

Brussels, 16 December 2014



**To: Lambras Papadias**  
**Head of Complaints and Inquiries Unit 3**  
**European Ombudsman**

Observations on the comments of the Commission on the complaint (ref. 852/2014/LP) about its failure to properly implement UN rules for contacts with tobacco industry lobbyists (the WHO's FCTC Article 5.3 and accompanying guidelines)

Dear Mr. Lambras Papadias,

Thank you for forwarding Mr. Barroso's comments (29/10 2014) on the Ombudsman's request for further information. The Ombudsman had pointed out that the Commission's opinion "does not at all address the specific arguments that the complainant put forward" and asked for clarification on several key issues. Mr. Barroso's response, unfortunately, repeats the very general and unconvincing responses provided on previous occasions and concludes as follows: "The Commission continues to believe that it complies in full with its obligations under the FCTC and does not therefore consider that further steps are necessary." This is very disappointing.

On the numerous meetings held by Commission officials with tobacco industry lobbyists, Mr. Barroso claims that these meetings are not "undisclosed" because they became known when the Commission reacted to access to documents requests from NGOs and responded to questions from MEPs. Barroso argues that "the Commission has been fully transparent in responding to questions as regards its meetings with representatives of the tobacco industry". As mentioned in our complaint, a reactive approach of releasing documents in response to access-to-documents requests from citizens is not sufficient to ensure that interactions with the tobacco industry "are conducted transparently". To ensure transparency around the Commission's contacts with tobacco lobbyists, citizens would – in the Commission's logic - have to continuously submit access-to-documents requests, wait for any relevant documents to be released and then upload these on the internet (as well as seek ways to inform citizens that this information is available on the website). All of this should clearly be the Commission's responsibility.

Mr. Barroso does not answer the Ombudsman's question about the transparency obligations that exist within DG SANCO (for proactive publishing of meetings with the tobacco industry as well as minutes from these meetings) and why "no such obligation should apply to the rest of the Commission, and in particular with regard to senior officials working for Commission departments other than DG SANCO". Instead Barroso argues that it is not "unusual" that DGs "choose to put in place specific rules for areas for which they have a specific

responsibility". Barroso even claims that "this is in line with the FCTC guidelines, which refer to the desirability of supplementary measures "when adapting ... to their specific circumstances". [1] This is an unsatisfactory answer, as it dodges the common sense question why such transparency rules would not cover **all Commission officials involved in tobacco control policy-making** (including his own cabinet, the Secretariat-General and other DGs). It is also worth noting that the Commission in its response has ignored the fact that Commissioner Sefcovic had initiated his own policy of proactively disclosing his meetings with the tobacco industry, which was a step towards better implementation of Article 5.3 and the guidelines.

Barroso argues that "neither the (legally binding) FCTC, nor the (legally non-binding) guidelines, stipulate that the EU institutions should act in the way suggested by the complainant" and adds that the guidelines state that "[w]ithout prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement these guidelines to the extent possible in accordance with their national law".

Recommendation 2.2 of the Article 5.3 Guidelines states that "where interactions with the [tobacco industry] are necessary, Parties should ensure that such interactions are conducted transparently." This clearly points toward an approach such as the one implemented by DG SANCO, with meetings held in public, with public notice, and disclosure of records.

The Commission, once again, claims "that its ethical framework, its practical implementation and enforcement, as well as its rules on access to documents and transparency, constitute the framework within which the implementation of the FCTC and its guidelines must be seen and together ensure that the FCTC and its guidelines are respected in full." The Commission has failed to show concretely how the principles and specific recommendations of the guidelines are implemented. As mentioned in our complaint, there are numerous specific recommendations in the Article 5.3 Guidelines that are not covered in the Commission's current transparency and ethics framework. There are no specific rules for the tobacco industry and no mention of the tobacco industry anywhere in the Commission's current transparency and ethics framework.

Since the departure of the Barroso II Commission, a range of new lobby transparency measures have been introduced as part of Commission President Juncker's Transparency Initiative. These include restrictions on meetings with unregistered lobbyists and pro-active transparency around meetings with lobbyists. These are important improvements, but unfortunately only limited to a small top layer of the Commission. Only commissioners are facing a clear written instruction not to meet unregistered lobbyists. Only the meetings of commissioners, their cabinet members and directors-general with lobbyists are disclosed online; a total of around 300 officials which is merely the tip of the iceberg. These measures are a welcome departure from the Barroso Commission's approach, but clearly should be broadened. Only a proportion of the meetings between Commission officials and tobacco lobbyists referred to in the appendix to our complaint would have been disclosed under the new rules.

The Commission continues to downplay the status of the Article 5.3 Guidelines as non-binding, ignoring that these guidelines do represent the consensus of the Parties to the FCTC (including the EU) on how to implement Article 5.3. The claim that the guidelines are non-binding and the assumption that the principles and recommendations are merely options that may or may not be implemented, is very problematic. In a 2012 article in the BMJ's Tobacco Control journal, Jonathan Liberman concludes that some elements of the FCTC's guidelines "may be more than simply 'recommendations' that Parties adopt measures beyond those that they are legally obliged by the FCTC to implement, but rather constitute 'subsequent agreement(s) between the parties regarding the interpretation of the treaty or the application of its provisions'." [2]

Liberman mentions that "the Article 5.3 guidelines build upon a very briefly expressed but critical treaty obligation ('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'), and a preambular recognition of 'the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts'. They constitute a detailed set of recommendations spanning a number of critical areas of government activity." Instead of pretending that existing transparency and ethics practices can be used as an excuse for not implementing Article 5.3 and the guidelines, the Commission should give a good example to the rest of the world by properly (and ambitiously) implementing these UN obligations.

By not making any meaningful effort to implement the guidelines, the Commission cannot claim to be properly implementing the FCTC. The Commission's reference to implementing the guidelines "to the extent possible in accordance with their national law" is merely an excuse for avoiding implementation. The fact is that there is nothing in EU law or other circumstances that prevents the Commission from properly implementing the transparency requirements and other recommendations. Lax implementation simply reflects a lack of political will.

Yours sincerely,

Olivier Hoedeman  
on behalf of Corporate Europe Observatory (CEO)

#### Notes

1: Barroso states that "SANCO has decided to develop specific guidelines for its staff working in the area of tobacco control". SANCO does have a policy of online listing of meetings with the tobacco industry, but it is the first time we have heard that there are "specific guidelines", which sounds like written clarification of the rules regarding contacts with the tobacco industry. If such specific guidelines exist it would have been good if the Commission had enclosed these in the appendix to its response.

2: "Four COPs and counting: achievements, underachievements and looming challenges in the early life of the WHO FCTC Conference of the Parties", Tobacco Control, [Volume 21, Issue 2](#), 2012; <http://tobaccocontrol.bmj.com/content/21/2/215.full.pdf+html>