

Reply of the European Commission to the European Ombudsman

Strategic inquiry: OI/6/2021/KR Subject: The transparency of the European Commission's interactions with representatives of the tobacco industry – Preliminary findings

I. BACKGROUND

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 interpretation of the FCTC, including Article 5(3) of the FCTC.

On 26 November 2021, the European Ombudsman ('the Ombudsman') launched a strategic initiative concerning the transparency of the European Commission's interactions with representatives of the tobacco industry. On that occasion, the Ombudsman required an inspection of all the documents the European Commission ('the Commission') holds regarding:

- (i) interactions, including meetings and (video-)calls, between Commissioners, their Cabinets and/or Commission staff members and tobacco interest representatives, which occurred in 2020 and 2021;
- (ii) requests for public access to documents on the Commission's interactions with the tobacco industry under Regulation 1049/2001, submitted in 2020 or 2021;
- (iii) any guidance related to the subject of this inquiry that was shared within the Commission in 2020 and 2021.

The Commission responded on 7 February 2022 by providing the required documents.

A meeting between the Ombudsman and the representatives of the relevant services of the Commission took place on 5 May 2022. The additional documents as requested during that meeting were provided to the Ombudsman.

As a follow-up to the meeting, the European Ombudsman addressed a letter to the European Commission on 8 November 2022, requesting the following:

- The minutes of the meetings, (video-)calls, and any other interactions between tobacco interest representatives and Commissioners, their cabinets and/or Commission staff members, also below Director-General level in all DGs, the Secretariat-General and the Legal Service, which occurred in 2020 and 2021. The Ombudsman noted that, to date (8 November 2022), the inquiry team had been provided with some of the minutes of the meetings identified as having taken place. The Ombudsman requested the Commission to provide any further minutes that have not yet been transmitted to

the inquiry team or confirm that no more minutes exist.

- The replies provided by the Commission to the access to document requests GESTDEM 2020/2580 and GESTDEM 2020/2583.
- Advice provided by DG SANTE to other DGs (for example by means of email exchanges between the respective DGs including at services level) in relation to meetings with tobacco interest representatives.
- Any internal guidelines and procedures for the execution of the controls concerning the information declared by registrants in the Transparency Register.

The Commission responded on 13 January 2023 providing the documents requested by the Ombudsman.

II. THE REQUEST TO THE COMMISSION

On 14 April 2023, the Ombudsman shared the preliminary findings of the strategic inquiry and asked the Commission to provide written replies on such findings.

With regard to the publication of details of interactions with tobacco interest representatives, the Ombudsman noted that the inspection showed that the proactive transparency policy put in place by the Commission's Directorate-General for Health and Food Safety (DG SANTE), which requires publishing online all the meetings its staff have with tobacco industry representatives and the minutes of those meetings, does still not apply across the entire Commission. The Ombudsman preliminary's view is that the absence of a whole-of-Commission approach to complying with the obligations stemming from the FCTC constitutes maladministration.

With regard to record-keeping related to interactions with the tobacco sector, the Ombudsman notes that the Commission did not identify minutes regarding numerous meetings that were organised with tobacco interest representatives. The Ombudsman concludes in its preliminary finding that the failure to keep and make available minutes on all of the Commission's meetings with tobacco interest representatives constitutes maladministration.

Finally, the Ombudsman notes that 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'. The Ombudsman also notes 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, but also that this assessment of necessity in relation to meeting requests from tobacco interest representatives appears to be the exception rather than the rule. In this respect, the Ombudsman asked the Commission to explain in what situations an assessment of necessity is conducted, how it is conducted and whether it is documented.

III. THE COMMISSION'S REPLY TO THE REQUEST FROM THE OMBUDSMAN

The Commission has welcomed the strategic inquiry launched by the Ombudsman and was keen to ensure all possible support to that inquiry. The Commission engaged with the Ombudsman's team throughout the various phases of the inquiry and has provided concrete

replies to all the requests raised by the Ombudsman, including through written inputs and participation in a meeting.

The Commission has analysed the Ombudsman's findings of the inquiry, which highlights important aspects related to the transparency of the Commission's interactions with representatives of the tobacco industry, as well as the application of the FCTC.

The Commission would like to underline that it fully complies with the EU's international commitments under the FCTC and remains strongly committed to doing so. These commitments have been reiterated in Europe's Beating Cancer Plan of 2021¹, which sets an ambitious objective for a tobacco-free generation of Europeans where less than 5% of the population uses tobacco by 2040. The Plan highlights several EU regulatory instruments to be strengthened. It will also create momentum for Member States to step up the pace at which EU legislation and their national tobacco control strategies are implemented. As outlined in the Plan, this will contribute to better implementation of the FCTC, including the obligations on transparency under Article 5(3) thereof.

The Commission considers that the safeguards provided by the collegiate character of the decision-making in the Commission, the ethical and integrity rules applicable to the Commission staff (notably by virtue of Staff Regulations, Code of Conduct for the Members of the Commission and Code of Good Administrative Behaviour), as well as the applicable rules on access to documents and on transparency regarding relations with interest representatives, constitute overall a framework which fulfils the requirements of the WHO Framework Convention on Tobacco Control (FCTC).

As regards the particular issue of publication of information on meetings held with interest representatives, the Commission would like to remind the Ombudsman of its robust internal rulebook in place governing transparency concerning interest representation. Since 2014, the Commission requires its top decision-makers at political and administrative level (Members of the Commission, the members of their Cabinet and Directors-General of the Commission) to publish information on all meetings they hold with interest representatives (lobbyists) in accordance with Commission Decisions 2014/839/EU, Euratom and 2014/838/EU, Euratom. Moreover, the Commission requires its representatives referred to above to meet only interest representatives that are registered in the Transparency Register established by the applicable Interinstitutional Agreement of 20 May 2021.

This strong general framework does not preclude specific additional arrangements reflecting the particular situation of Commission services working on public health policies. DG SANTE, which holds the primary responsibility in setting and implementing public health policies with respect to tobacco control, takes a proactive approach to transparency², as recommended by the Ombudsman. It has supplemented the horizontal transparency rules by ensuring the online publication of reports of all its meetings with the tobacco industry³ and provides support to other Commission services upon their request⁴. In 2020, DG SANTE

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

² See note Ares (2020) 3754445.

³ [Events \(europa.eu\)](https://european-council.europa.eu/media/en/press-room/pages/press-room.aspx?pid=14777)

⁴ As noted by the Ombudsman, DG TAXUD has also decided to take steps towards supplementary transparency measures, publishing all its meetings with the tobacco industry on a dedicated tobacco transparency page ([Meetings with the tobacco industry \(europa.eu\)](https://european-council.europa.eu/media/en/press-room/pages/press-room.aspx?pid=14777))

reminded other services of the obligations under the FCTC as well as of the non-binding guidelines for the implementation of Article 5(3).

These additional arrangements for DG SANTE reflect its particular role as the Commission department directly dealing with ‘public health policies with respect to tobacco control’, in line with the FCTC.

The Commission considers that a combination of horizontal rules, as well as dedicated tobacco-specific arrangements and actions where services work on public health policies, are fully in line with the objectives of the FCTC.

The Commission will further clarify and embed this as a whole-of-Commission approach to ensure the clarity and transparency of its arrangements to govern contacts with the tobacco industry to be consistently applied by all Commission services in relation to setting and implementing public health policies with respect to tobacco control.

With regard to the reference made by the Ombudsman to minutes from two meetings that DG TAXUD would not have published, the Commission highlights that DG TAXUD rules for meetings with the tobacco industry are as strict as those of DG SANTE. The meeting of 5 October 2020 with the representatives of the tobacco industry was organised by DG TRADE, which drafted and validated the minutes, and could then be identified as lead DG. The meeting on 27 November 2020 between the DG of TAXUD and the European Travel Retail Confederation (ETRC) was not related to tobacco. The ETRC is not a lobbyist group for the tobacco industry and the meeting in question was primarily devoted to a discussion on post-Brexit situation for retail. Therefore, the meeting minutes were not published on TAXUD’s tobacco transparency page.

With regard to record-keeping, the Commission notes that it has a strict document management policy in place in accordance with obligations arising from Regulation (EC) No 1049/2001⁵, complemented by a Commission Decision on document management⁶, a dedicated guidance note of 2018, guidelines for staff and continuous training initiatives for staff aimed at enabling consistent and harmonised application of the document management rules across the whole Commission. On this basis, while minutes are not compulsory for all meetings, a written record of meetings is recommended where related to important information or need for action by the Commission. Such record should then be registered in the Commission’s corporate document management system and, upon a request for public access to documents, its public disclosure must be assessed in accordance with the rules of Regulation (EC) No 1049/2001. As the Ombudsman does not, in her letter, list the minutes of meetings which would not have been identified or would not exist, the Commission would be interested in receiving more information about the reasons on which such claim is based.

With regard to the Ombudsman’s question on the assessment of necessity, there is no specific Commission procedure or rule defining the modalities to be fulfilled or documentation to be provided that would need to be fulfilled in the context of such a specific assessment of necessity, when evaluating whether a meeting with tobacco representatives should or should not be accepted. However, as indicated earlier in this reply, horizontal rules on ethics and

⁵ 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 L 145, 31.5.2001, p. 43–48

⁶ Commission Decision of 23 January 2002 amending its Rules of Procedure, C(2002)99, OJ L 21 of 24.01.2002, p.23.

conduct of staff with regard to relations with stakeholders apply to all Commission staff. They set legally binding ethical standards and ensure that the principles of independence, impartiality, objectivity and loyalty are applied in the European Public Service. Furthermore, the Commission has endorsed the 'Practical recommendations for public officials' interaction with interest representatives' issued by the Ombudsman in May 2017 and has requested all services to follow them thoroughly. Relevant training on ethics and staff conduct is provided to staff upon recruitment and on a continuous basis. Based on that, Commission staff are in a position to make informed judgments in order to avoid any risk of conflicts of interest as well as any risk of compromising the image and reputation of the Institution. Moreover, staff are always advised to discuss with line management and ethics services when in doubt. The note from DG SANTE of 2020 concerning the FCTC was another contribution to sensitising Commission staff to the need to be particularly scrupulous when applying horizontal rules on ethics and staff conduct in relation to possible contacts with the tobacco industry.

IV. CONCLUSIONS

In conclusion, the Commission attaches particular importance to ensuring transparency of its interactions with representatives of the tobacco industry and to complying with EU's international commitments under the FCTC in relation to 'setting and implementing [its] public health policies with respect to tobacco control'.

Horizontal rules on ethics and integrity for Commission staff, and on transparency, combined with dedicated tobacco-specific arrangements and actions applied by the Commission service that holds the main responsibility for setting and implementing public health policies with regard to tobacco control, provide altogether a framework that is compliant with the objectives of the FCTC, and in particular its Article 5(3) and the associated non-binding implementation guidelines. As further pro-active follow-up to the Ombudsman's observations, the Commission will instruct its Directors-General and Heads of Service, and all Heads of Cabinet, to conduct an assessment of the exposure of their Services to the lobbying by tobacco representatives in the context of health policies and policies related to tobacco control, and, in case of likely exposure, to put in place internal procedures requiring staff to publish minutes of meetings with tobacco representatives and providing a place of their publication.

For the Commission
Věra JOUROVÁ
Vice-President

