



Recommendation of the European Ombudsman in the inquiry into complaint 852/2014/LP against the European Commission regarding its compliance with the Tobacco Control Convention

Recommendation

Case 852/2014/LP - **Opened on** 20/06/2014 - **Recommendation on** 01/10/2015 - **Decision on** 06/12/2016 - **Institution concerned** European Commission (Critical remark) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The NGO, Corporate Europe Observatory, complained to the Ombudsman that the European Commission was not meeting its obligation, under the Tobacco Control Convention, to be accountable and transparent in its dealings with the tobacco industry. In particular, the complaint was that the Commission (with the exception of DG Health) was failing to proactively publish details and minutes of meetings with representatives of the tobacco industry. The Commission's position was that, by dealing with applications for access to documents concerning meetings with the tobacco industry, and by responding to relevant questions from MEPs, it was meeting its obligation under the Convention to be accountable and transparent. The Commission also contended that the strict and proactive rules adopted by DG Health reflected that Directorate's specific responsibilities and were not appropriate in the case of the Commission as a whole.

The Ombudsman took the view that parties to the Convention are required to take active measures both to limit the extent of interactions with the tobacco industry and to ensure transparency where such interactions occur. The Ombudsman rejected the view that the Commission generally could operate on a lower level of transparency than is required of DG Health: all of the Directorates are involved in legislative and policy areas which relate to tobacco control. The Ombudsman found inherent weaknesses in the current practices of the Commission (excluding DG Health) which make them unreliable and unsatisfactory in terms of transparency and accountability. The Ombudsman found that the current practices amounted to maladministration. She recommended to the Commission that all of its Directorates should ensure proactive transparency as is already the case with DG Health. This will require the publication on-line of the details and minutes of all meetings with tobacco interest representatives. The recommendation specifically includes reference to meetings of the Commission's Legal Service with tobacco industry representatives, including its legal representatives.

The background to the complaint



1. In 2003, the World Health Assembly adopted the Framework Convention on Tobacco Control (the "Convention"), which aims at reducing tobacco-related deaths and diseases around the world in a comprehensive manner. To date, the Convention has been ratified by 176 Parties. The EU concluded the Convention by Council Decision 2004/513/EC of 2 June 2004 [2] . The Convention entered into force on 28 September 2005.

2. Article 5(3) of the Convention provides as follows:

"In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law" .

3. In order to implement the above provision, non-binding Guidelines (the "Guidelines") have been drawn up by the parties to the Convention. According to "Principle 2" of those Guidelines, "*Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent . Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent* ". The Guidelines also recommend, inter alia, that the Parties to the Convention should "*establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur* ". [3]

4. In January 2013, the complainant, Corporate Europe Observatory (a NGO based in Brussels) along with four other NGOs , wrote to the President of the European Commission concerning the alleged failure by the Commission to properly implement Article 5(3) of the Convention. It complained of the fact that a number of Commission officials appeared to have had meetings with tobacco industry lobbyists that were never disclosed. It argued that with the exception of the Directorate-General for Health and Food Safety ("DG Health"), the Commission's services had failed to ensure transparency and to adopt measures to avoid undue influence by the tobacco industry. The complainant suggested that all the DGs of the Commission should publish lists and minutes of their meetings with tobacco industry representatives and lobbyists. It also asked the Commission to (i) adapt its Code of Conduct for Commissioners and its Staff Regulations to ethical standards specifically regulating the relations of the institution with the tobacco industry, and (ii) make mandatory the registration of tobacco industry lobbyists in the EU Transparency Register.

5. On 7 February 2013, the Commission replied that the existing rules and tools concerning transparency and lobbying, as well as its policy in terms of stakeholder consultations, are fully compatible with the Convention. It also contended that the Guidelines are not binding, and that Regulation 1049/2001 on access to documents ensures a high level of transparency in line with the transparency requirements of the Convention.

6. On 13 December 2013, the complainant requested further information from the Commission regarding its policy of implementing Article 5(3) of the Convention, adding that, according to its own research published in December 2012, members of the President's own Cabinet and officials from the Secretariat-General appeared to have held undisclosed meetings with tobacco industry lobbyists.



7. In his reply, on behalf of the Commission, Commissioner Šefčovič stated that the Commission's internal rules on transparency, professional ethics and lobbying were fully compatible with the Convention and the Guidelines. The fact that DG Health had developed specific guidelines in this area for its staff, was understandable given its responsibility for the "Tobacco Products Directive" (Directive 2014/40/EU). The Commissioner also stated that he himself was complying with the rules of DG Health in this area, and was publishing the minutes of his meetings with representatives of the tobacco industry.

8. Not satisfied with the Commission's replies, the complainant turned to the Ombudsman.

The inquiry

9. The Ombudsman opened an inquiry into the complainant's allegation that the Commission had failed to implement Article 5(3) of the Convention and the associated Guidelines properly. The inquiry also included the complainant's claims that the Commission should a) undertake a thorough assessment of how to implement the Convention rules across all of its departments; b) publish online lists of all meetings with tobacco industry representatives and minutes of such meetings; c) implement a code of conduct on relations with the tobacco industry amending where necessary the relevant provisions of the Code of Conduct for Commissioners and the Staff Regulations; and d) ensure registration and disclosure of the identity and activities of tobacco industry lobbyists via the EU's Transparency Register.

10. In the course of the inquiry, the Ombudsman received the opinion of the Commission, followed by a supplementary opinion in which the Commission was invited to specify whether, as the complainant had argued, a number of undisclosed meetings between senior Commission officials (other than staff of DG Health) and tobacco industry representatives had taken place, and whether records of any of such meetings were kept. The Ombudsman also received the comments of the complainant in response to the Commission's first and supplementary opinion. In addition to that, the Ombudsman carried out an inspection of the Commission's file concerning this case.

11. The Ombudsman's recommendation takes into account the arguments and opinions put forward by the parties.

Alleged failure by the Commission to implement Article 5(3) of the Convention and the Guidelines properly

Arguments presented to the Ombudsman



12. The **complainant** considers that the current rules and procedures put in place by the Commission in order to comply with Article 5(3) of the Convention and the implementing Guidelines are not sufficient to ensure transparency and to avoid undue influence when interacting with tobacco industry interests.

13. In the complainant's view, the controversy around previous tobacco industry attempts to influence the EU's "Tobacco Products Directive" have highlighted the importance of effectively regulating the relations between the EU institutions and the tobacco industry. Given that the EU is a Party to the Convention, all EU institutions have an obligation to protect the integrity of policy-making and law-making from the vested interests of the tobacco industry.

14. According to the complainant, the Commission's responses to questions from MEPs and the content of documents released following requests for access to documents made under Regulation 1049/2001 over the last few years, suggest that senior Commission officials have had numerous meetings with tobacco industry lobbyists that were not disclosed online, despite the obligation for transparency.

15. In that regard, the complainant takes issue with the Commission's view that releasing documents under Regulation 1049/2001 is sufficient to fulfil the transparency obligation laid down in Article 5(3) of the Convention, given that this places on the public the burden to act and ensure compliance of the EU with the Convention.

16. The complainant argues that there is an evident and unjustified lack of coherence between the policy and practices of DG Health, on the one hand, and those of the rest of the Commission's services on the other hand. DG Health publicly discloses its contacts with tobacco lobbyists and representatives while the rest of the Commission's services does not.

17. In order to ensure full compliance with Article 5(3) of the Convention and the Guidelines, the complainant considers that the Commission should introduce across all of its services effective measures to ensure transparency of its interactions with tobacco industry representatives, publish online lists of all such meetings as well as minutes of them, implement an effective code of conduct on relations with the tobacco industry, and ensure the mandatory registration and disclosure of the identity and activities of tobacco industry lobbyists via the EU's Transparency Register.

18. In its opinion, the **Commission** emphasised the EU's strong commitment to fully comply with and implement the provisions of the Convention. It noted however that the Guidelines are not binding and should therefore be implemented in ways that are compatible with established legal and administrative practices.

19. According to the Commission, the ethical framework applicable to Members of the Commission and staff, as well as its rules on access to documents and transparency constitute the framework within which compliance with and implementation of the Convention and its non-binding Guidelines take place.



20. According to the Commission, its ethical framework is fully compatible with the Convention and its Guidelines. In that regard, the Commission also referred to the recent amendments of the Staff Regulations in the area of conflicts of interest, applicable as from 1 January 2014, and the Guidelines on gifts and hospitalities which the Commission issued to its staff in 2012. In addition, the Commission has issued a "Practical Guide to staff on ethics and conduct", which contains recommendations regarding contacts with interest groups.

21. As regards the rules on access to documents, the Commission argued that Regulation 1049/2001 ensures a high level of transparency, and is therefore compatible with the transparency requirements of the Convention, as clearly demonstrated by the fact that documents related to contacts with the tobacco industry and other stakeholders have already been released in response to requests by the complainant.

22. The Commission also contended that, given the specific responsibility of DG Health for the "Tobacco Products Directive", it is understandable that that DG would develop specific transparency-oriented guidelines for its staff working in this area. However, neither the Convention nor the Guidelines contain any provision which support the complainant's claim that the Commission, as a whole, should publish online all meetings with tobacco industry representatives and minutes of such meetings.

23. The fact that the Commission, apart from DG Health, has not published on-line details of a number of meetings with tobacco industry representatives mentioned by the complainant does not imply that those meetings were "undisclosed". On the contrary, according to the Commission, it "disclosed" those meetings through the access granted on numerous occasions to documents requested under Regulation 1049/2001, and in its replies to questions from the European Parliament concerning such meetings. Those questions related in particular to meetings of officials from the Secretariat-General and the Legal Service with tobacco industry representatives. All documents in relation to those meetings were subject to the rules on access to documents. Where minutes were drawn up, these have been provided. However, meetings with no concrete outcomes did not necessarily require the taking of any minutes.

24. As regards the need for tobacco industry lobbyists to register their activity through the EU Transparency Register set up jointly by the European Parliament and the Commission in 2011, the Commission stated that enrolling in the Register also implies signing up to its Code of Conduct that includes a number of provisions governing the relationship between the lobbyist and the EU Institutions. Whilst the Register in its current form remains voluntary in nature, Commission staff are expected as a matter of course to ask lobbyists, with whom they are interacting, whether they are enrolled in the Register and to urge them to do so if this is not the case.

25. In its observations, the **complainant** argued that the Commission has yet to provide a convincing explanation as to why the rest of the Commission's services does not apply the same transparency rules as DG Health's staff does in the area of tobacco policy and law-making.



26. The complainant welcomed the measures that were recently introduced by the Commission as part of its new "Transparency Initiative" which include restrictions on meetings with unregistered lobbyists and a pro-active transparency as regards the online publication of meetings with lobbyists. However, those measures would need to be further broadened as they only target a very small number of top Commission officials (Commissioners, their Cabinet members and Directors-Generals).

The Ombudsman's assessment leading to a recommendation

27. The thrust of the complainant's allegation is that the Commission as a whole should adopt the stricter rules on proactive transparency and ethics already adopted by DG Health. Only by doing so, according to the complainant, will the Commission be in full compliance with the transparency obligation resulting from Article 5(3) of the Convention and the corresponding provisions of the Guidelines.

28. Before addressing the merits of this allegation, it is important to clarify at the outset the issue of the alleged "undisclosed" meetings of top Commission's officials with tobacco industry representatives to which the complainant made reference in support of its allegation.

29. The Ombudsman notes that, as the Commission pointed out, those meetings were not "undisclosed" in the sense that they were kept secret and that no records were kept by the Commission. Rather, the complainant used the term "undisclosed" to refer to meetings and minutes of such meetings which were not published proactively online by the Commission. In fact, as the Commission explained, the existence of those meetings was made known and documents related to them (notes, minutes) were released to the complainant following requests for access to documents made under Regulation 1049/2001. In addition, such details were also given by the Commission in replies to questions from MEPs.

30. The Ombudsman's inspection did not provide any evidence to suggest that, apart from the meetings with tobacco industry representatives that the Commission had already disclosed (under Regulation 1049/2001 and in replies to MEPs' questions), other meetings may have taken place the existence of which the Commission had kept secret. However, the evidence from the Ombudsman's inspection tended to support the complainant's view that the Commission's current compliance framework is inadequate. As explained below, the Ombudsman takes the view that the Commission's current framework does not give full effect to the transparency obligation arising under Article 5(3) of the Convention.

31. The Commission's position is that its existing ethical framework for Commissioners and staff, together with the access to documents regime under Regulation 1049/2001, are sufficient to ensure the EU's compliance with Article 5(3) of the Convention. The Commission takes the view that since the Guidelines are not binding, there is no need for it to apply to the rest of its services the strict transparency rules that have been put in place in this area by DG Health. In the Commission's view, the fact that DG Health publishes online all the meetings of



its staff with tobacco industry representatives, together with the minutes of those meetings, is due to the fact that DG Health is entrusted with the implementation of the Commission's health policy, which also includes the regulation of tobacco products.

32. The Ombudsman finds that the Commission' position is not convincing. The objective of the Convention is to "*to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke*". Among the general obligations agreed upon by the Contracting Parties to achieve that objective, Article 5(3) of the Convention provides that "*in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law*". The Guidelines adopted as a means to implement Article 5(3) of the Convention also recommend, inter alia, that the Parties to the Convention should "*establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur*".

33. The Convention and the Guidelines, by requiring Parties to "*act*" to protect their health policies from commercial or other vested interests of the tobacco industry, impose a proactive approach rather than a reactive or even passive one. The Commission appears to have given partial effect to this requirement since DG Health has put in place such a proactive and effective transparency framework. This framework requires the publication online of all the meetings of its staff with tobacco industry representatives as well as the minutes of those meetings. The Ombudsman therefore fails to understand why these proactive rules, which can be considered to constitute best practice, should not apply across all of the Commission's services. This would ensure these rules apply to its top officials and officials of other services such as the Secretariat-General and the Legal Service, services that are closely involved in the policy and law making of the Commission as a whole.

34. It should also be kept in mind that the effectiveness of DG Health's proactive transparency rules could be seriously weakened and undermined where other Commissioners and/or officials from other services, which are closely associated with the Commission's law and policy-making activities, are allowed to hold unreported meetings with tobacco industry representatives. In this scenario, which in fact is currently the case, the existence of such meetings becomes known to the public only if and when a citizen or other person makes an access to documents request under Regulation 1049/2001, or a MEP puts a relevant question to the Commission. Although DG Health is entrusted with the implementation of the Commission's policy on health, including the implementation of the "Tobacco Products" Directive, the fact remains that it is not only the DG Health officials and its Commissioner who ensure the implementation of the Convention, but the Commission as a whole through its law and policy making activities. Therefore, the Ombudsman fails to see why it should only be DG Health that publishes online meetings of its staff with tobacco industry representatives while the rest of the Commission does not do so even though they are also involved, one way or another, in the law and policy-making activities of the Commission in the area of tobacco regulation.



35. The Ombudsman, therefore, does not share the Commission's view that the current ethical framework applicable to Commissioners and its staff ensures full compliance with the transparency obligation laid down in Article 5(3) of the Convention. Although these rules require, amongst other things, that officials should carry out their duties objectively, impartially and in keeping with their duty of loyalty to the Union (see Article 11 of the Staff Regulations), they do not impose any clear-cut obligations on officials to act to protect the policies of the EU " *from commercial and other vested interests of the tobacco industry* ", nor do they appear to give effect to the Guidelines in the sense of taking concrete " *measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur*".

36. Likewise, even if it is true that Regulation 1049/2001 is capable of ensuring a high degree of transparency in the EU, the fact remains that meetings of Commission officials, other than those of DG Health, with tobacco industry representatives will remain undisclosed unless and until a citizen makes a request for access to documents or a MEP puts a relevant question to the Commission. The Ombudsman agrees with the complainant that, in essence, such an approach shifts the burden of compliance with the transparency obligation of Article 5(3) of the Convention from the Commission to the citizen. However, this could certainly not have been the intended effect of complying with Article 5(3) of the Convention.

37. The Ombudsman's inspection has shown that there are inherent weaknesses in the Commission's current approach which make it unreliable and unsatisfactory in terms of achieving transparency. At present, relevant information is provided only where an access to documents request is made or a relevant question raised by a MEP. In the absence of such a request or question, information is not forthcoming. Making a relevant access to documents request, or posing a relevant MEP question, is likely to elicit the type of information sought only where such request or question is carefully worded. If no record of a meeting with a tobacco industry representative is kept (because there is no requirement to keep such a record), then an access to documents request will be futile. Likewise, in the case of a MEP question, where no record has been kept, a full reply depends on whether the officials concerned are able to recall having had any such meetings and what was actually discussed.

38. The Ombudsman's inspection also showed that certain meetings of members of the Commission's Legal Service with tobacco industry representatives were disclosed in replies given by the Commission to MEPs. However, when the same officials were asked by the Commission for the purposes of this inquiry, to say whether they had had meetings with tobacco industry representatives, they replied in the negative. The Commission explained that this apparent inconsistency was due to the fact that members of its Legal Service do not, in general, regard contacts with lawyers representing law firms providing legal advice to companies, as being contacts with the industry itself. It is obvious that this interpretation is flawed and has the effect, in the present context, of concealing the existence of meetings between Commission staff and representatives of the tobacco industry. Furthermore, this example demonstrates the dangers inherent in leaving it to individual staff members, or categories of staff, to decide themselves whether a meeting must be reported. Leaving it to staff to decide which meetings must be reported, or to decide whether a meeting with



employees, advisors, lobbyists, and/or lawyers representing the tobacco industry should be treated simply as a courtesy or informal meeting, will inevitably frustrate the effective implementation of the transparency obligation of Article 5(3) of the Convention.

38. In light of the above, the Ombudsman concludes that the Commission's failure to apply, across all of its services, the stricter transparency rules applied by DG Health regarding the publication online of all meetings with tobacco industry representatives, and the publication of minutes of such meetings, constitutes maladministration. She will therefore recommend to the Commission to ensure that the proactive transparency policy put in place by DG Health will apply across all of the Commission services.

39. In making her recommendation the Ombudsman is also aware that, on 25 November 2014, the Commission adopted two Decisions requiring the publication of information concerning meetings held by Commissioners, members of their cabinets and Directors-General with organisations and self-employed individuals, and that in principle, those officials should only meet organisations and self-employed individuals which feature in the Transparency Register. The Ombudsman considers that this initiative is indeed a step in the right direction towards strengthening transparency in the EU. However, as the complainant observed, these new rules apply only to a limited number of top officials. Thus, as a result, policy officers, and members of the Legal Service dealing with tobacco issues, Heads of Unit and Directors are not bound by those new transparency and disclosure rules. Those rules cannot therefore be seen as fully addressing the need for effective compliance with the transparency obligation laid down in Article 5(3) of the Convention and its Guidelines.

40. This recommendation is also made with a view to addressing the complainant's claims a) to c). As regards claim d) (regarding the registration and disclosure of the identity and activities of tobacco industry lobbyists via the EU's Transparency Register), the Ombudsman notes that, on 24 January 2015, the Commission made public its intention to submit a proposal, in 2015, for a mandatory register of lobbyists covering the Commission, the European Parliament and the Council [4]. This proposal, when adopted, would address the complainant's concerns and the fact that, at present, registration in the Transparency Register remains voluntary in nature. The Ombudsman therefore invites the Commission to provide, in its detailed opinion on this recommendation, an update on its announced intention to propose the setting up of a mandatory Transparency Register.

The recommendation

The Commission should ensure that the proactive transparency policy put in place by DG Health, requiring the publication online of all the meetings its staff have with tobacco industry representatives and the minutes taken of those meetings, should apply across all of the Commission's services irrespective of the seniority of the official concerned and including, specifically, members of its Legal Service.

The Commission and the complainant will be informed of this recommendation. In



accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 December 2015. The detailed opinion could consist of the acceptance of the recommendation and a description of how it has been implemented as well as an update on the Commission's announcement on 27 January 2015, that it intends to make its own proposal in 2015 for a mandatory register of lobbyists covering the Commission, the European Parliament and the Council.

Strasbourg, 01/10/2015

Emily O'Reilly European Ombudsman

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] OJ 2004 L 213, p. 8.

[3] Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, FCTC/COP3(7), http://apps.who.int/gb/fctc/PDF/cop3/FCTC_COP3_DIV3-en.pdf.

[4] http://europa.eu/rapid/press-release_IP-15-3740_en.htm.