



**To : Ms Emily O'Reilly
European Ombudsman
1, avenue du Président Robert Schuman
F - 67001 Strasbourg**

Brussels, 20 June 2023

Subject: Ombudsman's inquiry on tobacco interaction with the European Commission

Dear Ms O'Reilly,

Tobacco Europe¹ and its members are writing to you following the publication of your letter of 18 April 2023 to the President of the European Commission and concerning your ongoing inquiry² into the European Commission's interactions with tobacco interest representatives. We believe that you are seeking to define for the Commission appropriate rules and practices about how the Commission ensures its interactions with tobacco interest representatives are transparent, as required by the Framework Convention on Tobacco Control (FCTC) of the World Health Organization (WHO)³.

We welcome your initiative in this regard as Tobacco Europe and its members are fully committed to engaging transparently with all stakeholders in decision making which affects our businesses. The tobacco industry is directly concerned by such potential rules and practices; hence we are taking this opportunity to share our views and concerns on this topic.

FCTC Article 5.3

Your inquiry tackles an important element in our view: the incorrect interpretation of Article 5.3 of the FCTC by the Commission's Directorate General for Health and Food Safety (DG SANTE).

Article 5.3 of the FCTC states: *"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."*

Article 5.3 aims to ensure accountability and transparency in interactions between the tobacco industry and policy makers, as well as independence and impartiality, in decision making on public health policies with respect to tobacco control. It does not provide a *carte blanche* justification for refusing dialogue with the industry, especially when that dialogue is not related to public health policies.

To quote the 2022 EU Court of Justice judgement in Case C-160/20⁴, on the methods used to measure tobacco product emission levels, *"It is clear from the very wording of that provision [Article 5.3 of the*

¹ [Tobacco Europe AISBL](#) is the umbrella organisation representing the three largest tobacco and nicotine product manufacturers, namely British American Tobacco, Imperial Brands and Japan Tobacco International.

² [Strategic inquiry OI/6/2021/KR](#)

³ <https://fctc.who.int/who-fctc/overview>

⁴ [Case C- 160/20](#)



FCTC] that it does not prohibit all participation of the tobacco industry in the establishment and implementation of rules on tobacco control, but is intended solely to prevent the tobacco control policies of the parties to the convention from being influenced by that industry's interests." Further, "That interpretation of Article 5.3 of the FCTC is borne out by the guidelines for the implementation of that provision, which do not themselves have binding force, but are intended, in accordance with Articles 7 and 9 of the FCTC, to assist the Contracting Parties in implementing the binding provisions of that convention."

In addition, as the European Commission made clear in its January 2016 response to your office regarding European Ombudsman case 852/2014/LP, *"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".*"⁵.

Better Regulation

The DG SANTE's misinterpretation of Article 5.3 as prohibiting all dialogue with the tobacco industry runs contrary to the accepted international principles of good governance, including the EU's own Better Regulation Principles. Many Member States' constitutional principles and laws require that policy making be inclusive, open and transparent, and the Better Regulation Agenda seeks explicitly to involve citizens, businesses and stakeholders in the decision-making process.

The benefits of such participation are widely recognized⁶ and, to ensure that no single voice unduly influences decisions on public policies, we encourage greater transparency, accountability, and inclusiveness.

Discrimination against a single business sector

Recently Tobacco Europe was informed that its membership of a European think tank would be terminated, with reference made by the think tank to both the WHO FCTC and to an informal exchange with Commission representatives who apparently made clear that they would no longer participate in the think tank's events whilst tobacco industry representatives are part of the membership. Such an expansive interpretation of Article 5.3 is unacceptable and at odds with democratic norms and good governance principles. This discrimination against a single business sector, totally unjustified by law or agreed practice, sets a chilling precedent which is counterproductive to the smooth functioning of democracy and is sure to undermine citizens' trust in the EU's institutions.

Necessity checks

In your letter, you mention "necessity checks" undertaken by the DG SANTE, under their "proactive transparency policy", pertaining to meetings with the tobacco industry. We are not aware of either such a policy or such checks, and do not believe that they have ever been made public or shared with

⁵ <https://www.ombudsman.europa.eu/en/doc/correspondence/en/63624>

⁶ OECD, *Recommendation of the Council on Improving the Quality of Government Regulation*, OECD/LEGAL/0278, OECD Council 9th March 1995 : *"regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government."*



affected parties such as Tobacco Europe and its member companies. I respectfully ask that you share both this policy and the details of the “necessity checks” from the DG SANTE.

Without having seen the detail of either the “proactive transparency policy” or the “necessity checks”, Tobacco Europe and its members agree with the European Commission’s letter to you of January 2016, that any extension of the DG SANTE’s strict procedural steps and tailor-made approach across the entire Commission will likely go beyond the requirements of Article 5.3.

The ENSP

Finally, we would like to draw your attention to what we believe is a clear lack of transparency and objectivity currently affecting the revision of the framework for tobacco control. One of the consortia supporting the Commission, the European Network for Smoking Prevention (ENSP), is an interest representative registered in the Transparency Register, with a clear agenda to influence EU tobacco control legislation, notably by lobbying the Commission for additional tobacco control measures through a European Citizens Initiative⁷ of which they are the lead funders.

The fact that this advocacy group has won a €3 million tender for research services could give rise to allegations that the DG SANTE applies a double standard when assessing the interests of external stakeholders. Clearly ENSP is not capable of conducting genuinely independent research. The parties to this tender are obliged to demonstrate they have no conflict of interest, yet this seems to have been disregarded in this instance.

As these matters are of considerable complexity, we would welcome the opportunity to meet with you in person to discuss them holistically and further explain our views.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Darge", with a long horizontal flourish extending to the right.

Nathalie Darge
Director, Tobacco Europe

⁷ <https://eci.ec.europa.eu/029/public/#/screen/home>