicial review by the Courts.

120. Does the Commission deem the statement of a person in a taped telephone conversation for sufficient to conduct an on-the-spot check?

According to article 12 of Regulation 1073/1999 and article 3 of the Commission decision establishing OLAF, the Commission shall not interfere in the conduct of OLAF's investigations. Therefore it is not for the Commission to assess the necessity and proportionality of any investigative activity.

Furthermore, in order to respect OLAF's independence and in the light of ongoing judicial procedures, the Commission is under a duty to refrain from commenting on the legality of OLAF's investigative action. Any potential breach of procedural/ fundamental rights would be a matter for the courts.

121. How many meetings have been held with producers of tobacco? How many contacts (including telephone and emails) have there been? When? What was the matter of those contacts? Could the Commission provide Parliament with all minutes of those meetings?

Regarding the services of the President (Secretariat General and Legal Service), please refer to the reply of 30 November 2012 to the questions no. 12 to 15 and 19 of the previous questionnaire, as well as to the subsequent letter of the Secretary-General of the Commission to the President of the Budgetary Control Committee of 13 March 2013. Only one of these meetings required minutes.

Although request for access to documents are generally dealt with under Regulation 1049/2001, this document will be transmitted to the Committee.

In addition, since the above-mentioned reply was sent, Ms Kindstrand from Swedish Match wrote on 6 December 2012 to Mr Sleath (Secretariat-General), who sent an acknowledgment on 21 December 2012.

It is not possible to list all contacts (including telephone conversations and emails) with outsiders whether they be "producers of tobacco" or anybody else on all matters and over an indeterminate period of time in the past.

122. Have Commission services collected data and information and compiled them on a DVD with materials and evidence concerning Commissioner Dalli? If yes, when? What information was collected? Did the Commission submit this information to OLAF? If yes, when? What information and materials have been transmitted to OLAF?

Under the first indent of Article 4(2) of Regulation 1073/1999, OLAF has the right of immediate access to any information held by the institutions for the purposes of internal investigations, and under the first subparagraph of Article 7(2) of that Regulation, the institutions are obliged, at the request of the office or on their own initiative, to forward any document or information they hold which relates to a current internal investigation.

In order to respect OLAF's independence and in the light of ongoing judicial procedures, the Commission is under a duty to refrain from commenting OLAF's investigative action.

123. The Director General of OLAF has in the press conference on the 17/10/2012 classified the lobby relationship between Swedish Match/ESTOC through the Maltese lawyer as "totally legitimate" ("tutto legittimo"); only the alleged bribe had "polluted" ("inquinato") this relationship. In the OLAF report (page 40) the Commissioner is reproached with this relationship. The contact of Swedish Match through the Maltese lawyer has been established outside the transparency register. An apology of Swedish Match has been received by the Budgetary Control Committee. How credible and legitimate deems the Commission such lobbyists that search contacts to Commissioners outside the transparency register?

The Commission expects and encourages all entities having activities aiming at influencing the European public decision-making process to register in the joint EP-COM transparency Register. The interinstitutional agreement (IIA) with the Parliament does not rule out contacts between Members of our institutions and non-registered entities. The Parliament itself has ruled out such restrictions and inserted a clause in the IIA whereby the establishment and the operation of the Register shall respect the rights of MEPs to exercise their parliamentary mandate without restrictions. Should any such restrictions be envisaged for the future, they would have to be considered as part of a review of the IIA.

The transparency register is backed up with a code of conduct

[http://europa.eu/transparency-register/about-register/code-of-conduct/index\\_en.htm](http://europa.eu/transparency-register/about-register/code-of-conduct/index_en.htm)

The Commission informs that the Joint Transparency Register Secretariat set up under the Interinstitutional agreement decided to refrain from commenting on the conduct of Swedish Match whilst the case as a whole is *sub judice*.

124. How credible and legitimate deems the Commission lobbyists that search contacts to Commissioners or Commission officials outside of article 5.3 of the WHO Framework Convention on Tobacco Control?

The framework Convention is addressed to public authorities and not to lobbyists:

Article 5.3 of the WHO FCTC reads as follows: "*In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.*"

The Conference of the Parties adopted guidelines for implementation of Article 5.3 of the Convention.<sup>1</sup> Parties are encouraged to implement these guidelines to the extent possible, in accordance with their national law.

125. Can the Commission rule out the possibility of lobby contacts of Commissioners and tobacco lobbyists outside the WHO Framework Convention on Tobacco Control?

As already pointed out in answers to previous written questions (in particular 1718/2013 and 3702/2013), the Ethical framework applicable to Commissioners and staff is compatible with the WHO FCTC guidelines, and clearly protects the decision making process from undue influence from commercial and other vested interests of the tobacco industry.

126. Does the Commission deem demands for resignation due to infringements of article 5.3 of the WHO FCTC for appropriate?

The question is hypothetical: the resignation of the former Commissioner was neither an acknowledgement of any guilt nor a judgement by the Commission. The resignation was a political decision by the former Commissioner. The Commission constantly recalled the necessity to respect the presumption of innocence.

127. How does the Commission ensure that deliberately caused provocations through lobbyists are ruled out - for example at public events?

<sup>1</sup> Decision FCTC/COP3(7).

The existence of rules, guidelines and registers do not per se guarantee that there will never be provocations. Rules, guidelines and Codes of conduct if correctly implemented by all the parties concerned, should nevertheless limit the risks.

128. Which official contact in accordance with article 5.3 of the WHO FCTC did occur between Commission officials and tobacco lobbyists in the years 2010, 2011 and 2012?

The service in charge of public health policy, DG SANCO published details of meetings relevant to the revision of the tobacco directive on its website. There was one in 2009, 3 in 2010 and none since.

[http://ec.europa.eu/health/consultations/index\\_en.htm?Page=7](http://ec.europa.eu/health/consultations/index_en.htm?Page=7)

Other meetings with tobacco interests took place in conformity with the Commission's general rules which are compatible with the FCTC guidelines. (see above answer to question 121)

129. The lawyer of the tobacco lobby, Michel Petite, had contacts with the Secretary General before the receipt of the complaint from Swedish Match at the 21.05.2012.

130. Which contacts were there?

- a) With whom?
- b) When?
- c) Why?
- d) How have the contacts been registered in the light of article 5.3 of the WHO FCTC?
- e) To which conclusion came the Secretary General after these contacts?
- f) Which agreements/arrangements/deals have been made?

Mr. Petite, a former Director General of the Commission Legal Service, in line with his duties as a former official, decided to phone the Secretary General of the Commission in May 2012 to alert her to information which Swedish Match communicated to him. Swedish Match had asked him how to bring the information to the attention of the Commission. The Secretary General, in her role as the official responsible for official communications, felt it was her duty to suggest that the allegations be brought to the official attention of the Commission and she therefore informed him that Swedish Match should write to her.

131. The bypassing of the Supervisory Committee before transmitting the information to Maltese Judicial authorities is a breach of the procedural rights of the persons concerned according to a judgement of the European Court of Justice (*Franchet/Byk*).

- a) Is the Commission aware of the financial burden accruing to the taxpayer - as experienced in the case *Franchet/Byk*?
- b) Which disciplinary measures are intended by the Commission?

Art 11 (7) of Regulation 1073 stipulates that OLAF must inform the Supervisory Committee (SUPCOM) of cases requiring information to be forwarded to the national judicial authorities, and the decision of the Court of First Instance in case *Franchet/Byk* (para 164) specifies that that information is to be provided to the SUPCOM prior to the forwarding of information to the national judicial authorities.

As OLAF has informed the Commission, prior to the transmission to the judiciary, OLAF informed the Committee and granted it full access to the case file for a period of one month upon its request. This access was later extended. These details were also explained to the CONT on 29<sup>th</sup> May.

For these reasons the Commission does not consider that the Supervisory Committee was bypassed. See also reply to question 100. The Commission does not envisage taking disciplinary measures. The Commission has already publicly made clear its view on 24 of April 2013. [http://europa.eu/rapid/press-release\\_MEMO-13-381\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-381_en.htm)

132. Several judgement of the Court of Justice (in cases against the Commission) state the importance of the presumption of innocence. Does the Commission see the presumption of innocence been preserved after the press conference of the Director General of OLAF on October 17, 2012, and several other interviews?

The Commission has stressed the presumption of innocence in all situations and is not aware that it has been compromised.

The Commission recalls that parties concerned have the right to judicial review in the Courts.

133. Does the Commission think the OLAF DG can participate or lead investigations on an operational level?

Article 6 of Regulation 1073/1999 states that "the Director of the Office shall direct the conduct of investigations".

134. What is the Commission's interpretation of the OLAF SC's opinion that the OLAF DG asked the SG not to inform the Commission president and Commissioner Dalli about the investigation?

This statement in the SC Report to the EP is based on an incorrect quotation of the letter addressed by the Director-General of OLAF to the Secretary General. The letter stated that the Secretary General is not to inform the person concerned before that person is contacted by OLAF in order not to jeopardise the OLAF investigative activities. The letter indicated that this prohibition should also apply to the President and any other Member or official of the Commission.

OLAF did not ask the Secretary General not to inform the President about the investigation.

135. What is the Commission's assessment of the relationship between OLAF SC and Olaf (DG)? How can the deterioration be explained?

In February 2012, OLAF underwent a fundamental reorganisation, just after the new Supervisory Committee had taken office. This situation, possibly combined with other factors resulting from different personal backgrounds and experiences, may have caused some adaptation problems on both sides.

The new Supervisory Committee defines its role in a different way than its predecessor. The issue of relations between OLAF and the Supervisory Committee but also inside the Supervisory Committee obviously was subject to different views, given the resignation of the President of the Supervisory Committee and of one of its members. These different views have and will require some adaptation of the relevant working methods. The competent Commissioner is taking steps to facilitate smooth cooperation for the future.

The Commission attached the highest importance to a constructive and loyal working relationship between the Supervisory Committee and OLAF.

136. What measures can be proposed by the Commission in order to improve the working relations between OLAF and the OLAF Supervisory Committee?

As discussed at the meeting of CONT on 28 May, the Commission has already held bilateral talks both with the DG OLAF and the SC in order to identify points of conflicts. It has also proposed solutions and has offered to mediate where issues could not be solved bilaterally between OLAF and the SC. The Commission has already taken the initiative, in full respect of the independence of the two parties, to bring the two parties together to agree on a roadmap for the measures that can ensure a constructive and fruitful future cooperation. On 7 June the Supervisory Committee wrote to the competent Commissioner to postpone a meeting which had been arranged to ensure appropriate follow up to the recommendations made in the Committee's annual activity report for 2012.

Question to the President of the Commission and the Commission Secretary General

137. On 7 September 2012 an email was send from SANCO to Mrs Day pointing out that the draft Tobacco directive had been changed on 6 points based on a prior agreement between SANCO and the legal service/ mrs Day.

Could the commission make this agreement available?

The first change mentioned, refers to lifting the proposed ban on chewing and nasal tobacco. Is it so that this change and the other changes proposed in the agreement were based on an opinion by the legal service?

138. Could the Commission make this/these opinion(s) available?

The Commission has received a request for access to documents pursuant to regulation 1049/2001 regarding the e-mail of 7 September 2012. As in previous instances, it will provide Parliament with a copy of its reply to the request.

The two opinions of the Legal Service issued in this file were contained (a) in the joint note of the Director General of the Legal Service and the Secretary General and of 25 July, and (b) a note of 10 December 2012 The first note has already been published following an access to documents request.

As regards the request for access to the second note, the Commission will treat this request for access to document in accordance with Regulation 1049/2001)

139. Can the Commission guarantee that Mr Petite was in no way involved either directly or indirectly in drafting and preparing this/these legal opinion(s)?

Yes.

140. Could all correspondence between Mr Petite and the Commission or individual staff of the Commission be made available?

The Commission has already received a request for access to documents pursuant to regulation 1049/2001 regarding this matter, and responded to it. As in previous instances, it will provide Parliament with a copy of its reply to the request.

141. Could the commission point out what is the difference between snus and chewing tobacco, considering that both content and the way it is administrated are almost similar, with the exception of the little bag containing the snus tobacco?

Snus should be understood as 'tobacco for oral use' which is defined in the Tobacco Products Directive (2001/37/EC) as: "*all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets,*

*or in a form resembling a food product.*" This definition does not exclude oral tobacco sold in powder format (loose snus), but provides a distinction based on the mode of consumption.

Chewing tobacco should be understood as a smokeless tobacco product exclusively designed for the purpose of chewing.

142. Does the Commission believe that the health effects between chewing tobacco and snus are different?

There are many forms of smokeless tobacco products which differ considerably in their composition and toxic potential. All smokeless tobacco products (including snus and chewing tobacco) contain carcinogenic substances and are associated with a number of adverse health effects.

Overall health effects on society also differ between different smokeless tobacco products (including between chewing tobacco and snus) as these effects are linked to estimated market potential and risk of uptake in new population groups (niche product versus mass product).

The health effects are further described in the Impact Assessment accompanying the proposal for the revised tobacco Directive,<sup>2</sup> as well as in the relevant opinion of the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR).<sup>3</sup>

143. If so what are the health problems caused by the little bag?

As described under question n° 141, the difference between snus and chewing tobacco is not linked to the "bag".

144. Has there been any formal complaint or suggestion of irregularity on the part of any of the parties under investigation or persons concerned?

Apart from the case T- 562/12 brought by the former Commissioner, against the Commission, to the best of its knowledge, there are no other complaints. Mr Dalli has also launched a complaint before the Belgian judicial authorities alleging defamation by Swedish Match.

145. In paragraph 2.3 section 15, on what basis did the Secretary General inform the President of the Commission of the complaint prior to taking the matter to OLAF?

The European Commissioner John Dalli resigned following an investigation on supposed attempt to influence new tobacco legislation. His decision has been taken under the OLAF investigations which, as a matter of fact, did not bring any formal proof of his guiltiness. Furthermore, doubts remain regarding potential investigation procedural infringements. While it has an individual independent status for the investigative function, OLAF is part of the European Commission.

<sup>2</sup> SWD(2012) 452 final.

<sup>3</sup> [http://ec.europa.eu/health/archive/ph\\_risk/committees/04\\_scenihr/docs/scenihr\\_o\\_013.pdf](http://ec.europa.eu/health/archive/ph_risk/committees/04_scenihr/docs/scenihr_o_013.pdf).

Why the European Commission have not waited for the OLAF's supervisory committee conclusions regarding the investigation procedure legacy as well as the Maltese Court decision, before forcing Commissioner J. Dalli to resign? Why conclusions weren't send firstly to the supervisory committee, and secondly to the Maltese Court, as the standard procedure usually requires?

The Secretary-General had a duty to inform the President of a complaint made against a Member of the Commission.

The Commission – and in particular it's President - has always taken every opportunity to recall the necessity of respecting the presumption of innocence in the most unambiguous and emphatic terms in many statements including to the Conference of Presidents of the European Parliament. As President Barroso said to the Conference of Presidents "the Commission and I fully respect the presumption of innocence of the persons concerned".

The former Commissioner decided to resign because he agreed with the President that it was politically untenable for him to continue in office.

This resignation was not an admission of his own culpability, nor the result of any condemnation. It was a political decision, as would normally be expected in such a situation.

See above answer to Q 131.

146. Don't you think the European Commission should conduct an independent investigation in order to assess potential procedural infringements in this particular case? If procedural infringements are confirmed, what actions can the Commission undertake to resolve this situation? What actions should be taken by the Commission to prevent any new procedural infringements?

The case referred to is under scrutiny in the European Court of Justice and criminal investigations in Malta and Belgium. Under these circumstances it is not the intention of the Commission to launch a separate investigation.

The adoption of the revised OLAF regulation will strengthen the procedural rights of persons concerned (art 9 of the compromise text) and will provide for a more comprehensive and clear framework for OLAF's investigation. It will also provide for an exchange of view at political level (art 16). Moreover, the Commission and its President have indicated on several occasions the intention to propose further measures to strengthen procedural rights in a future proposal to amend Regulation 1073/1999. This proposal is being developed in the context of a planned proposal that would adapt OLAF's legal framework to take account of the establishment of a European Public Prosecutors Office.

The Commission is looking forward to discussing with the CONT committee and the representative of the Council any further modification to be made to the Regulation with a view to drawing on experience so far.