Ombudsman says rogue process beyond her brief – I say ‘look again’

written by Clive Bates | 2 February 2014



Does it do what it says on the tin?

On 13 January, I made a complaint to the European Ombudsman about the European Commission sidestepping the treaty requirements for consultation, reasoned justification, impact assessment and scrutiny of legislative proposals when it comes to the 4,500 words of new legislation about e-cigarettes negotiated in secret in a process that has led to scientific, legal and procedural defects. This has led to further exchanges…

The short version

The Ombudsman says she will not investigate my complaint about the Commission avoiding consultation, impact assessment etc because it would intrude on the political work of the European Parliament. For unstated reasons, they don’t like to do that – hardly surprising as she is appointed by the Parliament, but not supported by the Ombudsman’s own rules of procedure. Needless to say I disagree and have written back to ask her to reconsider, arguing that (1) all of this was the responsibility of the Commission; (2) asking

what's so special about the European Parliament anyway? It is also governed by the treaties. The involvement of the European Parliament should not be cover for maladministration by the Commission; (3) this implies no-one is responsible or accountable – so it's unsurprising that they cut corners.

She has however, required the Commission to write back to me, which it has now done. I have responded to the Commission pointing out its reply avoids the main points and asking it to: (1) justify the process followed for the directive and; (2) the credibility of the measures in the directive. The Ombudsman asked for observations on the Commission's reply, and I have copied my new letter to the Ombudsman as my observations. I await a new response from the Commission.

It all adds to my sense that the EU has gone rogue, with inadequate accountability for sticking to the rules – see my Manchester University policy blog: Do we need a 'new settlement' with Europe – or just a better sausage factory?

In more detail

The European Ombudsman, Emily O'Reilly, has replied and her letter is here (PDF). Her reply does two things:

1. It states that the complaint is outside the Ombudsman's mandate because if she made an inquiry into this complaint, which although was about the *European Commission*, it would impinge on the European Parliament's political role. She states that her institution "*takes the view that complaints concerning concerning the political work of the European Parliament fall outside the concept of maladministration".* I don't accept the logic in this position and have just written back to her to request that she reconsiders this ruling. My letter with the arguments why she should reconsider is here (PDF) and set out in full below. The Ombudsman is barred from intervening in cases before the European Court of Justice, but there is nothing in its statute that stops the Ombudsman doing this.

2. It asserts that the Commission should have responded to my e-mail of 23 October to Dominik Schnichels and Joanna Darmin of DG SANCO in the European Commission. The Ombudsman requests that the Commission now responds. The Commission has responded (PDF here) and I have just written back to them pointing out they have avoided the main issues and requesting a substantive

response on the reasons for avoiding the main process obligation of the EU Treaties, and on the lawfulness of the measures proposed in time for the European Parliament plenary. My reply to the Commission is here (PDF) and set out in full below.

Reply to Ombudsman

Here is my reply…

1st 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

Reply to the European Commission

Here is my reply….

1st February 2014

E-cigarettes and Tobacco Products Directive

Dear Mr Schnichels

Thank you for your reply of 29 January 2014 to my email of 23 October 2013. I am grateful for your considered response. However, the most substantive points I made in my 23 October message remain unaddressed.

In a closed process between October and December 2013, over 4,500 words of new legislation have been formulated to apply to e-cigarettes, which are a significant emerging technology with great public health potential. Article 18 of the TPD is now for all practical purposes a new legislative proposal and could be written as a separate directive. As I am sure you are aware, there are treaty obligations to consult on legislative proposals, to provide a reasoned justification, and to develop an impact assessment. It is the Commission's responsibility to see that these requirements are met, but none of this has been done. The Parliament does not have the power of legislative initiative, but had rejected the essence of Commission's proposal to regulate these products as medicines. At that point, the Commission should have withdrawn the proposals that related to e-cigarettes so that a proper legislative process could be followed, meeting the treaty requirements for consultation, supporting analysis and timely scrutiny by national parliaments. The Commission is the 'guardian of the treaties' but appears to have sides-stepped these important treaty obligations when it had the power to do otherwise. This was the primary point of my letter of 23 October.

I was not trying to be obstructive – the treaties require consultation, reasoned argument and impact assessment for good reasons. Though I support the Parliament's rejection of medicines regulation for e-cigarettes in October, I do not think the text that emerged from the trilogue process in December is worthy of the EU legislature. Like many others, I believe it is disfigured by scientific misunderstandings, arbitrary and inconsistent measures and legal weaknesses. In my view, these would have been flushed out had there been proper supporting analysis and a more open Commission-led process in which the views of consumers, businesses and experts could have been considered properly.

I am sorry to say that after 23 October, I had given up communicating with the

Commission. However, I accept your point that my letter may have appeared to be sent to you for information rather than for a response. I have subsequently elaborated at greater length on the technical and legal deficiencies of the directive, most recently in the attached letter to ENVI committee MEPs of 19 January 2014. I realise now that I should have also sent this to you and asked you for a response.

I would be grateful therefore, for your response on the following:

1. Why the TPD provisions related to electronic cigarettes were not withdrawn and recast as a new legislative proposal in order that the requirements of the treaties with respect to consultation, justification, impact assessment and scrutiny could be met.

2. A response to the criticisms I have made of the measures described in the attached letter in the appendix under the heading 'unlawful measures'. I think an explanation and justification for the controversial provisions of this directive would be very helpful at this point, before the formal first reading.

It is a matter of regret that I am compelled to ask these questions and make these points almost in retrospect and as the legislative process is drawing to a close. It would be better in future if the proper process was followed and such widely held concerns were understood and anticipated in advance through consultation.

I look forward to receiving your reply.

Yours sincerely

Clive Bates

Appendix: Flawed science, irregular procedure, unlawful measures – letter to ENVI MEPs 19 January 2014