



EUROPEAN  
COMMISSION



EUROPEAN ANTI-FRAUD OFFICE

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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:

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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?

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

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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?

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

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

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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?

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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?

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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.

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?

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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.

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## **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:

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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.

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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.

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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.

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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.

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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.