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From: Clive Bates  
London, UK  
By e-mail

1<sup>st</sup> February 2014

Dear Ms O'Reilly

**Re: Complaint 81/2014/OV (Procedures followed for Tobacco Products Directive)**

Thank you for your letter of 22 January responding to my complaint of 13 January 2014. I am grateful for the rapid turnaround, your considered response and for your decision to request a substantive reply from the Commission to my letter of 23 October 2013. I have now received the Commission's reply. I was disappointed, however, that you have ruled my maladministration complaint to be outside your mandate. I would like to invite you to reconsider this ruling, both for this case and more generally. I think there are three main responses to your reasoning.

**1. The complaint was strictly procedural and related to responsibilities of the Commission, not the European Parliament. It is a legitimate case of maladministration.**

I have not requested that you examine the substance of the legislation, only the process followed. The Commission is responsible for consultation, impact assessment and reasoned justification to support legislative proposals and no consultation, justification or impact assessment has been done. The Commission does have powers to withdraw proposals or not to adopt amendments. It could and should have chosen to do this in order that the treaty obligations were met. It does have an unambiguous responsibility to uphold European law, including the treaties, and therefore it should have acted in a way that enabled it to do this. Because it has the powers, it also has the responsibility to see the process is conducted lawfully. The outcome I seek is not "to block the existing (revised) proposal", but to see that the proposal is subject to the practices mandated in the treaties, which give citizens a role in law-making and provide checks on arbitrary decision-making. Legislation made with proper consultation and analysis is less likely to be disfigured with scientific and legal errors or beset by unintended consequences, and I am sure that was the intention of those drafting the treaties.

**2. The European Parliament is not 'sovereign', rather it is constrained by the treaties, both in terms of policy and process**

I argue above that my complaint was strictly about the Commission and the powers and responsibilities it has under the treaties. However, you have argued that this impinges on the political work of the European Parliament. In doing so, you have taken a deferential approach to the European Parliament's 'political role'. This mirrors the approach that

administrators would take towards many national parliaments in order to recognise their 'sovereignty'. However, that is far less obviously justified or necessary in the European Union and I can find no reason, other customary practice that you have done this. The European Parliament is not sovereign in the same sense as most members state parliaments. It is a directly elected debating and voting assembly embedded within a complex international agreement (the EU treaties). As a legislature, it plays a joint role with two other institutions, the Commission and Council, with relationships and responsibilities governed by the treaties. The existence of a directly elected Parliament should not provide 'cover' for another institution to avoid its responsibilities. The Parliament is not unfettered – for example, it does not have the power of legislative initiative (other than via request to the Commission), yet it has created extensive brand new legislation through amendment. Finally, the more recent developments of the treaty give an enhanced role to national parliaments, and they should also expect the European institutions to follow due process. Given the requirements of the treaties and other institutions involved, the 'political role' of the European Parliament should not trump the treaties, but fit within them.

### **3. The implications of your ruling is that there is no administrative responsibility for adherence to the treaties during the legislative process**

Completely new legislation, amounting to 4,500 words or 12 pages, has been created for an important emerging industry with millions of consumers and thousands of businesses involved, and with many contentious views in the expert community. There is a treaty requirement to consult, provide relevant analysis and subject proposals to scrutiny in national parliaments. All of this has been sidestepped, even though it could have been done properly if the Commission acted within its powers. The corollary of your decision is that no one has administrative responsibility and accountability for ensuring that this process operates in the way intended. It implies that interested parties should have no expectation that their rights to due process will be protected. It is not hard to see therefore why the European legislature will be prone to expediently side-stepping its obligations. Whilst the European Court of Justice provides a final challenge, an important purpose of good administration is to avoid the need for citizens to incur the expense, difficulty and delay of going to court to challenge unlawful decisions and process violations retrospectively.

To summarise, I am not an expert in this field, but I do feel strongly that it cannot be right to bring significant new legislation into being without any consultation or supporting analysis. I believe that the treaties support that view and I have tried to show why in detail in my complaint. I also think it is quite clear that the Commission has the responsibility and powers necessary to see that these treaty requirements are upheld. I cannot see why the parallel involvement of the European Parliament should stop this being a case of maladministration.

I hope you will look favourably at my request to reconsider based on the arguments above.

Yours sincerely

**Clive Bates**