

Preliminary findings in the OI/6/2021/KR on the European Commission's interactions with tobacco interest representatives

Correspondence - 14/04/2023

Case OI/6/2021/KR - **Opened on** 26/11/2021 - **Decision on** 19/12/2023 - **Institution concerned** European Commission (Maladministration found) |

Ms Ursula von der Leyen

President

European Commission

Dear President,

I am writing to share with you my preliminary findings in the above inquiry. The inquiry concerns how the European Commission ensures that its interactions with tobacco interest representatives are transparent, as required by the Framework Convention on Tobacco Control (FCTC) of the World Health Organisation (WHO). [1]

To get an overview of the situation following my previous inquiry into the matter, [2] I inspected documents held by the Commission concerning all interactions with tobacco interest representatives in 2020 and 2021, including requests for public access to documents concerning such interactions. My inquiry team also met with representatives of the Commission to discuss matters arising from that inspection.

After careful assessment of all the information that the Commission shared in the course of this inquiry, I believe that it would be useful to receive a written reply from the Commission on my preliminary findings.

1. Publication of details of interactions with tobacco interest



representatives

The inspection showed that the proactive transparency policy put in place by the Commission's Directorate-General for Health and Food Safety (DG SANTE) does still not apply across the entire Commission. DG SANTE's policy requires the publication online of all the meetings its staff have with tobacco industry representatives and the minutes taken of those meetings, irrespective of the seniority of the official concerned.

In 2016, following my previous inquiry, I recommended that the Commission should apply DG SANTE's proactive transparency policy across all of the Commission's services and I found that the Commission's refusal to do so constituted maladministration. [3]

While the Commission's Directorate-General for Taxation and Customs Union (DG TAXUD) has made improvements in the meantime [4], other Commission departments that interact with tobacco interest representatives have not.

In the period that is within the scope of this inquiry, I found that numerous Commission departments had meetings with tobacco interest representatives, including:

- Agriculture and Rural Development (DG AGRI),
- Climate Action (DG CLIMA),
- Environment (DG ENV),
- Financial Stability, Financial Services and Capital Markets Union (DG FISMA),
- Internal Market, Industry, Entrepreneurship and SMEs (DG GROW),
- Mobility and Transport (DG MOVE),
- Neighbourhood and Enlargement (DG NEAR),
- Trade (DG TRADE), as well as
- European Anti-Fraud Office (OLAF).

As some of these meetings were held with commissioners, members of their cabinets or with directors-general, some details relating to these meetings were made public by virtue of the Commission's overall approach to lobbying transparency. [5] However, details of meetings that took place at a less senior level were not made proactively available to the public.

I therefore also assessed the public's ability to scrutinise the Commission's interactions with tobacco interest representatives via requests for public access to documents. In 2020 and 2021, the Commission received 19 public access to documents requests concerning meetings with tobacco interest representatives. While the Commission granted full or partial access [6] in reply to twelve of these requests, it replied to the remaining seven requests that no documents were identified as falling within the scope of the request.

The fact that many Commission departments interact with interest representatives from the tobacco industry shows that the interests of the tobacco sector are cross-cutting. Responding to tobacco lobbying in compliance with the FCTC therefore requires a whole-of-Commission proactive approach.



My preliminary view is that the absence of a whole-of-Commission approach to complying with the obligations stemming from the FCTC constitutes maladministration.

2. Record-keeping related to interactions with the tobacco sector

During the inquiry, my inquiry team identified shortcomings in the Commission's record-keeping practice in this area. In reply to my inspection requests, the Commission did not identify minutes regarding numerous meetings that were organised with tobacco interest representatives.

The FCTC provides that “[i]n 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 . [7]

There is a lack of transparency and therefore accountability when minutes of meetings are not made proactively available and cannot be made available upon request. If minutes of meetings with tobacco interest representatives do not exist, it is difficult to see how the Commission can ensure that these interactions do not pose risks, either directly or indirectly, to public health policies.

My preliminary view is that the failure to keep and make available minutes on all of the Commission's meetings with tobacco interest representatives constitutes maladministration.

3. Assessing ‘necessity’ when interacting with tobacco interest representatives

Lack of proper record keeping makes it difficult to hold the Commission to account for the meetings it has with tobacco interest representatives, which is contrary to the spirit of the FCTC. The implementing guidelines for Article 5.3 of the FCTC state that “ [p]arties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products ” [8] .

The inspection showed that, in one instance, the Commission declined a meeting request from a tobacco interest representative because the meeting was deemed to be unnecessary from a regulatory point of view. In the correspondence in question [9] , the Commission made reference to the fact that the obligation to do such a necessity check stems from the FCTC.

I agree with this interpretation of the FCTC. However, based on the inquiry inspection, this assessment of necessity in relation to meeting requests from tobacco interest representatives appears to be the exception rather than the rule.

In view of this, could the Commission please explain in what situations an assessment of



necessity is conducted, how it is conducted and whether it is documented?

I would be grateful to receive the Commission's reply, which will be made public on our website, within three months of receipt of this letter. Should your services require any clarification, they can contact the responsible inquiries officer, Mr Koen Roovers.

Yours sincerely,

Emily O'Reilly European Ombudsman

Strasbourg, 14/04/2023

[1] In 2003, the World Health Organisation adopted the Framework Convention on Tobacco Control (FCTC), which aims at comprehensively reducing tobacco-related deaths and diseases around the world. The Council of the European Union approved the Convention in June 2004. The Convention entered into force on 28 September 2005. See: <https://apps.who.int/iris/rest/bitstreams/50793/retrieve> [Link].

[2] Decision concerning the European Commission's compliance with the Tobacco Control Convention (852/2014/LP), available at: <https://www.ombudsman.europa.eu/en/decision/en/73774>

[3] Decision concerning the European Commission's compliance with the Tobacco Control Convention (852/2014/LP), available at: <https://www.ombudsman.europa.eu/en/decision/en/73774> [Link]

[4] I note however that some meetings declared by the Commission in the context of the ongoing inquiry were not published on the website of DG TAXUD, namely a meeting held by DG TRADE and DG TAXUD with representatives of the tobacco industry on 5 October 2020 and a meeting held by Director-General of TAXUD and the ETCR and on 27 November 2020.

[5] For details, please see the Commission decisions of November 2014 on the publication of information on meetings held between commissioners, members of their cabinets and directors-general and organisations or self-employed individuals: <https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/transpare> [Link].

[6] Most redactions were made to protect personal data, as provided in Article 4(1)b of Regulation 1049/2001. In four cases, redactions were made to protect commercial interests



(under Article 4(2). In one case redactions to protect international relations (under Article 4(1)a) and protection of the decision-making process (under Article 4(3)). See:
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049> [Link].

[7] Article 5.3, see footnote 1.

[8] Recommendation 2, see:

https://fctc.who.int/docs/librariesprovider12/default-document-library/who-fctc-article-5.3.pdf?sfvrsn=a52de22a_16&

[9] Reply from Commissioner Janus Wojciechowski of 15 May 2020 to a transnational tobacco company.