

Decision concerning the European Commission's compliance with the Tobacco Control Convention (852/2014/LP)

Decision

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) |

This case concerned an allegation from an NGO that the European Commission is failing to meet its obligation under Article 5(3) of the WHO's Tobacco Control Convention to be transparent in its dealings with the tobacco industry. In particular, the complainant argued that the Commission, with the exception of its Directorate General for Health (DG Health), was not proactively making public all information on meetings between the Commission and the tobacco industry.

Having analysed the issue carefully, the Ombudsman recommended that the Commission should apply DG Health's proactive transparency policy to all Commission services (including the Commission's Legal Service) and to all Commission officials, irrespective of their seniority. The Commission responded by insisting that the current general ethical and transparency rules applicable to all Commission staff already prevent undue influence from the tobacco industry.

The Ombudsman strongly disapproves of the Commission's response to her Recommendation. She finds that the Commission has failed to provide any convincing arguments to justify its refusal to apply, across all its services, the proactive transparency rules applied by DG Health. The Ombudsman also considers that there are no valid reasons why the Commission transparency rules regarding meetings with lobbyists should apply only to its most senior officials, thus excluding Directors, Heads of Units and any other official who interacts with the tobacco industry. Further, the Ombudsman does not agree that meetings between members of the Commission's Legal Service and tobacco-industry lawyers do not come under the WHO Tobacco Control Convention transparency rules.

The Ombudsman concludes her inquiry with a finding of maladministration on the part of the Commission arising from its refusal to apply the proactive transparency policy of DG Health across the entire Commission.

The background



1. In 2003, the World Health Organisation (the "WHO") adopted the Framework Convention on Tobacco Control (the "**Convention**"), 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.

2. 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*".

3. The WHO also drew up non-binding Guidelines (the "**WHO Guidelines**") to give effect to the Convention. Principle "2" of the WHO Guidelines states that "*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 WHO Guidelines also recommend 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*".

4. In January 2013, the complainant, a Brussels-based NGO, "Corporate Europe Observatory", complained to the Commission that a number of Commission officials had undisclosed meetings with tobacco industry representatives and lobbyists. It suggested that the Commission as a whole should follow the practice of the Commission's Directorate-General for Health and Food Safety ("DG Health") by publishing lists and minutes of all meetings with the tobacco industry.

5. The Commission replied that its rules and its policy on stakeholder consultations were fully compatible with the Convention. It stated that the WHO Guidelines are not binding. It added that Regulation 1049/2001 on public access to documents [1] ensures a high level of transparency, in line with the requirements of the Convention.

6. The complainant then requested further information from the Commission, this time about allegedly undisclosed meetings between, on the one hand, the tobacco industry and, on the other hand, members of the Commission President's Cabinet and officials from the Secretariat-General.

7. In its reply, the Commission denied that senior officials from its services had ever held undisclosed meetings with the tobacco industry. It added that the strict approach adopted by DG Health reflected that Directorate's specific responsibilities in the area of health.

8. The Ombudsman opened an inquiry into the complainant's allegation that the Commission is failing to implement Article 5(3) of the Convention and the WHO Guidelines properly.

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



The Ombudsman's recommendation

9. In October 2015, on the basis of her inquiry into the complaint, the Ombudsman made the following recommendation [2] to the Commission:

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.

10. In summary, the Ombudsman was not convinced by the Commission's view that its existing ethical framework for Commissioners and staff, together with the public access to documents regime under Regulation 1049/2001, can ensure the EU's compliance with Article 5(3) of the Convention. Neither was the Ombudsman convinced that there is no need to extend the transparency rules applied by DG Health to the rest of the Commission. She noted that by requiring Parties to "act" to protect their health policies from commercial or other vested interests of the tobacco industry, the Convention and the WHO Guidelines require that public bodies take a **proactive** approach to transparency regarding meetings with the tobacco industry, rather than a reactive or even passive one. The Ombudsman failed to understand why proactive rules should not apply across all of the Commission's services given 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.

11. Moreover, the Ombudsman considered that the current ethical framework that the Commission chooses to apply to Commissioners and Commission staff does not impose any clear-cut obligations on Commissioners and Commission staff to protect the policies of the EU from being influenced by the tobacco industry. The fact that, after the event, recourse to Regulation 1049/2001 can ensure a high degree of transparency in the EU is not sufficient. This does not change the fact that 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, something that certainly was not the intention of Article 5(3) of the Convention.

12. The Ombudsman also took the view that any meetings that members of the Commission's Legal Service might have with tobacco-industry lawyers should be made public.

13. In making her Recommendation the Ombudsman also took into account two Commission Decisions of 25 November 2014 [3] which require the publication of information concerning meetings held by Commissioners, members of their cabinets and Directors-General with organisations and self-employed individuals. The Decisions state that, in principle, such officials should meet with organisations and self-employed individuals only where they are on the Transparency Register. Although this was a step in the right direction towards strengthening transparency, the Ombudsman noted that these new rules apply only to a limited number of top officials. The rules do not apply to meetings with policy officers, members of the Legal Service,



Heads of Unit and Directors, even though these officials may also deal with tobacco issues.

14. The Commission responded to the Ombudsman's Recommendation on 29 January 2016. It repeated its view that the reason why DG Health follows, in its interactions with the tobacco industry, a more proactive approach is because DG Health is in charge of public health policies and has a special responsibility as regards tobacco.

15. The Commission stated that, on the basis of an examination of the information proactively published since December 2014, very few meetings have in fact taken place between the tobacco industry and Commissioners, members of their cabinets and Directors-General. According to the Commission, this was because the Tobacco Products Directive had in the meantime entered into force (May 2014).

16. The Commission also stated that new conflicts of interest rules in the recently amended EU Staff Regulations, together with the guidelines to staff about gifts and hospitality and the recently revised Practical Guide for staff on ethics and conduct, contribute to the development of a strong and coherent ethical culture. It argued that these rules, taken together with the ethical framework applicable to Members of the Commission and staff, meet high public service standards and are in line with the transparency requirements of Article 5(3) of the Convention. It stated that the Convention does not require it to have a specific "horizontal transparency" regime for the tobacco industry sector (provided the general rules suffice).

17. Finally, the Commission stated that members of its Legal Service do not meet with industry "representatives" but only with "legal experts". It added that it had already explained to the European Parliament that during 2011-2012, two meetings had taken place between two officials of the Legal Service and an outside lawyer, a former Legal Service official, whose law firm represented a tobacco firm. It explained to Parliament that the Director-General of the Legal Service had also met that outside lawyer in November 2012. Thus, the Commission insisted, it had always provided accurate and consistent information regarding meetings by members of its Legal Service.

18. In its observations, the complainant regretted the Commission's refusal to comply with the Ombudsman's recommendation and its refusal to take specific measures to tackle the tobacco industry's lobbying.

19. According to the complainant, even though the Tobacco Products Directive has now entered into force, the tobacco industry is still lobbying the Commission's services on other tobacco issues, such as EU trade policy (it referred to the TTIP negotiations and other trade negotiations), the renewal of the agreements with four tobacco manufacturers on combating illicit trade in tobacco, and the ongoing discussions around the choice of technology for high-tech digital watermarks (used on tobacco packaging to prevent counterfeiting).

20. The complainant also stated that the Commission's claim that lawyers representing the tobacco industry are "legal experts" rather than lobbyists, and therefore that meetings with them fall outside the scope of Article 5(3) of the Convention, would create a dangerous loophole, as it



would effectively allow the tobacco industry to bypass the applicable rules on lobbying.

The Ombudsman's assessment after the proposal for a recommendation

21. The Ombudsman very much regrets the fact that the European Commission has chosen not to make its dealings with the tobacco industry more transparent in line with the Convention and the WHO guidelines.

22. In particular, the Commission's persistent refusal to extend the transparency policy of DG Health to all its DGs, through the proactive online publication of all meetings of all Commission staff with tobacco lobbyists, cannot be reconciled with the clear objectives of Article 5(3) of the Convention.

23. The Ombudsman notes that the Commission has not denied the fact that the tobacco industry actively lobbies numerous Commission DGs and services to advance its commercial interests. The Ombudsman would thus have expected that the experience gained by the Commission from the adoption of the Tobacco Products Directive, widely acknowledged as the most lobbied dossier in the history of the EU institutions [4] , would have convinced it of the need to strengthen further its ethical rules by extending DG Health's proactive transparency rules across all of its DGs and all its staff.

24. The Commission has argued that very few meetings have taken place with the tobacco industry since the entry into force of the Tobacco Products Directive and that, accordingly, there is no obvious reason to extend DG Health's proactive transparency approach to all of its DGs and staff. This argument is clearly misplaced. It reflects a very short term and random approach at the expense of a comprehensive and legally sound framework. The Ombudsman considers that the Commission's position should not depend on whether, at a given point in time, a legislative process affecting the Tobacco industry's interests is still in the making [5] .

25. As the complainant pointed out (see paragraph 19, above), the tobacco industry is now targeting other issues, which affect not just DG Health's area of responsibility, but also those of other DGs. As one of the leading tobacco producers has recently acknowledged, the industry's focus is now turning to the two key pieces of legislation that are being considered at Member State and Commission level: firstly, the European Tobacco Products Directive's implementing acts for Articles 15 and 16 [6] , and secondly, the World Health Organisation's Framework Convention on Tobacco Control's Protocol to Eliminate Illicit Trade in Tobacco Products. [7] These developments should have led the Commission to recognise the paramount importance of strengthening further the existing transparency rules, thus giving full effect to Article 5(3) of the Convention.

26. The two Decisions taken by the Commission in late 2014, requiring the publication of information concerning meetings held by Commissioners, members of their cabinets and Directors-General with organisations and self-employed individuals which already feature in the Transparency Register are not sufficient to deal with the lobbying activities of the tobacco industry and to meet the transparency requirements of Article 5(3) of the Convention.



27. In this context, the Ombudsman notes that the Commission, in its reply to the Ombudsman's Recommendation, has not put forward any argument to support a view that the tobacco industry's lobbying is targeting only the 250 or so top Commission officials whose meetings are disclosed online. It cannot be presumed that the tobacco industry is not also meeting with officials at the level of Director, Head of Unit or policy coordinator. These officials are not covered by the transparency measures introduced in late 2014.

28. Nor did the Commission try to argue that extending the 2014 transparency rules to all of its staff, irrespective of seniority, would somehow adversely affect the effectiveness of its decision-making process or render it more cumbersome. In fact, the sophistication and pervasiveness of the tobacco industry lobbying should have led the Commission to ensure that actually none of its officials dealing with tobacco issues, at any service or level, would be exempted from the 2014 transparency rules.

29. Finally, the Ombudsman fails to understand the Commission view that meetings between members of the Commission's Legal Service and lawyers or "legal experts" representing or acting upon instructions from the tobacco industry should not come within the transparency requirements of Article 5(3) of the Convention. Other than where such meetings take place strictly in relation to legal proceedings, as opposed to lobbying, there is nothing to justify treating such meetings any differently from other meetings with the tobacco industry. As the complainant rightly noted, by acting this way the Commission is creating a dangerous loophole, which would allow the tobacco industry to bypass the existing transparency framework. As the Ombudsman has often reminded the EU institutions, transparency remains the key to building trust between the EU administration and citizens.

30. The Ombudsman appreciates the significant steps taken by the Commission to improve the transparency of lobbying in general terms. She also appreciates its intentions to make further improvements in this area. However, the Commission has failed to avail of the clear opportunity created through this inquiry to build upon the experience already gained through the adoption of the Tobacco Products Directive and thus set a global benchmark for compliance with Article 5(3) of the Convention in the vital area of tobacco lobbying. In particular, the Ombudsman criticises the Commission's refusal to **ensure that the proactive transparency policy put in place by DG Health, which requires the publication online of details of all meetings with the tobacco industry, including the minutes taken of those meetings, applies across all Commission services and staff. The Commission has not provided any good reasons for refusing to take these measures.** The Commission's refusal to take these measures constitutes maladministration.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Commission's refusal to publish online details of all meetings which its services and



its staff have with the tobacco industry constitutes maladministration.

The complainant and the Commission will be informed of this decision

Emily O'Reilly

European Ombudsman

Strasbourg, 07/12/2016

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p.43

[2] The Ombudsman's full analysis leading to her recommendation can be found here:
<http://www.ombudsman.europa.eu/cases/recommendation.faces/en/61021/html.bookmark>

[3] See Commission Decision of 25.11.2014, on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals, and Commission Decision of 25.11.2014 on the publication of information on meetings held between Directors-General of the

Commission and organisations or self-employed individuals; see also
http://europa.eu/rapid/press-release_IP-14-2131_en.htm

[4] <http://www.bath.ac.uk/research/news/2015/02/24/tobacco-lobbying-eu-directive/>

[5] Article 28 of the Tobacco Products Directive provides that no later than five years from 20 May 2016, and whenever necessary thereafter, the Commission "shall submit to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a report on the application of this Directive". In that report, the Commission "shall indicate, in particular, the elements of the Directive which should be reviewed or adapted in the light of scientific and technical developments".

[6] Article 15.11 (Traceability) of the Tobacco Products Directive provides that the Commission «shall, by means of implementing acts:(a) determine the technical standards for the establishment and the operation of the tracking and tracing system (of tobacco products), whereas Article 16.2 (Security Systems) provides that the Commission "shall, by means of implementing acts, define the technical standards for the security feature (carried by tobacco products) and their possible rotation and adapt them to scientific, market and technical developments

[7] The Protocol to Eliminate Illicit Trade in Tobacco Products (FCTC Protocol) is based on



Article 15 of the FCTC and was adopted on 12 November 2012. The EU signed the FCTC Protocol on 20 December 2013. The Protocol needs however to be ratified by 40 parties for it to enter into force and its ratification by the European Union (and its Member States) would significantly contribute to the swift entry into force and implementation of the FCTC Protocol.