

# Targeting the European Commission:

The 7 Lobbying Techniques of Big Tobacco



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# Executive Summary

**This report presents and analyses key contacts between the European Commission (EC) and the tobacco industry (TI) – including third parties in receipt of TI funds, as well as influential vaping groups that are financially independent, but whose messaging is consistent with the TI. These documented contacts, in 2019 and 2020, were accessed via document requests sent to eight separate EC departments, known as Directorates-General (DGs).**

**Big Tobacco has been influencing policy to its advantage for decades – postponing, protesting, promoting untruths, playing the victim and pushing new technologies – in order to disrupt tobacco control policies.**

**Despite the World Health Organization’s (WHO) Framework Convention on Tobacco Control (FCTC) Article 5.3, which requires that governments protect public health policies from tobacco industry influence, the EU struggles to implement a systematic, proactive transparency policy regarding meetings with tobacco lobbyists, labelled by the European Ombudsman as “maladministration.” This makes the EC particularly vulnerable to the influence of skilled industry representatives.**

**The documents acquired reveal that tobacco companies are active and successful in exerting commercial influence across several EC DGs through letters, physical meetings and other less well recorded contacts, in part thanks to the EC’s continued non-compliance with FCTC provisions. Several main tactics – none of them new, but used by tobacco lobbyists over decades – can be identified in the lobbying of the EC, principally regarding the EU’s new track and trace scheme, EU trade negotiations and taxation questions.**

**The main tactics identified are:**

- 1. Promoting untruths**
- 2. Postponing regulation**
- 3. Playing the victim**
- 4. Protesting against regulators**
- 5. Preying on third countries**
- 6. Pushing new technologies**
- 7. Playing the EC off against member states**

**The documents released also make clear that most parts of the EC fail to implement the requirements of the FCTC, as requested by the European Ombudsman. Each department gave quite different responses, variously asking to narrow down the request, asking for extensions, failing to reply and refusing to release identified documents. A few themes emerged from the Commission departments' responses to, and interactions with, the industry and its representatives:**

- 1. Failing to limit contact**
- 2. Refusing disclosure of information**
- 3. Reactive transparency**

**Evidently, the tobacco industry is as active as ever in lobbying European institutions and its aims are unfortunately often assisted by the lack of proactive transparency. In order to address this the Commission should, as a first step:**

- 1. Proactively list all meetings (including minutes) and correspondence between Commission officials and the tobacco industry and/or their representatives on a central and easily accessible public register, such as the one used in the Netherlands.**
- 2. Outline and establish a clearly defined policy regarding how officials should handle contacts with the TI.**
- 3. Broaden the interpretation of public interest to include transparency around lobbying and the protection of public health as overriding objections related to so-called personal data and the protection of commercial interests.**

## List of abbreviations

<b>BAT</b>	British America Tobacco	<b>SG</b>	Secretariat-General of the European Commission
<b>DG</b>	Directorate-General		
<b>DG AGRI</b>	Directorate-General for Agriculture and Rural Development	<b>SME(s)</b>	Small and medium enterprise(s)
<b>DG COMP</b>	Directorate-General for Competition	<b>TED</b>	Tobacco Excise Directive
<b>DG ECFIN</b>	Directorate-General for Economic and Financial Affairs	<b>TPD</b>	Tobacco Products Directive
<b>DG GROW</b>	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs	<b>WHO</b>	World Health Organization
<b>DG SANTE</b>	Directorate-General for Health and Food Safety		
<b>DG TAXUD</b>	Directorate-General for Taxation and Customs Union		
<b>DG TRADE</b>	Directorate-General for Trade		
<b>EC</b>	European Commission		
<b>ESTA</b>	European Smoking Tobacco Association		
<b>FCT</b>	Fine-cut tobacco		
<b>FCTC</b>	Framework Convention on Tobacco Control		
<b>FTA</b>	Free Trade Agreement		
<b>HTPs</b>	Heated tobacco products		
<b>PMI</b>	Philip Morris International		

# 1.

# Introduction

## Targeting the European Commission:

### The 7 Lobbying Techniques of Big Tobacco

Big Tobacco has been influencing policy to its advantage for decades – delaying, derailing, distracting from and casting doubt on tobacco control policies. To combat the wealth and influence of these companies, the World Health Organization’s (WHO) Framework Convention on Tobacco Control (FCTC) was developed. It entered into force in 2005, providing clear global guidelines to tackle and reduce tobacco-related death and disease and protect public health policies from tobacco industry (TI) influence, including by limiting interactions with the industry to a minimum. Specifically, Article 5.3 of the FCTC specifies that “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.”<sup>1</sup>

Despite the European Union and all EU member states being signatories of the FCTC,<sup>2</sup> the European Commission (EC) struggles to implement a systematic, proactive transparency policy regarding meetings with tobacco lobbyists, as required by Article 5.3 and recommended by the European Ombudsman.

In 2016, the Ombudsman’s investigation into transparency around tobacco lobbying concluded that the European Commission’s “refusal to publish online details of all meetings which its services and its staff





have with the tobacco industry constitutes maladministration.”<sup>3</sup> Only DG SANTE publishes details of all meetings with the tobacco industry on its website, and often ensures these take place as workshops with other stakeholders, rather than solely with the industry. However, DG SANTE is not the only DG responsible for tobacco control, nor the only one heavily targeted by industry lobbying.

Other relevant Commission DGs are not so forthcoming with information. As the EU prepares for a review and possible revision of its Tobacco Products Directive (TPD), beginning in 2021, it can be expected that lobbying by the tobacco industry to avoid stricter controls and to water down existing regulations will intensify. The previous revision of the TPD, finalised in 2014, led to the resignation of former European Health Commissioner John Dalli as a result of a lobbying controversy.<sup>4</sup> It also stimulated the industry to transform their product portfolios and adapt their business and lobbying strategies by deploying new influencing tactics.

More recently, a minor controversy was uncovered in which a member of European Commission Vice-President Maroš Šefčovič’s cabinet met Philip Morris International (PMI) to discuss the “working priorities of the new EC” at a New Year’s reception on 23 January 2020, violating Article 5.3 Guidelines. The EC

claimed that the meeting “did not touch upon topics related to tobacco control,”<sup>5</sup> which is undermined by the minutes released from the meeting.<sup>6</sup>

The so-called courtesy meeting in question, organised by the Slovak Permanent Representation to the EU, was sponsored by PMI under Šefčovič’s patronage, which hints at much closer relations than are coherent with the FCTC’s guidelines, as does the fact that members of his cabinet have met PMI in the past to discuss industry concerns.<sup>7</sup> Commissioner Šefčovič also committed a major transparency error by not disclosing a lobby meeting with PMI in January 2017.<sup>8</sup> This suggests the lessons of “Dalligate” have not been taken on board, and as in the past, the EC is not adequately prepared for the battle ahead given that internal practices have remained largely unchanged. Recent agreement between the major European institutions over a common lobby register offers little hope of progress, as each institution will be able to define whether organisations have to join the transparency register.<sup>9</sup> Within the European Commission for instance, there are no plans to require lobbyists meeting EC officials under directors-general to be registered.

This report presents and analyses the contacts between the TI – including third parties in receipt of TI funds, as well as influential vaping groups that are financially

independent, but whose messaging is consistent with the TI – and the European Commission in 2019 and 2020. The documents were uncovered by the European Public Health Alliance (EPHA) and Corporate Europe Observatory (CEO) in cooperation with STOP, the global tobacco industry watchdog. CEO submitted a comprehensive set of requests, including one on 13 December 2019 addressed to European Commission President Ursula von der Leyen.<sup>10</sup>

The request asked for all reports and other notes from meetings between all relevant DGs and “representatives of the tobacco industry (producers, distributors, importers as well as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry) during 2019,”<sup>11</sup> as well as all correspondence between the two groups. The transparency unit of the EC’s Secretariat-General split the request into eight separate requests, one for each DG considered relevant by the SG Access to Documents team. The request (and subsequent follow-up) eventually resulted in more than 100 documents being released, which are analysed here.

The evidence reported here is also relevant to Europe’s Beating Cancer Plan, which was released on 3 February 2021, and includes the ambition to create a “Tobacco Free Generation” by 2040. As part of the

Cancer Plan implementation, a review of the flagship TPD will take place in 2021, and the Plan also contains the ambition to enable a better implementation of the FCTC. The new Cancer Action Plan and revision of the Tobacco Excise Directive (TED) are thus likely to be high on lobbyists’ priority lists.

In light of this, it will be particularly important to insist on a more stringent implementation of Article 5.3, and this report’s recommendations provide practical support to the Commission to enable a successful implementation of the Cancer Plan and the TPD review, inter alia by adopting the good practices of DG SANTE and national governments.

**“...the European Commission (EC) struggles to implement a systematic, proactive transparency policy regarding meetings with tobacco lobbyists...”**

# 2.

# Industry tactics

- 2.1 Promoting untruths**
- 2.2 Postponing regulation**
- 2.3 Playing the victim**
- 2.4 Protesting against regulators**
- 2.5 Preying on third countries**
- 2.6 Pushing new technologies**
- 2.7 Playing the EC off against member states**

The documents provided reveal that tobacco companies are active and successful in exerting commercial influence across several EC DGs through letters, emails and physical meetings, and also most likely more informal and unrecorded methods, in part thanks to the Commission's continued non-compliance with FCTC Article 5.3. Several main tactics – none of them new but commonly used by tobacco lobbyists over several decades<sup>12</sup> – can be identified in the lobbying of the EC, principally regarding the EU's new track and trace scheme, EU trade negotiations and taxation questions. The main tactics identified are:

1. Promoting untruths
2. Postponing regulation
3. Playing the victim
4. Protesting against regulators
5. Preying on third countries
6. Pushing new technologies
7. Playing the EC off against member states

## 2.1 Promoting untruths

A common tactic of the tobacco industry is to promote (often non-peer-reviewed) research that casts doubt on the scientific consensus on tobacco, disputing public health facts, and then to commission their own studies to try to influence science.<sup>13</sup> In 2008, the

WHO published a document called “Tobacco industry interference with tobacco control” to assist member states in implementing the WHO FCTC Article 5.3 Guidelines against such interference, identifying the main tactics used by the industry, one of which is “funding research, including universities” to create doubt about the evidence of the health effects of tobacco use.<sup>14</sup>

This tactic is now being employed to influence policy, particularly the EU's Tobacco Excise Directive. A report of a meeting between DG TAXUD and British American Tobacco (BAT) (08 October 2019) shows how BAT used the findings of a study it commissioned (undertaken by Deloitte/Taj consultants) to support their views against increasing minimum rates in the TED. Their study concluded that an increase in rates would unduly affect Eastern European countries, increase illicit trade and vastly increase price elasticity of cigarettes. Furthermore, they argued that the Directive should not be reviewed claiming that there is “no sufficient data” to impose tax regimes on e-cigarettes or heated tobacco products (HTPs).<sup>15</sup> This also displays another common tactic: calling for the delay of tobacco control regulation.

Similarly, in February 2019, BAT provided DG TAXUD with its “Analysis of the potential impacts of revising the minimum excise requirements in the European Excise

Directive,” containing eight main findings and a number of detailed national examples to support its position against an increase in minimum excise requirements.<sup>22</sup> Further, the European Smoking Tobacco Association (ESTA) met DG TAXUD on 12 February 2019 to present the findings of a study undertaken by London School of Economics’ consultants on the taxation structure for fine-cut tobacco (FCT).<sup>23</sup> The study was used to support their key argument that FCT keeps consumers away from illicit, unregulated products, while making it more expensive would push FCT users to illicit products, despite the fact they

did not offer any data on the illicit trade of raw tobacco.

Further, ESTA and Tobacco Europe provided the Commission with a joint position arguing, amongst other things, that limiting the quantity of tobacco that can be purchased by individuals in a cross-border context for public health reasons would undermine the basic principles of the Internal Market.<sup>24</sup> It is clear therefore that the tobacco industry remains active in commissioning research to strengthen its position and argue its corner.

## Box 1: Tobacco Excise Directive (TED)

The 2011 Tobacco Excise Directive on the structure and rates of excise duty applied to manufactured tobacco<sup>16</sup> defines the categories of manufactured tobacco products, the principles of taxation and the minimum rates and structures to be applied. The Directive distinguishes between cigarettes and other tobacco products such as fine-cut tobacco, cigars and cigarillos. EU member states are free to apply excise duty rates above the minimum defined at EU level.<sup>17</sup>

A 2018 EC report concluded that the Directive should not yet be revised, due to the lack of sufficient data on emerging markets for electronic cigarettes.<sup>18</sup> However, shortly after,

the idea that the TED should be subject to a so-called better regulation evaluation came onto the EC agenda. This opened the door to lobbying to further delay or dissuade any eventual review and revision. In February 2020, an evaluation of the Directive’s functioning was published,<sup>19</sup> concluding that the directive was no longer as effective in deterring consumption, while the number of smokers in the EU remains high. Further, the emergence of new products reveals the Directive’s limitations. It concludes that the Directive “shows a low degree of coherence”<sup>20</sup> with other EU policies, meaning a more comprehensive approach, taking on board all aspects of tobacco control, is needed.<sup>21</sup>

## 2.2 Postponing regulation

As already mentioned, delaying or deterring the introduction or revision of tobacco control legislation is a common tactic employed by Big Tobacco and its allies. The documents obtained by CEO, EPHA and STOP show that the industry was determined to delay two of the main tobacco-related EU regulations currently active: the

implementation of track and trace as part of the TPD and the revision of the previously mentioned TED.

PMI wrote to DG SANTE on 8 March 2019 to ask whether the EC would “officially delay the introduction” of the track and trace system.<sup>30</sup> It based this request on concerns about the readiness of ID issuers in member states, despite the fact that the implementation deadline is specified in the TPD itself, meaning there is “no legal

## Box 2: Track and Trace

Articles 15 and 16 of the Tobacco Products Directive provide for EU-wide systems of traceability and security features for tobacco products, in order to address illicit trade.<sup>25</sup> Track and trace works by marking tobacco packs, which allows tracking of distribution chains and, if they are found on the illicit market, packs to be traced back to their origin. The EU systems entered into force on 20 May 2019, though only for cigarettes and rolling tobacco. Other tobacco products will not have to fulfil the rules until 20 May 2024.<sup>26</sup> A transitional period between May 2019 and May 2020 allowed for the gradual recording of track and trace data across all economic operators and for the sale of pre-May 2019 stocks. There were attempts to delay this full implementation period, but this was not granted.<sup>27</sup>

The implementing acts required each EU member state to appoint an independent ID issuer responsible for generating and issuing unique identifier codes to be applied to unit packets. Each manufacturer and importer of tobacco products is required to host the traceability data exclusively related to their products. The fact that the system covers all economic operators, and that the unique identifiers are generated by independent agents has been praised, but the system does delegate some aspects (like the choice of data host, external auditors and potentially providing some elements of the security features) to tobacco companies.<sup>28</sup> Several data storage providers with historical links to tobacco companies have been appointed.<sup>29</sup>

possibility to delay the launch date” of the system, as the Commission pointed out in response.<sup>31</sup> PMI responded by complaining that “certain external factors outside of our control (...) could negatively impact a successful launch of the system,” and result in increased illicit trade and thereby lost income. They particularly highlighted the operational readiness of the repositories system and of ID issuers, possible changes to the data dictionary and code structure of unique identifiers, and the cost of unique identifiers for cigarette packs.<sup>32</sup>

The tobacco industry has also been investing a lot of energy into delaying the revision of the 2011 TED in order to protect their significant profits for as long as possible. It is clear that for several years before 2019, DG TAXUD officials engaged in a string of meetings about excise duties with PMI, BAT, Japan Tobacco International (JTI) and lobby consultancy firms which focused on the introduction of so-called sin taxes for new products including e-cigarettes and heated tobacco products. Industry representatives repeatedly stressed that taxing such products in a harmonised way would be premature and unjustified, while PMI expressed its preference for a new tax category of low-risk products. Comparisons were also made between these products and alcohol to stress their declared “low risk,” the potential difficulties in administering such a tax and the limited revenues associated.

## 2.3 Playing the victim

In addition, tobacco companies often portray themselves as victims, for instance, of smuggling, excessive regulation or by emphasising their status as small and medium enterprises (SMEs). Regarding smuggling, research shows that the largest tobacco companies are in fact active participants in this illicit trade, and have been for decades.<sup>33</sup> Moreover, industry-funded research routinely overestimates levels of tobacco smuggling to inflate the perceived risk, in order to stave off more stringent regulation, for instance by pressing the case for reduced excise taxes, leading to increased sales in the legal market.<sup>34</sup>



Smuggling was certainly used by tobacco lobbyists in 2019 to argue against the implementation of the track and trace system. A number of letters and emails emphasise the problems with meeting the established deadline and warning that this difficulty may prevent companies from placing products on the market, hence increasing opportunities for illicit trade. BAT also sent correspondence to the EC Secretariat-General on 6 November 2019, again highlighting discrepancies in the fees charged by ID issuers, which are “excessively high” in certain cases.<sup>35</sup> Clearly industry representatives are fond of portraying themselves as the innocent victims of smuggling and regulation intended to protect public health.

Furthermore, they have been seeking to control the global system to prevent smuggling, while simultaneously remaining involved in the illicit trade, as revealed in two reports released by the Tobacco Control Research Group at the University of Bath.<sup>36</sup> The industry lobbying around track and trace preceded the contacts that took place in 2019. The documents received from previous Freedom of Information (Fol) requests confirm that the industry tried to influence the nature and timing of the system required under the secondary legislative acts, e.g. via position papers and studies and by pointing out the investments already made to be compliant with Articles 15 and 16 and to reduce illicit trade.<sup>37, 38</sup>

Another approach the industry, its allies as well as pro-vaping groups use to argue against tobacco control regulation is to emphasise the impact that increased legislation will have on the ability of small and medium enterprises to continue trading. Several such organisations and associations contacted the EC to plead their case, emphasising their SME status, as supporting such organisations has long been a stated aim of the EC. For example, representatives of the German Association of Vapers met DG TAXUD on 10 September 2019 to emphasise that their membership is “essentially centred around small and medium-sized businesses,” with price-sensitive consumers who are likely to turn to DIY solutions from Chinese websites if prices were to increase as a result of the revision of the TED. The main point they emphasised was that regulation is difficult to handle for SMEs.<sup>39</sup>

On track and trace, one producer, German family-owned tobacco company Von Eicken GmbH, complained to DG TRADE that the incompatibility between the EU’s track and trace system and comparable systems in certain third countries, particularly Russia “will cause the exclusion of the small and medium-sized European industry from the Russian market as these companies (...) have no production sites in Russia,” before asking for an exemption from the system for “export goods for third countries (...) with proper traceability codes incompatible with the EU



trace & trace.” They note darkly that if this is not possible, “this will impact and annihilate a large number of jobs within the EU,” including at two of Von Eicken’s own production sites.<sup>40</sup> Once again, the position is clear: Tobacco companies are the victims of an over-bearing nanny state, with no concern for their plight. It also shows that they often look to bypass the less responsive DG SANTE by appealing to other, more amenable DGs.

Similarly, the European farmers lobby COPA-COGECA contacted DG AGRI to protest against the potential abolition of the Civil Dialogue Group (CDG) on tobacco. The end of these meetings was proposed because the EU no longer grants direct subsidies to tobacco producers. In their letter to DG AGRI dated 22 November 2019, COPA-COGECA highlight the economic and social importance of tobacco in certain (unspecified) regions where “the livelihoods of millions” depend on tobacco harvesting, especially in areas “without viable economic alternatives.”<sup>41</sup> The claim that millions would be affected is somewhat undercut by EU figures from 2018 recording just 26,000 specialist tobacco producers across the whole EU.<sup>42</sup>

In a COPA-COGECA meeting attended by a DG AGRI official, farmers from tobacco-producing member states complained about production issues, asking for tobacco “to be treated at least as any other agricultural product” under the CAP, apparently ignorant

of the reasons why this is not the case. DG AGRI’s representative reminded them of the “health-policy reasons [which mean] there is no way that the [European Commission] will propose to revert to a past where specific, coupled support was paid,” while also pointing out the ways it was possible to receive funding under the CAP, and reassuring them that the tobacco CDG would not be abolished.<sup>43</sup>

Lastly, a number of Greek vaping associations (including Vapour Smok-e and the Greek Association for Traders of Vaping Products) appealed to the EC regarding the amendment by the Greek government of the requirements for placing non-nicotine-containing e-liquids on the Greek market and the prohibition on placing other chemical products. These associations complained that the measure hinders the free movement of goods within the EU, and highlighted that the Greek government failed to conduct a public consultation on this matter. Going further, they argued that the public health grounds used by the Greek Ministry of Health were not valid, and that placing health warnings on vaping products would be difficult to implement, or even impossible, given the lack of transition period.

## 2.4 Protesting against regulators

Another tactic is simply to criticise and smear those involved in tobacco control, or in this case, the part of the Commission which implements Article 5.3 as the WHO recommends. A letter dated 10 May 2019 sent by ESTA to DG SANTE expressed grave concerns about the flaws of the proposed track and trace system, decrying DG SANTE as they “clearly decided to

only have very few meetings on highly complex and technical issues with the industry, hiding behind a misinterpretation of international obligations while ignoring well-established democratic and self-professed better regulation principles.”<sup>44</sup> The Tobacco Control Research Group at the University of Bath has demonstrated how the tobacco industry, especially BAT, was involved in the development of the better regulation principles, seeing them as beneficial due to their emphasis on self-regulatory approaches, and reducing costs

## Box 3: EU Trade & Tobacco

The EU is currently negotiating trade deals with the UK, USA, the Association of South East Asian Nations (ASEAN), Australia, New Zealand and Chile. Negotiations with India, Tunisia, Malaysia, Philippines and Indonesia are either explicitly on hold, or no date has been set for the next round of negotiations. Negotiations with Morocco are to be relaunched. Deals are in place with Japan (from 1 February 2019), Singapore (21 November 2019) and Vietnam (1 August 2020) while investment protection agreements with these three are still being negotiated or need to be ratified. The deal with Canada is being provisionally applied, while waiting to be ratified by all EU member states. Agreement in principle has been reached with the Mercosur (Brazil, Argentina, Paraguay

and Uruguay) and Mexico, and the texts are undergoing legal scrubbing before proceeding to ratification by the European Council, Parliament and member states.<sup>46</sup>

EU trade therefore represents a huge opportunity for the tobacco industry to increase its profits. An EPHA report showed that tobacco was included as an offensive interest in the EU's negotiations with Mercosur. This means that tobacco was regarded as an area in which the EU could secure improved market access for European companies (via lower tariffs, more generous quotas and intellectual property protections for example). That the tobacco industry was explicitly included shows the influence the industry enjoys with DG TRADE.<sup>47</sup>

to business.<sup>45</sup> Therefore this view from ESTA should not be a surprise. However, to describe DG SANTE's implementation of Article 5.3 as "a misinterpretation of international obligations" and promote the EC's much-criticised "Better Regulation principles" above an international agreement shows the skewed perspective of ESTA, and their willingness to criticise those who do not accede to their demands.

## 2.5 Preying on third countries

The documents received also further underline the considerable interest that tobacco companies hold in the EU's trade policy. It seems clear that industry bodies with European headquarters see EU Free Trade Agreements with third countries as a prime opportunity to expand their market share in those countries and regions, where tobacco control legislation may be weaker or more easily circumnavigated. Simultaneously, trade is a key field in which tobacco companies work to ensure that their interests are not negatively impacted.

For instance, JTI met representatives of DG TRADE and DG GROW on 23 May 2019 to discuss no fewer than eleven negotiations being conducted by the EU, whether active, suspended, slow-moving or already concluded. Fundamentally JTI stated its

support for "an ambitious EU trade agenda" and was concerned with "the treatment of tobacco products (...) with respect to tariff liberalization and rules of origin,"<sup>48</sup> as already previously highlighted by EPHA.<sup>49</sup> Weakening rules of origin has long been an interest for the industry since these rules determine how much of the tobacco used in exported products has to originate from the EU. Lower requirements for EU content enable companies with global value chains to benefit from the lower tariffs negotiated in the EU deal, and lower unit costs of production and offshoring possibilities.<sup>50</sup> EU trade negotiators appear to have been favourable to such lobbying demands, as for example the agreed EU-Mexico FTA contains more flexible rules of origin than the previous standard.<sup>51</sup>



JTI was also sure to emphasise that tobacco should not be excluded from any “investment protection agreements which the EU concludes with third countries.”<sup>52</sup> The tobacco industry has famously made use of investment protection measures like Investor State Dispute Settlement (ISDS) to challenge tobacco control legislation, like Australia’s plain packaging regulation, which further had a chilling effect on New Zealand’s plans for similar legislation.<sup>53</sup>

Litigation is a commonly used tactic of the industry globally, as exposed in STOP’s Crooked Nine report.<sup>54</sup> As mentioned above, investment protection agreements are currently being negotiated with China, Japan, Singapore and Vietnam. During the meeting between JTI and DGs TRADE and GROW, the tobacco company presented their position on such investment negotiations, particularly with China. The revised approach for ISDS in investment agreements does include exceptions for “legislation in the public interest” and for “public health,” meaning theoretically cases like PMI vs Australia should not be possible under future EU investment agreements. However, the industry’s continued interest in such investment protection agreements should be a cause for concern for tobacco control organisations.

## 2.6 Pushing new technologies

A significant number of documents relate to novel products, or so-called next generation products (NGPs), including e-cigarettes, heat sticks and heated tobacco products, with both the industry and pro-vaping groups lobbying on the issue. Many of the arguments in this area try to distinguish these products from traditional cigarettes, arguing that they help smokers to “make the switch”<sup>55</sup> and “are developed exclusively for adult smokers.”<sup>56</sup> Although there is an ongoing debate about the relative safety of such products, what is clear is that the industry holds a growing share of the NGP market, in order to mitigate the impact of the decline in cigarette sales.<sup>57</sup> A University of Bath study found that these products, and the associated harm reduction narrative, serve to “‘renormalize’ an industry that is determined to be seen as a responsible business with a legitimate product,” and that the products are used in lobbying by the industry to frame itself as part of the solution rather than the problem.<sup>58</sup>

The documents related to these novel products mainly focus on taxation, in the context of the potential revision of the TED (see Box 1). Under the current directive, excise duties on e-cigarettes and heated tobacco products are less than for cigarettes, and industry representatives

were clearly keen to keep it that way. Several organisations argued that such products are only in the early years of development meaning there is not enough data to enable them to be accurately taxed. BAT, for example, in a meeting with DG TAXUD argued that there was no need to review the Directive due to the lack of data on e-cigarettes and heated tobacco products.<sup>59</sup> Pro-vaping organisations, including the German Association of Vapers and French vaping federation FIVAPE, similarly argued against reviewing the Directive, and against taxing their products alongside traditional tobacco products.<sup>60</sup>

The German association argued in their meeting that since many of their members are SMEs they would be more penalised by regulation and taxes. Both argued that such products help smokers to quit, with the French FIVAPE arguing in their letter that because of this, vaping products “must remain affordable.”<sup>61</sup> The spokesperson for the European Citizen Initiative on so-called smart regulation of vaping – funded and partly staffed by Imperial Tobacco<sup>62</sup> – also joined the meeting with the German Association of Vapers, undermining claims of independence from Big Tobacco. Fortunately, these efforts to delay the revision appear to have been unsuccessful as earlier in 2020, the Commission concluded that the differences between member states in terms of taxation of new tobacco products,

e-cigarettes and heated tobacco products means that taxation rules are no longer as effective in deterring tobacco consumption and the wide disparity in taxes between some member states is facilitating illegal trade. EU member states followed suit by asking the European Commission to include these products under the EU TED, with the goal of harmonising taxation across the EU.<sup>63</sup>

## 2.7 Playing the EC off against member states

An approach that runs alongside many of the tactics used above is the attempt to use the EU, and particularly rules related to maintaining consistency across the single market, against member states. In this way tobacco lobbyists, as well as pro-vaping groups, argue that public health legislation in a particular member state distorts competition rules, or means that the EU single market is threatened as products are subject to different rules in different countries, and therefore cannot move freely. This argument was employed (unsuccessfully) by the Greek vaping associations mentioned above to try to move the Commission to intervene against the Greek government.<sup>64, 65</sup> Several official complaints on this matter were submitted to DG GROW via the European complaint

system CHAP (the identities of those filing the complaints were redacted), trying to induce the Commission to intervene, but these were waved away by the Commission.<sup>66</sup> References to the sanctity of the single market and the free movement of goods are widespread,<sup>67</sup> suggesting lobbyists see this as an effective way to argue against legislation, and that they believe EU officials may be susceptible to this line of argument.

**“...tobacco lobbyists, as well as pro-vaping groups, argue that public health legislation in a particular member state distorts competition rules...”**



# 3.

# European Commission's role

- 3.1 Failing to limit contact**
- 3.2 Refusing disclosure of information**
  - 3.2.1 Strategic advantage and/or protection of commercial interests**
  - 3.2.2 Personal data**
  - 3.2.3 Other reasons**
- 3.3 Reactive transparency**

Whatever tactics they employ, the lobbyists attempting to undermine tobacco control legislation would surely be less influential if the EC and its departments were impervious to their approaches, and fully implemented the Article 5.3 requirements to only conduct the bare minimum of meetings with the tobacco industry and preferably never meet them one-on-one. Unfortunately, the FoI requests make clear that most parts of the EC fail to implement the requirements of the FCTC, as requested by the European Ombudsman. The EC justifies this by arguing that compliance with Article 5.3 is safeguarded by the combination of the Transparency Register, Code of Conduct for Commissioners, non-tobacco specific ethics rules applicable for Commission staff, and the possibility to request access to documents via Regulation 1029/2001.

The requests submitted by CEO resulted in eight separate processes with eight Commission DGs that the Secretariat-General considered relevant: DG SANTE, GROW, AGRI, TAXUD, TRADE, COMP, ECFIN and the SG itself. This resulted in separate and quite different responses, variously asking to narrow down the request, asking for extensions, failing to reply and refusing access to identified documents. Table 1 summarises the response of each DG.

**“...there are examples of EU policy following tobacco lobbying lines, such as the shift to more flexible rules of origin in recent trade agreements. This displays precisely why officials are required to limit contacts in the first place.”**



## Table 1

DG	Documents identified	Documents released	Documents state	Process
SANTE	178	57	Asked to narrow down the request to cover fewer companies. Provided a complete list from which EPHA, CEO, STOP requested access to 57 documents.	Asked to narrow down the request to cover fewer companies. Provided a complete list from which EPHA, CEO, STOP requested access to 57 documents.
GROW	31	15	Redacted names of lobbyists and EU officials, otherwise unredacted. Refused access to several documents on the basis of the protection of commercial interests.	Activated three-week extension
AGRI	3	3	Redacted names of lobbyists and EU officials, otherwise unredacted.	Activated three-week extension
TAXUD	13	13	Redacted names of lobbyists and EU officials, and information related to protecting commercial interests. Meeting records more detailed.	Activated three-week extension
TRADE	4, then 11	11	Redacted names of lobbyists and EU officials, otherwise unredacted. Meeting records are superficial.	Failed to reply on time, and then activated three-week extension
COMP	7	0	Refused access on the basis of protecting inspections, investigations and audits, and on the basis that disclosure would undermine the EC's decision-making process, as well as the protection of commercial interests. Documents relate to an antitrust investigation, and may reveal direction of EC investigation/ procedure.	Rejected access, was asked to provide a list but has not yet responded
ECFIN	0	0	State that no existing documents are "in the possession of the institution"	Failed to reply on time, and then activated three-week extension
SG	2	2	Redacted names of lobbyists and EU officials, otherwise unredacted.	Requested two extensions

A few themes emerge from the DGs' responses to and interactions with the industry and its representatives:

1. Failing to limit contact
2. Refusing disclosure of information
3. Reactive transparency

## **3.1 Failing to limit contact**

Guidelines for the implementation of Article 5.3 of the FCTC recommend that governments establish measures to limit interaction with the tobacco industry.<sup>68</sup>

The released documents clearly show that several DGs do not respect this, and there are examples of EU policy following tobacco lobbying lines, such as the shift to more flexible rules of origin in recent trade agreements.<sup>69</sup> This displays precisely why officials are required to limit contacts in the first place.

DG SANTE had by far the most intensive correspondence with the tobacco industry and the most meetings, which is unsurprising given they lead on tobacco control, and it is clear that DG SANTE tries to minimise this. Most of the SANTE documents are correspondence rather than meeting records, and SANTE officials often refer to stakeholder group meetings and webinars with a wider range of stakeholders than just

industry. DGs GROW, TAXUD and TRADE follow SANTE in terms of correspondence.

A second key conclusion pertains to the gap in implementing Article 5.3 in terms of protecting EU policymaking from direct industry influence. The released documents suggest the continued existence of open-door policies at some DGs (in particular DGs TAXUD and TRADE) and that accepting industry meeting requests is a standard approach rather than an exception. This, combined with the occurrence of meetings during which EU policy and related matters are discussed (which leaves ample room for influencing trade, taxation and public health related policy processes and negotiations), is disappointing.

## **3.2 Refusing disclosure of information**

This point regards the information that is in fact released when documents are provided through FoI requests. Such requests are based on 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. This includes a number of articles enabling information to be withheld, meaning that documents are

often heavily redacted, or their disclosure is simply refused. The regulation does include a clause referring to “overriding public interest” in disclosure, which would override such objections, but this is currently interpreted very narrowly. The various justifications for redaction or refusal are outlined below.

### **3.2.1 Strategic advantage and / or protection of commercial interests**

DG TRADE often refuses to provide more detailed information about the content discussed during meetings as disclosure would reveal “external stakeholders’ main business concerns, strategic interests, priorities and their internal assessment and input for the negotiations with [relevant country/group]. As such, this information indirectly reveals negotiating priorities, strategic objectives and tactics which the EU could consider pursuing in its trade negotiation.”<sup>70</sup> This clearly puts the economic interests of tobacco companies above public health and tobacco control, and so flies in the face of the FCTC. Of the 11 documents identified in 2020, none were redacted for this reason, however.

The Fol regulation also states, “The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property.” Several DGs redacted or refused information using this justification, namely DGs GROW, TAXUD and SANTE – once again suggesting the EC’s interpretation of the Fol regulation does not adequately prioritise public health.

DG TAXUD’s response reveals another worrying problem: that the DGs handling the requests consult with the tobacco industry about what can be released and what cannot, undermining transparency. Their letter accompanying the released documents states: “For the third party documents 1, 2, 7, the letter sent with document 9, the presentation sent with document 12 and document 13, we initiated consultations under Article 4, Para 4 of Regulation 1049/2001 with the third parties from whom the documents originate. I am pleased to inform you that the third parties agreed to the disclosure of documents 1, 2 and 7 and the letter/presentation attached to document 9 and 12.”<sup>71</sup> That Fol requests should be dependent on the benevolence of the industry is deeply worrying and suggests that any truly sensitive information will certainly never be allowed to see the light of day.

## 3.2.2 Personal data

All DGs, even those that tend to provide more information in general, redacted all the names of lobbyists they met with as personal data on the basis of Regulation 1049/2001 and the Data Protection regulation. While this may appear reasonable at first glance, this is a flawed interpretation of the regulation. If these lobbyists are trying to influence EU policy in an official capacity and are representing industry interests, then their names are hardly just personal data. Refusing to release names makes it impossible to see the potential conflicts of interest that might exist, or to track revolving door issues where former EC employees leave to work for big industry, or vice versa.

Clearly releasing the names is in the public interest. However, the Commission's interpretation of the Data Protection Regulation puts the burden of proof on the party asking for the documents to prove that it is necessary to make the data public "for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced." This sets the bar very high, making it nigh on impossible to obtain information about revolving door practices and individual conflicts of interests via the FoI process, despite the clear argument that the release of lobbyists' names serves

a specific purpose in the public interest, namely to enable scrutiny of conflicts of interest and revolving door issues.

## 3.2.3 Other reasons

DG COMP refused access to all the identified documents on the basis of "Article 4(2), third indent protection of purpose of investigations, and Article 4(3) protection of the institution's decision making process." Their letter explains that the requested documents form part of a pending antitrust investigation, in which no final decision has yet been adopted. The documents contain information "from which the direction of the investigation, the future procedural steps which the Commission may take, as well as its investigative strategy may be revealed to the public" – information that could be misinterpreted or misrepresented, causing damage to the reputations of the companies being investigated, and undermining the EC's investigation strategy.<sup>72</sup>

CEO responded to emphasise the obligation to be as transparent regarding tobacco lobbying as possible under Article 5.3, clarifying the purpose of the request, and asking for a list of the documents. This was sent on the 4 February 2020. As of yet, no response has been received.

## 3.3 Reactive transparency

Clearly the FoI system is far from the proactive transparency the FCTC promotes, and which the European Ombudsman has called on the EC to implement. Instead, it is reactive transparency. Only DG SANTE publishes information about contacts with tobacco lobbyists online while the lobby meetings of Commissioners, their cabinets and the DGs across the EC – a group of approximately 300 high-level officials – are also disclosed. The records of these meetings are spread across various websites, and meetings with the tobacco industry are not clearly indicated or listed separately. This makes it challenging to gain an overview without using third-party websites like integritywatch.eu or lobbyfacts.eu. Further, transparency (in this limited way) unfortunately does not necessarily prevent meetings with tobacco industry representatives from occurring; CEO identified several such meetings, such as between members of Maroš Šefčovič, Johannes Hahn and Vera Jourova’s cabinets and PMI or BAT, between 2017 and 2020.<sup>73</sup>

The system that does exist – the FoI system which the EC claims is sufficient to fulfil the transparency requirements of Article 5.3 – falls a long way short of providing transparency. In the requests for this report,

only DG SANTE produced a (presumably) complete list containing all contacts they had with the tobacco industry in 2019 – both all meetings and all correspondence. Ideally, even DG SANTE would not need to ask to “scale down” the scope of the request made, the only plausible reason for this being that there are likely to be far more contacts between different DGs and the tobacco industry than the documents received from them suggest. It also shows that the current system is not just burdensome for those seeking information, but also those providing it – proactive disclosure would be far more efficient for both parties.

DGs SANTE and GROW were the only DGs to include information pertaining to document dates, types and authors. The wildly differing responses from the DGs is enabled by the Commission’s practice of splitting larger requests into separate applications per DG. This makes it harder to follow as information trickles in separately and also means some potentially relevant DGs are excluded. For example, no information has been received from DG Research, Environment, Employment and Development Cooperation. Further, as we have seen, it enables different DGs to take different approaches, interpreting the request as they see fit, obliterating any chance of consistency across the EC, and resulting in highly fragmented information, differing widely in quality. This makes it very difficult to draw firm conclusions about

the scope and depth of policy-industry dialogues. Given that one important lesson from the 2012-2014 TPD review was that lobbyists are increasingly bypassing DG SANTE and focusing on other DGs with less rigorous approaches, consistency across the EC is crucial.

Lastly, a message dated 11 December 2019 from the European Cigar Manufacturers Association (ECMA) to DG GROW asks to exchange views “over the phone in the coming days to discuss the new EU-SME Strategy as well as the ongoing inter-service consultation regarding the possible revision of the Excise Tobacco Products Directive.”<sup>74</sup> This raises another important concern: How many phone calls, texts and WhatsApp conversations are taking place that are not recorded, and not entered into the EC’s transparency register or covered by FoI requests?

**“...the current system is not just burdensome for those seeking information, but also those providing it...”**

# 4.

# Recommendations

Evidently, the tobacco industry, plus its allies and pro-vaping groups, are as active as ever in lobbying European institutions, and are unfortunately often assisted in its aims by DGs and their lack of proactive transparency. Here we offer a number of recommendations that are necessary in order to be able to resist tobacco lobbying and corporate capture of the European institutions.

1. As a first step, the EC should ensure that DG SANTE's approach is adopted across all DGs in contact with the industry by proactively listing all meetings (including minutes) and correspondence with the tobacco industry and their representatives on a central and easily accessible public register similar to [the one operated by the Netherlands](#). All meetings that discuss tobacco and the promotion of tobacco interests should be recorded in a central portal covering all EC DGs and bodies, to prevent the industry from simply working to lobby EU officials via third parties such as broader industry federations<sup>75</sup> or networks, like Business Europe which has a long-standing relationship with PMI and BAT,<sup>76</sup> or front groups like Forest.
2. Create a clearly defined policy for all DGs regarding how officials should handle contacts with the industry, again using the Dutch example as a template. This includes points such as only meeting when necessary and organising wider

stakeholder meetings in place of one-on-one meetings. DG SANTE's 2011 instructions to officials regarding meetings with the tobacco industry<sup>77</sup> provide a clear basis for rules covering all DGs.

3. The Commission should adjust its current implementation of the FoI regulation, as has happened regularly throughout its existence. The EC should recognise transparency around lobbying and the protection of public health as clear aspects of the public interest, which overrides objections related to so-called personal data and the protection of commercial interests. This would result in a better balance between protecting commercial interests and safeguarding the overriding public interest in transparency.



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#### Annex: Overview of tobacco industry, allies and prominent pro-vaping group contacts in 2019 (Company subsidiaries/different offices were combined, e.g. BAT includes BAT Italy)

DG	SANTE	GROW	TRADE	TAXUD	AGRI	SG	Total
BAT	9 exchanges			1 exchange 1 meeting		2 exchanges	12 exchanges 1 meeting
PMI	6 exchanges						6 exchanges
JTI	4 exchanges	1 meeting	1 exchange	1 meeting			5 exchanges 1 meeting
ESTA	2 exchanges			2 exchanges 1 meeting			4 exchanges 1 meeting
CECCM / Tobacco Europe	2 exchanges			4 exchanges			6 exchanges
COPA- COGECA					1 exchange 1 meeting		1 exchange 1 meeting
New Nicotine Alliance		2 exchanges					2 exchanges
Lithuanian Confederation of Industrialists		1 exchange					1 exchange
European Cigar Manufacturers Association		2 exchanges					2 exchanges
Vapour & Smok-e		1 exchange					1 exchange
Greek Association for Traders of Vaping Products		1 exchange					1 exchange
Dos Santos S.A.U	1 exchange						1 exchange
Planta Tabak- Manufaktur	1 exchange						1 exchange

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<b>DG</b>	<b>SANTE</b>	<b>GROW</b>	<b>TRADE</b>	<b>TAXUD</b>	<b>AGRI</b>	<b>SG</b>	<b>Total</b>
YESmoke	1 exchange						1 exchange
China Tobacco International Europe	2 exchanges						2 exchanges
Karelia Tobacco Company	1 exchange						1 exchange
Denis Lauko s.r.o	1 exchange						1 exchange
Poschl Tabak	1 exchange						1 exchange
Slance Stara Zagora Tabac JSC	1 exchange						1 exchange
Continental Tobacco	1 exchange						1 exchange
Polish Tobacco Industry Association	1 exchange						1 exchange
Landewyck Tobacco S.A	1 exchange						1 exchange
Rys Andrzej Jan	1 exchange						1 exchange
Imperial Brands	1 exchange						1 exchange
Vision Tobacco FZCTobacco S.A	1 exchange						1 exchange
Juul				1 exchange			1 exchange

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<b>DG</b>	<b>SANTE</b>	<b>GROW</b>	<b>TRADE</b>	<b>TAXUD</b>	<b>AGRI</b>	<b>SG</b>	<b>Total</b>
German Association of Vapers				1 meeting			1 meeting
Tabaknatie				1 meeting			1 meeting
Arcturus Group (on behalf of Fédération interprofessionnelle de la vape (FIVAPE))				1 exchange			1 exchange
Von Eicken			1 exchange				1 exchange
Total: 30 Companies/ associations	38 exchanges	6 exchanges 1 meeting	2 exchanges	9 exchanges 5 meetings	1 exchange 1 meeting	2 exchanges	12 exchanges

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The European Public Health Alliance (EPHA) is Europe's leading NGO alliance advocating for better health. EPHA is a dynamic member-led organization made up of public health NGOs, patient groups, health professionals and disease groups, working together to improve health and strengthen the voice of public health in Europe.

Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policymaking.

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## Targeting the European Commission:

### The 7 Lobbying Techniques of Big Tobacco

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