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Brussels, **29 JAN. 2016**

Subject: *Complaint by Mr Oliver HOEDEMAN, Corporate Europe
Observatory (CEO), ref. 852/2014/LP*

Dear Ms O'Reilly,

Thank you for your letter of 1 October 2015 regarding the above-mentioned case.

I am pleased to enclose the comments of the Commission on this complaint.

*Naturally, the Commission remains at your disposal for any further information
you may require.*

Yours sincerely,

A handwritten signature in blue ink, consisting of a stylized 'J' and 'C' followed by a long horizontal line.

Enclosure

*Ms Emily O'REILLY
European Ombudsman
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Opinion of the Commission on the European Ombudsman's recommendation
- Complaint by Mr Oliver HOEDEMAN, Corporate Europe Observatory (CEO),
ref. 852/2014/LP

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

The European Union acceded, on 30 June 2005, to the World Health Organisation's (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, and as in several other areas of the FCTC, the Conference of the Parties, in decision FCTC/COP3(7), adopted "guidelines" for the implementation of Article 5(3) of the FCTC¹.

The parts of these guidelines which are of most interest in the context of this complaint concern the principle that "*Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent*" and it is recommended to "*Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.*"

The guidelines for the implementation of the FCTC are not legally binding upon the Parties. Parties are encouraged to implement the FCTC guidelines as far as possible, in accordance with their national law. This means that they should be implemented in ways that are compatible with established legal and administrative practice.

II. THE COMPLAINT

Following correspondence between the complainant and the Commission in the period January 2013 to February 2014, the complainant submitted a complaint to the European Ombudsman on 7 May 2014.

The European Ombudsman decided to open an inquiry into the allegation that the Commission had failed to implement Article 5(3) FCTC and the associated guidelines.

In the course of this inquiry, the Commission provided two replies and received the office of the European Ombudsman for an inspection of the Commission files.

In summary, the complainant argued that the FCTC and the implementing guidelines required the Commission to "publish online lists of all meetings with tobacco industry representatives and minutes of [...] meetings" with the tobacco industry.

¹ http://apps.who.int/gb/fctc/PDF/cop3/FCTC_COP3_DIV3-en.pdf

The Commission did not share this interpretation, as explained in the letters to the complainant and later in comments on a request for further information from the European Ombudsman. Whilst the Commission is fully committed to implementing the FCTC, it did not consider that either the (legally binding) FCTC, or the (legally non-binding) guidelines, were in any way not implemented. As far as the guidelines are concerned, it was noted in particular that they state that *"Parties are encouraged to implement these guidelines to the extent possible in accordance with their national law"*.

In addition, the Commission considered that its ethical frameworks (Staff Regulations, Implementing Rules, Practical Guide to Staff Ethics and Conduct, Code of Conduct for Commissioners, Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public etc.), as well as the rules on access to documents and on transparency, constituted a framework which is fully consistent with the FCTC and ensured that the FCTC and its guidelines are respected.

III. THE RECOMMENDATION

The Recommendation by the European Ombudsman reads as follows:

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.

IV. COMMISSION'S COMMENTS

The Commission will hereafter refer to the specific points in the background and the assessment leading to the Recommendation.

With reference to point 13, the Commission agrees with the complainant that all EU institutions have obligations to protect the integrity of policy and law making. As the EU is a Party to the FCTC, all institutions are bound by its binding provisions.

With reference to point 23, the Commission would like to repeat and underline that there are no "undisclosed" meetings, in the sense that that they have been hidden in some way. All enquiries about meetings having been held were responded to in accordance with the rules, whether they took the form of access to document requests or European Parliament questions. Where corresponding minutes existed, those have been disclosed. The Commission welcomes the clear statement of the European Ombudsman in points 29-30 that there is no evidence that meetings have been kept "secret".

In the assessment, the European Ombudsman questions the policy of the Commission in a number of specific aspects.

Points 33 and 38 raise the issue of the differing practice between DG Health and Food Safety and other Commission services. The Commission considers that the differences in practice are fully justified. DG Health and Food Safety has supplemented the Commission internal rules on transparency with specific rules for the area for which they have a specific responsibility. This is not unusual in the Commission. In addition, the FCTC itself points to such a distinction: Article

5.3 FCTC speaks of the protection of "public health policies with respect to tobacco control", underlining that these policies can be seen as in a different category. Services with the specific responsibility for public health policies are in this sense singled out in the FCTC, and the Commission considers that it is appropriate that the Directorate-General in charge of public health policies has a tailor-made approach, going beyond the legal requirements, due to its specific responsibilities in this area.

In points 35 and 36, the Ombudsman challenges the relevance of the Commission's overall ethical framework to the specific implementation of the FCTC.

For the Commission, however, the ethical and transparency rules in place for all staff in all Commission departments ensure the integrity of policy and law making and prevent undue influence in all areas.

The Commission's overall transparency framework ensures an accountable and transparent administration able to fulfil the obligations of the FCTC. The transparency achieved through Regulation 1049/2001 is an important element of this, flanked by the other aspects of the Commission's transparency policy, such as the Transparency Register, and the proactive publication of information on meetings held by Commissioners, members of their cabinets and Directors-General of the Commission with stakeholders² (acknowledged by the Ombudsman in point 39). An examination of the information proactively published since December 2014 clearly indicates that meetings between Commissioners, members of their cabinets and Directors-General of the Commission and tobacco industry or their representatives are very few. This is not surprising given that the legislative process for the Tobacco Products Directive has come to an end with its entry into force in May 2014. The remaining technical work on implementation is carried out by DG SANTE. Together, the Register and the information policy on meetings lead to a very high degree of transparency of the Commission, also in comparison with the other institutions.

The Commission would also recall that the recent amendments of the Staff Regulations in the area of conflicts of interest were implemented by all institutions as of 1 January 2014. The Commission has issued specific guidelines to staff (for example on gifts and hospitality, in 2012) and undertaken information campaigns. A Practical Guide for staff on ethics and conduct, recently revised, contains recommendations regarding contacts with interest groups in general and sets out when a record of a meeting should be ensured (p. 12). This document has been distributed to the Commission staff in paper form and is also accessible electronically. The Commission is committed to continue to ensure adequate training and regular awareness-raising activities for its staff in order to develop a strong and coherent ethical culture. Taken together, the ethical and integrity framework applicable to Members of the Commission and staff, and the Commission's rules and instruments concerning transparency and lobbying, meet high public service standards. The overriding principles regarding contacts with interest groups are

² 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 and C(2014) 9051 final and 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 C(2014) 9048 final.

transparency, integrity and equality of treatment, in order to protect the general interest of the Union. The very same principles apply to all policy areas, including tobacco control, and to contacts with representatives of the tobacco industry.

As a result, the Commission does not believe it has failed to "act" as required by the FCTC. The "action" on the side of the Commission, as explained above, consists in a series of measures which ensure the integrity of policy and law making and the accountability and transparency of contacts with representatives of interests, in particular as regards contacts with the tobacco industry in the field of health policy. Whilst, as noted above, there are provisions in the FCTC which open the door to particular arrangements for services directly responsible for public health, the Commission does not consider that the FCTC imposes an obligation to introduce a specific horizontal regime for the tobacco industry sector, if the overall rules suffice; and in the Commission's view, the current rules do not mean that the current approach is "unreliable and unsatisfactory."

The Ombudsman also notes the Commission's commitment to present a proposal on a mandatory Transparency Register for interest representatives (Point 40).

The Commission had foreseen in its Work Programme 2015 to put forward a proposal for an Interinstitutional Agreement on a mandatory Transparency Register covering the European Parliament, the European Commission and the Council of the EU. Given the negotiations on the separate Interinstitutional Agreement on Better Regulation, which have only just been concluded, it was decided to postpone this particular item to 2016.

As a first step, the Commission intends to launch an open public consultation with a twofold objective: (1) to gather views on the functioning of the current Transparency Register and (2) to receive input for the design of the future mandatory regime of registration. The purpose will be to assess and understand what has worked well so far, what can be improved and how, in order to ensure that the Register delivers its full potential as a meaningful tool governing relations between the EU institutions and interest representatives.

Finally, in point 38, the Ombudsman questions the information given by members of the Commission Legal Service as regards meetings with the tobacco industry. Staff of the Commission's Legal Service are of course subject to the ethical and transparency rules in place for all staff in all Commission departments. That being said, the Commission does not consider that the meetings mentioned in paragraph 38 of the recommendation were contacts between the Legal Service and tobacco industry representatives. As the Commission had stated to the European Parliament (CONT Committee), there were no such contacts. Legal Service's customary outside contacts are not with industry representatives (companies or associations) on policy matters, but with legal experts. These contacts are typically limited to issues of EU law. In that context, as the Commission had explained to the European Parliament for the sake of completeness, two brief conversations took place in September 2011 and September 2012 between two officials of the Legal Service and an outside lawyer, who had formerly been a Legal Service official and who mentioned that his law firm provided legal advice to a tobacco company. The Director-General of the Legal Service, once informed that these conversations had taken place, asked to be personally informed by the outside lawyer of those legal counsel activities and this meeting took place on 14 November 2012. Thus, the information given by the Commission regarding Legal Service meetings was accurate and consistent.

V. CONCLUSION

The Commission continues to believe that it complies in full with its obligations under the FCTC and does therefore not agree with the findings and the recommendation of the European Ombudsman.