

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

- Strategic initiative on the upcoming revision of tobacco related legislation ref. SI/1/2021/KR

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

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

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

Subsequently, the Conference of the Parties adopted "guidelines" on the implementation of the FCTC, including Article 5(3) thereof.

On 20 June 2014, following a complaint by an NGO, the European Ombudsman opened an inquiry into the allegation that the Commission failed to implement properly Article 5(3) of the FCTC and the accompanying guidelines.

Following the investigation, the European Ombudsman made the following recommendation 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.

In its reply of 29 January 2016, the Commission considered that due to its overarching transparency framework, it complied in full with its obligations under the FCTC and therefore did not agree with the findings and the recommendation of the European Ombudsman.

II. EUROPEAN OMBUDSMAN'S CURRENT INQUIRY

In a letter of 11 February 2021, the European Ombudsman raised again the issue of proactive publication of all information on interactions between the Commission and the tobacco industry, noting in particular the upcoming revision of tobacco-related legislation.

In that context, the European Ombudsman also noted that the Commission recently authorised a former Commissioner to join a global communications consultancy, which lists Philip Morris International as one of its largest clients under the EU Transparency Register. The European Ombudsman asked the Commission to reassure the public that it will take all

necessary steps to ensure that it meets its obligations under the FCTC, by monitoring the compliance of the conditions it has placed on the former Commissioner.

The letter furthermore notes, *inter alia*, that the former Commissioner who was responsible for ensuring obligations under Article 16 of the Staff Regulations on staff as Commissioner for Human Resources, has been authorised for 13 post-mandate activities.

III. THE REPLY OF THE EUROPEAN COMMISSION

The Commission remains strongly committed to complying with the EU's international commitments under the FCTC. As the European Ombudsman noted, these commitments have been reiterated in Europe's Beating Cancer Plan adopted on 3 February 2021. The Plan sets an ambitious objective for a tobacco-free generation of Europeans where less than 5% of the population uses tobacco by 2040. The Plan outlines several EU regulatory instruments to be strengthened. It will also create momentum for Member States to better enforce EU legislation and to implement their national tobacco control strategies, especially as regards sales to minors and campaigns on smoking cessation. As the Plan outlines¹, this will contribute to better implementation of the FCTC, including the obligations on transparency under Article 5(3) thereof.

The Commission is aware that the upcoming revision of tobacco-related legislation will generate a high interest among various industry stakeholders and is likely to trigger lobbying activities. With that in mind, an internal note was circulated in summer 2020 to remind the Commission, at the Director-General and Cabinet levels, of the obligations under the FCTC, including the non-binding guidelines for the implementation of Article 5(3). Beyond the standard checks in the Transparency Register, it strongly recommended to refrain from participation in events or platforms involving (health) policy aims or debates where the tobacco industry, openly or covertly, is either a sponsor, member or participant.

The Commission's decision-making process is strongly protected against undue influence by a thorough preparation of decisions between several departments of the Commission, a legal scrutiny by the Commission's Legal Service and by the collegial character of the actual decision-making in the Commission, which is composed of 27 independent Members.

In addition, ethical and transparency rules in place provide additional guarantees for the integrity of the Commission's policy-making and prevent undue influence in all policy areas, and in all departments. The Commission continues to publish proactively information on the meetings held by Commissioners, members of their cabinets, Directors-General and Heads of Service of the Commission with interest representatives (organisations or self-employed individuals). Reports of these meetings are routinely disclosed pursuant to requests on the basis of Regulation (EC) No 1049/2001, which remains an important element of the Commission's transparency policy. The Directorate-General of Health and Food Safety

¹ Communication from the Commission on Europe's Beating Cancer Plan (COM(2021)44 final), point 3.2, paragraph 4, footnote 26, page 9.

continues to take a proactive approach to transparency, as recommended by the Ombudsman.

Moreover, the Commission's legal framework to address the issue of new professional activities after leaving the service of the Commission has been reinforced with the latest reform of the Staff Regulations. New provisions require an assessment of conflicts of interest upon staff members' recruitment or reintegration after a period of leave on personal grounds. New provisions also explicitly address the issue of lobbying and advocacy during leave on personal grounds or after having left the Institution. The Commission decision on outside activities and assignments and on occupational activities after leaving the service provides clarity on the criteria taken into account to assess each case. The Commission also publishes annually a report on the implementation of the Staff Regulations' prohibition on senior managers engaging, during the 12 months after leaving the service, in lobbying or advocacy vis-à-vis staff of their former institution for their business, clients or employers on matters for which they were responsible during the last three years in the service. It also publishes its decisions regarding post term of office professional activities of former Members of the European Commission and related opinions of the Commission's Independent Ethical Committee.

Furthermore, since the closing of the inquiry in 2016, the Commission has further reinforced the Transparency Register framework. Indeed, in 2018 it adopted a very comprehensive Code of Conduct for the Members of the European Commission requiring Commissioners and their members of Cabinet to meet only those organisations or self-employed individuals which are registered in the Transparency Register. In addition, in December 2020, the Commission agreed with the European Parliament and the Council of the European Union on a new interinstitutional agreement on a mandatory transparency register, thereby concluding the negotiation process that started in 2016 with the adoption of the relevant Commission proposal². The new interinstitutional agreement will enter into force once it has been formally approved by each of the signatory institutions. This new mandatory Transparency Register is bound to further increase transparency concerning interest representation and lobbying activities at the Union level.

The Commission also adopted a new decision on outside activities during active service and activities after leaving the service for staff.

The European Ombudsman mentions in her letter the authorisation given by the Commission on 11 November 2020 to Former Commissioner Oettinger to accept a post term of office professional activity with Kekst CNC.

Indeed, the Commission authorised former Commissioner Oettinger to become a member of the Global Advisory Board of this company.

The Ombudsman refers in this regard to the fact that Philip Morris International is listed as an important client of Kekst CNC in the Transparency Register. The Commission would like to underline that its decision refers to the fact that Kekst CNC is, according to publicly available

² COM(2016) 627 final

information, active worldwide and in many different areas. It has its headquarters in Munich (Germany) and has offices in 13 cities in Europe, Asia, the United States and the Middle East, including one in Brussels.

The former Commissioner's authorised role consists of 'providing intelligence and exclusive advice on global macro-economic and geo-political trends and developments' in an Advisory Board of a globally active company.

The Commission decision contains strong conditions and restrictions designed to ensure compliance with the ethical duties to which former Commissioner Oettinger remains submitted, such as the prohibition of lobbying the Members of the Commission or Commission staff, during a period of two years following his term of office, on behalf of Kekst CNC on matters for which he was responsible during his mandate. The Commission decision also establishes that, during the same period, former Commissioner Oettinger should not provide any advice on how Kekst CNC or its clients could directly or indirectly lobby the European Commission, even on matters for which he was not responsible in his former portfolios.

Mr Oettinger clarified himself in the media (e.g. in 'Politico', edition of 12 February 2021) that his work had 'nothing to do with tobacco', that he had 'not had contact with Philip Morris and had no ambition to have any contact with this company in the future' and that he perfectly knew his obligations and restrictions.

Mr Oettinger confirmed to the Commission in a letter of 17 March 2021 that he did not, and would not, advise Philip Morris International, neither directly nor indirectly, and neither in the framework of his function as member of the Global Advisory Board of Kekst CNC nor generally in the framework of his professional activity.

All Members of the Commission are appointed in accordance with Article 17(3) of the Treaty on European Union, which states that 'the members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt'. Former Commissioner Oettinger served two terms, from 2010 to 2019, and the Commission has no reason to doubt that he will abide by the principles of integrity and discretion enshrined in Article 245 of the Treaty on the Functioning of the European Union.

Finally, the number of former Commissioner Oettinger's post term of office professional activities as such does not seem relevant in the framework of the current strategic initiative launched by the European Ombudsman in the context of the upcoming revision of tobacco related legislation.

For the Commission
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