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## DANCING THE TANGO

# THE EXPERIENCE AND ROLES OF THE EUROPEAN UNION IN RELATION TO THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

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## ABSTRACT

This paper analyzes the experience of the European Union (EU) in the formation and application of the WHO Framework Convention on Tobacco Control (FCTC), which came into force on 27 February 2005. Its fifth year is a timely moment to review the EU's role in creating and applying the first binding global health treaty of the World Health Organization. In addition to the 167 nation states that have become parties to the Framework Convention, the European Union is the only and first-ever regional economic organization that has become a full signatory member and party to the FCTC. We understand this special circumstance as a result of an important learning process for the EU on how to conduct international negotiations in a policy field which is mostly shared in legal competence.

While legal competence is a determining factor of whether and how the European Commission is active in theory, we found that working relationships between the Member States and the European Commission in practice are a much more fluid partnership based largely on trust and solidarity that cannot be understood from a reading of the division of legal competence alone. The role that the European Commission plays as a bank of knowledge and capacity is seen as an unparalleled asset for the Member States. Although there is some uncertainty on how EU diplomacy will be organized in the future, the EU remains proof that nation states can and in fact have shared sovereignty, not only for the collective benefit of its own exclusive club, but with benefits for global governance. Granted, the EU is a unique entity, but its experience in international diplomacy may provide a model for how other non-traditional actors, be they similar regional unions or actors from academia, business or civil society, might one day have a more integrated voice in multilateral negotiations.

# **DANCING THE TANGO: THE EXPERIENCE AND ROLES OF THE EUROPEAN UNION IN RELATION TO THE FRAMEWORK CONVENTION ON TOBACCO CONTROL**

Miriam Faid<sup>1</sup>

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## **1. INTRODUCTION**

This research study analyzes the experience and role of the European Union (EU) in negotiating and facilitating the application of the Framework Convention on Tobacco Control (FCTC). The European Union is comprised of a group of 27 Member States<sup>4</sup> who aim to speak with one voice in international negotiations, and a network of institutions of which the European Commission, the European Parliament, and the Council of the European Union are the primary actors. On 21 May 2003, 192 Member States of the World Health Organisation (WHO) unanimously adopted the Framework Convention on Tobacco Control at the 56<sup>th</sup> World Health Assembly. In the two years that followed, the Convention was signed by 167 nation states, the European Union and 26 of its Member States.<sup>5</sup> The European Union is the only signatory to the FCTC that is not a nation state, but a regional economic and political organization of Member States. The unique institutional character of the EU and its engagement in such international negotiations reflects the nature of the 21<sup>st</sup> century demanding complex multi-actor global diplomacy.

The 5<sup>th</sup> year anniversary of the Framework Convention provides an opportune time to re-examine the evolution that the EU has undergone in these negotiations. The FCTC process has provided many lessons, not only for the European Commission and the EU Member States, but also for third countries and other stakeholders involved in the FCTC negotiations. Seeing this as a process of evolving and redefining international relations from a traditional system of unitary state actors towards new forms of multi-actor, multi-level international relations is an important perspective for this review.

The empirical basis of this study combines a review of existing literature on the EU's involvement with the FCTC and 15 semi-structured interviews with representatives of EU Member States, the European Commission, non-EU countries (here referred to as third countries), and other key stakeholders actively involved in the negotiations

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<sup>4</sup> When discussions on the FCTC first began in 1999 the EU consisted of 15 Member States. In 2004, 10 States joined the EU as new Member States, followed by 2 more in 2007.

<sup>5</sup> The Czech Republic is the only EU Member State that has not ratified the Convention.

during the development of the FCTC (2000-2004) and its continuing application (2005-ongoing).<sup>6</sup> While the study wishes to highlight the progress the EU has made as an actor in health diplomacy since the start of the FCTC negotiations in 1999, interviews focused primarily on the experiences of Member State officials post 2005 when the FCTC came into force.

When discussing the EU in multilateral settings with interviewees, they would initially focus on the division of legal competence as the key means to explain how the European Commission and the Member States would work together in international negotiations. Interestingly though, when asked to elaborate further, interviewees often found it easier to use colourful imagery, describing the interactions between the European Commission, the rotating EU Presidencies, and the wider group of FCTC signatories as, for example, an intimate dance of the Tango; or the decorating of a Christmas tree. This stresses the creative and interactive nature of defining the roles of the European Commission and the EU Member States.

Policy making in the EU is generally a complicated process that must balance national interest with collective responsibilities—both regionally and globally. The European Commission and the Member States, represented by the rotating EU Presidencies, and other stakeholders in the FCTC each have distinct roles to play in this process. While legal competence is a determining factor of whether and how the European Commission is active in theory, working relationships between the Member States and the European Commission in practice are a much more fluid partnership based largely on trust and solidarity that cannot be understood from a reading of the division of legal competence alone. We believe that looking solely at legal competence to understand the EU's role in international settings is misleading. Rather, our study is focused less on legal competence issues, but more on the question of how the capability and capacity to add value to the process is developed.

In the following sections, we describe the roles of the European Commission and the EU Member States in context of the FCTC. This provides the basis for a more detailed analysis of the EU's role and performance in respect to the FCTC within Europe, vis-à-vis third countries and in multilateral settings. While we set out the strengths of the EU as a multilateral global health actor, we also address its challenges and highlight opportunities to improve performance. Many of these challenges are already known. In fact, the Lisbon Treaty tries to address them. In this sense, this paper is a timely reminder of what is at stake for the EU's continued development as a key actor in global health diplomacy.

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<sup>6</sup> The interviews were conducted between February 2010 and April 2010, with follow up in June 2010

## 2. THE ROLE AND EXPERIENCE OF THE EU IN THE FCTC

### 2.1. Negotiation of the FCTC

In 2003, the World Health Organization concluded this first international legal health treaty, designed to be an effective multilateral cooperation instrument in the fight against the growing global tobacco epidemic.<sup>7</sup> The Framework Convention constitutes an important milestone in combating the promotion and use of tobacco products. Its power lies not only in the multilateral agreement itself but in the process by which it is negotiated and applied to which the European Union and its Member States contributed significantly.<sup>8</sup>

The negotiations from 1999-2003 that led to the successful adoption of the FCTC had created new institutional forums that provided opportunities for shared capacity-building and strengthening of international networks. These forums included intergovernmental working groups and intergovernmental negotiating bodies (INBs), where the text of the FCTC was drafted and debated. Following adoption of the FCTC, a similar system of working groups and INBs was established for drafting the guidelines and recommendations for the implementation of FCTC articles and for negotiating protocols—equivalent to binding international agreements—contained within the FCTC such as in the case of article 15 on illicit trade in tobacco products. These bodies report to the larger Conference of Parties (COPs), which met in 2006, 2007, and 2008.<sup>9</sup> The COP is a forum for all signatories to decide on final guidelines and protocols, as well as to hear reports on the implementation process of articles.

In all these settings, the European Union has, and continues, to be an actor of central importance. On the one hand, EU countries are some of the world's most progressive tobacco regulators. On the other hand, the EU Member States include some of the world's biggest raw tobacco producing and tobacco product importing countries.<sup>10,11</sup> In addition to EU Member States the European Commission represents an additional force for tobacco control within the region and globally as an actor in the FCTC. In fact, when considering the relevance of all involved major EU institutions, as Princen (2007) argues, the European Commission has been the major agenda-setter in tobacco

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<sup>7</sup> The Convention's key obligations for the Member States include: enact comprehensive bans on tobacco advertising, promotion, and sponsorship; obligate the placement of rotating health warnings on tobacco packaging that cover at least 30% (but ideally 50% or more) of the principal display areas and can include pictures or pictograms; ban the use of misleading and deceptive terms such as "light" and "mild"; protect citizens from exposure to tobacco smoke in workplaces, public transport, and indoor public places; combat smuggling, including the placing of final destination markings on packs; increase tobacco taxes. For further info, see: the WHO Framework Convention on Tobacco Control: <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

<sup>8</sup> Taylor, A (2000), *The Framework Convention on Tobacco Control: the power of the Process*; paper presented to the 11th World Conference on Tobacco or Health, Chicago.

<sup>9</sup> The fourth COP session is scheduled to be taking place in Punta del Este, Uruguay in November 2010. A draft protocol of protocol on illicit trade will be considered at this session.

<sup>10</sup> The EU the world's fifth largest producer of raw tobacco. In addition, The EU is the world's biggest tobacco importer (400 000 tons annually— more than 20% of world imports) and fourth biggest exporter. See: [http://ec.europa.eu/agriculture/markets/tobacco/index\\_en.htm](http://ec.europa.eu/agriculture/markets/tobacco/index_en.htm)

<sup>11</sup> For example the European Public Health Alliance maintains a list of European smoking bans in public spaces, including bars and restaurants. <http://www.epha.org/a/1941>

control.<sup>12</sup> When the tobacco control negotiations started in 1999, the European Union already had strong policy on tobacco control. Issues such as labelling of tobacco products<sup>13</sup>, cross-border advertising<sup>14</sup>, and marketing and smuggling formed part of the EU's agenda for addressing its common market.<sup>15</sup> The need for internal market regulation meant that the European Union already shared legal competence with the EU Member States in this area and could therefore become involved in the FCTC process.<sup>16</sup>

To understand the roles of the Commission and the Presidency vis-à-vis the Member States one has to look beyond the general policy field of the negotiations and into the content of the specific Articles that are being discussed. Furthermore, shared competency does not necessarily equate to a clear-cut division of competency between the European Commission and the EU Member States. Ultimately, competence is shared on all Articles under the FCTC; however, depending on the specific issues, the role of the European Commission can be perceived as either strong or weak. Given this situation working on the FCTC requires the European Commission to strike a careful balance between proactive engagement and support to Member States. For example, labelling (Article 11 FCTC) and advertising (Article 13 FCTC) largely involve issues for which the EU has legislated, namely by the Tobacco Products Directive (2001/37/EC) and the Tobacco Advertising Directive (2003/33/EC). On the other hand, tobacco dependence and cessation (Article 14) and education, communication, training and public awareness (Article 12) mainly touch issues for which no specific EU legislation exists. For the European Commission and the Member States, working in public health therefore requires a process of exploration to determine how to achieve this balance, which can only be done through practice—through actually working together.

While other regional and civil society actors are observers of the FCTC, the fact that the European Union (formerly the European Community<sup>17</sup>) is an actual signatory to the FCTC has provided an opportunity for the entire multilateral diplomatic community to learn how to work with this new type of actor. At the initial stage of the negotiations circa 1999, many third countries were hesitant to accept the European Community as a negotiating partner of equivalent status to nation states. Some third

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<sup>12</sup> Princen 2007

<sup>13</sup> The Tobacco Products Directive (2001/37/EC).

<sup>14</sup> The Tobacco Advertising Directive (2003/33/EC).

<sup>15</sup> The legal basis of the EU tobacco control legislation is the functioning of the internal market that needs to ensure a high level of health protection (Ex-Article 95 that was renumbered as Article 114 following the Lisbon Treaty). The use of this legal basis has been confirmed in several cases from the European Court of Justice (notably Case C-380/03 Germany v Council and the European Parliament, judgment of 12.12.2006). See also Collin/Gilmore (2002); Bossman/Cairney/Studlar (2009); Neuman/Bitton/Glantz (2002); Mamudu/Studlar (2009)

<sup>16</sup> Until 1989, there was no legislation specific to tobacco control on the EU level while the EU Member States had their own tobacco control laws. This changed gradually with the implementation of the 'Europe Against Cancer' programme and the Television Without Frontiers Directive (1989) that banned tobacco advertising and sponsorship on television in the EU. Throughout such processes, the European Commission gained authority in this subfield of public health in an evolutionary manner. (See Neumann/Bitton/Glantz 2002 ; Mamudu/Studlar 2009; Duina/Kurzer 2004).

<sup>17</sup> As of December 2009 the term European Community was replaced by European Union as the legal identity of the EU. Therefore the use of European Community in this paper signals a historical discussion whereas European Union refers to the European Community today.

countries feared that the new role of the European Community would help the European Member States to have an additional vote and therefore an unfair advantage in the negotiations. However, through diplomatic interactions with the various EU actors non-EU FCTC participants are learning to understand the complex arrangements that define and guide the practice of the EU Member States and the European Commission. The European Union is now seen as a key actor in the negotiations alongside rather than as an adjunct to the EU Member States. Although negotiations have not yet successfully produced a draft protocol, the INB on illicit trade, which was chaired by the European Commission, provides a positive example of the capacity and capability the EU can add.<sup>18</sup>

## 2.2 Working together in areas of shared legal competence

The EU aims to speak with one voice in international bodies and must therefore come to a coordinated common position in the lead up to such negotiations. For the FCTC, arriving at a common EU position is a labour intensive process involving actors in the European Commission, EU Member States, and representatives in Brussels and Geneva. In EU Member States, preparatory work for FCTC external negotiations and internal EU coordination is realised by individuals in various government ministries ranging from the Ministry of Health to non-health related ministries and departments such as those responsible for customs and taxation as well as agricultural policy and trade. The Ministry of Health or the Ministry of Foreign Affairs are usually acting as the main coordinator for this network. In some cases governments may also consult with experts from academia and civil society.

In Brussels the web of activities involves officials and experts from various directorates of the European Commission, mainly from Directorate-Generals for Health and Consumers (usually the lead department for tobacco control issues), the anti-fraud department (OLAF), agriculture, trade, justice, and enterprise, who meet in coordination meetings with officials from the EU Member States' permanent representations in Brussels. These Member State representatives are often health attachés but can also come from other specializations, for example customs and taxation. Brussels coordination meetings can be *ad hoc* in preparation for upcoming negotiations or as part of existing coordination mechanisms, such as the Council working group on health.<sup>19</sup> In addition to the preparations realized in the different EU Member States, the final positions of the European Union are prepared by the health working group of the EU Council of Ministers for Health, which comprises Member State representatives and Commission staff. If the Member States cannot reach a consensus, the issue is submitted to the Committee of Permanent Representatives (COREPER) and eventually to the Council of Ministers for Health.<sup>20</sup>

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<sup>18</sup> The INB on illicit trade seeks to establish the first binding protocol of the FCTC. It brings together diverse actors from policy sectors, such as taxation, customs and law enforcement with health diplomats. Discussions have been ongoing since 2006 and a final text is yet to be agreed.

<sup>19</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.

<sup>20</sup> See Guigner 2009

In addition, to these internal meetings in Brussels, there are also EU coordination meetings in Geneva. These meetings are called for by the EU Presidency, usually on an *ad hoc* basis, in the months before a major meeting of negotiators and involve the European Commission's representatives in Geneva, and the health attachés of EU Member State's missions to the United Nations.

The coordination between discussions in Brussels and discussions in Geneva is not an iterative or hierarchical process where Member States and the European Commission come to decisions on positions in Brussels which are subsequently communicated to the representatives in Geneva to implement in negotiations with third countries. Rather, the topics of the meetings in Brussels are often different from those discussed in Geneva—the former dealing with more technical issues and the substance of the EU's common position, and the latter dealing mainly with issues linked to international relations and specific political aspects of whatever negotiations are at hand. Health attachés from the Geneva missions are in communication with their counterparts in Brussels permanent representation; however, the coordination between these two arenas is conducted mainly through colleagues based in the Member State government ministries back in Member State capitals. We refer to this institutional arrangement as “triangular coordination”.

### *2.2.1 The Roles of the European Commission under the FCTC*

Many interviewees attributed the EU's success as a global health actor to the whole hearted commitment of former EU Commissioner for Health, David Byrne (1999-2004) who could build on the continuous success of his predecessors. Former European Commissioners such as Manuel Marin, Vasso Papandreou, and Padraig Flynn had all been devoted to effective smoking prevention strategies in order to tackle the smoking epidemic. Commissioner Manuel Marin initiated the EAC programme, Vasso Papandreou proposed the ban on advertising and Padraig Flynn encouraged its ultimate adoption.<sup>21</sup> Health Commissioner Byrne used their previous works as the premise through which he could place tobacco control at the centre of his public health strategy by highlighting the enormous human and economic costs of smoking.<sup>22</sup> He firmly believed that a successful EU engagement in the FCTC negotiations would give the EU a strong momentum in global health. But equally important, he strengthened ties with the WHO and successfully motivated his staff of the European Commission to push as strongly as possible for a thorough global tobacco control treaty.<sup>23</sup> Following Commissioner Byrne, strong implementation of the FCTC has been a priority area for successor EU Commissioners Kyprianou, Vassiliou and Dalli.

As a result of this commitment at the highest level of leadership the European Commission, staff has been encouraged and was equipped with the resources to spearhead progressive tobacco control policy. Due to the steadfastness and dedication of the European Commission team, the Presidencies and the Member States started to

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<sup>21</sup> See ASPECT Report 2004

<sup>22</sup> Ibid.

<sup>23</sup> Towards the end of his mandate he called upon his successor to continue the fight against tobacco and keep smoking prevention efforts at the heart of Community health policy (ASPECT Report, p. 108 supra note 15).

look more and more towards the European Commission as a partner. Confidence and a spirit of teamwork were built during the negotiations. This evolutionary process has liberated the EU—in this case—from spending its energy and resources on the question of “whose competence is this?”, enabling it to focus on “how do we best represent our collective interests and positions in this process?”

It was still the case that, when asked to describe the role of the European Commission in the FCTC, many interviewees’ first reaction was to start with an explanation of the division of legal competencies. However, responses would soon leave the issue of legal competence behind, describing a working relation between the European Commission, the EU Presidency and the Member States that was more closely based on fluid sharing of responsibilities and sense of working together in team spirit. In the discussions we found that in an area of shared competence one can not simply refer to the Treaty to determine whether the European Commission is active or inactive. In the case of shared competence the European Commission is in fact always active within the limits of the Treaty, thus legal competence is always relevant, but in determining *how* the European Commission is active rather than *if* it is active we must look beyond mere legal competence.

Through our interviews several key aspects of the European Commission’s performance were raised repeatedly. Firstly, the European Commission was seen as bringing vital practical diplomatic and coordinating experience to the negotiation table. This happened already during the negotiations on the Convention itself. Specifically, the FCTC negotiations on Article 11, as Guigner (2009) says, provide a good example of EU leadership. According to him, “an agreement on the labelling requirements was concluded just the day before the adoption of the Treaty (...). The inclusion of this important provision in the Convention would not have been possible without the pre-existing European law in this area and the political leadership in the EU”.<sup>24</sup> Further, in the FCTC working groups, whenever the EU has strong legal competence in the issue at stake, it is directly involved; at times even serving as one of the key facilitators.<sup>25</sup> The European Commission has been a key player in developing several FCTC guidelines, notably for Article 13 on cross border advertising, for Articles 9 and 10 on the regulation and disclosure of tobacco product contents, Article 11 on packaging and labelling, and in the ongoing negotiations for a protocol on illicit trade in tobacco products. Yet, the European Commission is not only active in areas of pre-existing EU-legislation. Even in areas where the European Commission lacks strong legal competence, interviewees said, the EU Presidencies still take up the opportunity to involve the European Commission in the facilitation of EU coordination and technical support.<sup>26</sup> In addition, through working with the European Commission, Member States staff from the healthcare sector, which often lacks diplomatic experience, gained crucial insights into how to work with an international agreement. Interviewees also mentioned that European Commission staff

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<sup>24</sup> Guigner 2009: 140.

<sup>25</sup> The “key facilitators” of a working group are a small group of countries who volunteer to lead the activities of the working group. The European Community has served as a key facilitator for the working groups on Articles 9 and 10 on the regulation of tobacco products and tobacco product disclosures, and Article 13 on cross-border advertising.

<sup>26</sup> This has been the case in the discussion on FCTC Article 12 on education, information and training, and for Article 14 on cessation which is seen by Member States as a domestic public health and education issues.

usually had experience of working in Member State governments and/or in the WHO; this experience is vital in facilitating cooperation between these different institutions.

A second important dimension of the European Commission's role is namely that, regardless of legal competence, the European Commission also provides the capability of consolidated technical knowledge to the Member States. The European Commission often prepares background papers, practical guides for policy implementation on national levels, impact assessments on tobacco control policies and evaluation reports. Such EU-wide information is useful to inform Member State FCTC delegations on key issues. Member States look to the Commission for policy input not only because of the European Commission staff's strong practical experience, but because the European Commission is connected with an array of important EU agencies which conduct sound scientific and preparatory work.<sup>27</sup> However, of equally important value is the knowledge of European stakeholder positions that the Commission accumulates through its open consultation processes with civil society groups, academia, industry and European citizenry. Since the adoption of the FCTC, the EU has developed and published background information on 'pictorial health warnings' (2005), a 'guidance document for the editing of combined health warnings on tobacco packages' (2006), 'practical guides on tobacco product ingredients' (2007) and on 'cigarette yield management and some basic steps for laboratory approval' (2007).<sup>28</sup> The Commission has also prepared and published two reports on the application of the Tobacco Products Directive (2005 and 2007) and a report on the implementation of the Tobacco Advertising Directive (2008). Twice a year it co-ordinates and manages discussions with the representatives of Member States in the Regulatory Committee under the Tobacco Products Directive (2001/37/EC). The Commission also regularly chairs meetings with national tobacco advertising experts in context of Directive 2003/33/EC). Furthermore, the European Commission conducted an impact assessment on smoke-free environments in 2009.<sup>29</sup> In using its unique resources, the European Commission builds a policy based on evidence, compiled from all 27 Member States, from EU agencies and other benchmark studies from around the world. All of this work is normally carried out by a team of 4-5 officials whose expertise accumulates over the years. Smaller Member States strain to cover all the issues under tobacco control and interviewees reported having found European Commission reports and studies on smoke free environments very helpful. Smoke free environments in particular provide an example of a policy area where the Commission has effectively engaged in a public health issue for which there is no EU legislation. Interestingly the Commission has managed to do this thanks to the knowledge resources and capacity it brings to the Member States and not through using its legal competence on safe working environments.

A third added value of the European Commission, highlighted by all interviewees, is the continuity and dedication of its staff. From 1999 to date, the European Commission has provided a reliable constant in an ever changing situation: Member

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<sup>27</sup> Such as: European Centre for Disease Prevention and Control (ECDC), the Executive Agency for Health and Consumers, European Medicines Agency (EMA), European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), European Foundation for the Improvement of Living and Working Conditions (EUROFOUND), The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Anti Fraud office (OLAF), etc.

<sup>28</sup> See : [http://ec.europa.eu/health/tobacco/key\\_documents/index\\_en.htm?Page=1](http://ec.europa.eu/health/tobacco/key_documents/index_en.htm?Page=1)

<sup>29</sup> See : [http://ec.europa.eu/health/ph\\_determinants/life\\_style/Tobacco/smoke\\_free\\_en.htm](http://ec.europa.eu/health/ph_determinants/life_style/Tobacco/smoke_free_en.htm)

State representatives seem to change more frequently than European Commission staff. The European Commission, on the other hand, since the start of the FCTC negotiations, has consistently had staff working 100% on tobacco control, with the FCTC taking up a large proportion of that time. This is generally not the case with Member State staff involved in the FCTC in Brussels or Geneva. Tobacco control and the FCTC is often only one of the many portfolios they are covering. In addition, EU Presidencies whom Member States rely on to carry out the bulk of FCTC related work inherit the FCTC as just one of the processes they have to lead during their six month tenure. The Commission therefore ensures that there is continuity in the skill sets and dedication of EU staff working on the FCTC despite variation in skills and interest made available for the FCTC by the rotating presidencies.

The added values highlighted above demonstrate the roles the European Commission plays as a bank of knowledge, capability and capacity. This has elevated the European Commission's role alongside the Presidencies within the FCTC negotiations. In this sense the European Commission can be described as a crucial asset of the EU and “a permanent presence,”—it is always in the front row of negotiations.

### *2.2.2 The Role of the EU Rotating Presidencies under the FCTC*

The EU rotating Presidency is the primary actor in charge of negotiating a coordinated EU position among the Member States. The role of the Presidency is therefore paramount for the EU to have a well prepared position with alternative negotiating points in case of diplomatic stalemates. The EU is a heterogeneous collection of nations. The resources that each country can bring to the Presidency and their interest in tobacco control can vary greatly. As a result, the performance of the Presidencies in the FCTC also varies, and the diplomatic success of the EU is greatly impacted by the capacity of the Presidency in international negotiations.

In general, holding the Presidency is demanding. This is even more so the case, when dealing with a difficult and complex dossier like the FCTC, which is at the interface of many different policy areas (e.g. public health, trade, taxation, customs, law enforcement, education). During its Presidency, a country is expected to be the key deal broker among the Member States. It is expected to be represented at all FCTC meetings, write background papers and speaking notes, and to call for and chair EU coordination meetings. Interviewees felt that having 27 countries working together should be a strength, but in fact they noted that what all too often occurs is that 26 Member States look at 1 to do all the work. This, in their experience, has at times been counterproductive.

Some interviewees felt there had been a change in the role of the Presidency today when compared to its work in the development of the FCTC. When negotiations were about the concrete articles that the FCTC would have, the Presidency was seen as very active in accumulating the positions of all the Member States and facilitating a common position. Today, in the negotiations on the protocol on illicit trade, and in Article working groups where either the European Commission or specific Member States lead, the Presidency is much less prominent—and this has been the case while the European Commission has grown in prominence.

### 3. GLOBAL HEALTH DIPLOMACY IN THE EUROPEAN UNION

Global health diplomacy seeks to capture “the multi-level and multi actor negotiation processes that shape and manage the global policy environment for health.”<sup>30</sup> It may be thought of as “a political activity that meets the dual goals of improving health while maintaining and strengthening international relations.”<sup>31</sup> The FCTC provides an excellent example of how the EU inserts itself as a regional global health actor in a larger global health diplomacy setting with different policy fields at play.

The lessons drawn from EU’s experience and performance in internal EU coordination and external negotiations of the FCTC set out in the following sections, can provide insight not only for EU’s further development as a global health actor but for other regions and actors seeking to develop their collective voice in global health diplomacy. First, we consider the challenges and concerns that participants in EU negotiations have indicated during interviews. We then look at the EU’s key strengths and the present opportunities to build on those strengths in order to overcome present challenges in respect of the internal and external dimensions of EU health diplomacy under the FCTC.

#### 3.1 The Performance of the EU under the FCTC

##### 3.1.1 Internal Challenges

###### *Information Flows: Triangular communications*

As mentioned earlier, the EU seeks to speak with one voice in international negotiations. In order to do this, a process of internal EU negotiation is needed to come to a common position. Internal EU coordination meetings occur in both Brussels and Geneva, and coordination between these two sets of meetings is managed via Member States ministries. National interests are given prominence through this process of triangular coordination, as this provides a mechanism for Member States to safeguard their interests in EU policies.

Interviewees stated that the scope of instructions that Member State governments communicate to their health attachés in Geneva can be limited due to lack of in-depth knowledge about the common positions developed in Brussels. The result is that when Geneva health attachés come together for internal coordination meetings, discussions can only go so far before health attachés must re-consult with their governments for further instructions. This significantly slows down the internal coordination process and creates a situation where active participation in discussions is not equal among the Member States. Although interviewees raised this as a challenge to EU coordination, it can be said that this is completely normal and happens in all coordination meetings, also those taking place in Brussels. Ultimately what the interviewees actually lament is not the institutional set-up, but the fact that Member States perform at different levels of effectiveness within this institutional arrangement. This is to say that not all member states are able to come equally prepared for internal negotiations meetings, this slows down progress, and the blame

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<sup>30</sup> Kickbusch 2007

<sup>31</sup> Ibid.; Kickbusch, Leslie, Adams 2008

falls on “communication” For example, one interviewee described a situation in which only 8 countries truly participated and 19 were described as just being present. Coordination without “transaction costs”, such as lag time, is not a realistic goal, however given interviewee focus on communication as a current challenge this issue warrants further investigation—if not into improving on the existing structure for coordination, than perhaps into building member state capacity to perform within this structure,

Secondly, discussions in Brussels sometimes miss out on vital insights from Geneva meetings, as it has also previously been argued by scholars like Van Schaik (2009) and Eggers/Hoffmeister (2006). This was expressed by one interviewee as a general concern not solely related to work on the FCTC, but as an important concern nonetheless. It may be logical that input to European positions should come foremost from Member State governments based in Member State capitals, however the depth of knowledge located in the Geneva missions should also be fully utilized in addition to that of permanent representations in Brussels and ministries in Member States.

As a general consideration, communication is a challenging area. These challenges change depending on different negotiation contexts. Some interviewees expressed a desire for better communication between the Commission and the Member States on the Commission’s negotiations with third countries. Other interviewees highlighted opportunities for improving communication between those EU actors participating in FCTC working groups with those Member States representatives not participating in these meetings. Again, further challenges were noted in sustaining the communication between all EU actors on FCTC related development in between key FCTC meetings. During these periods, there are no specific mechanisms in place to keep Member States and the Commission informed on significant developments in third countries which could have impacts on the ongoing negotiations.

Communication is a key feature for internal policy coherence in any policy-making process. Due to the complex nature of the EU institutional arrangements and combined with the interdisciplinary specificity of the FCTC, it is clear that communication hitches are bound to arise. Interviews suggest that the EU stands to gain if it can boost Member State capacity to participate at equal levels within this coordination framework, and if the Geneva knowledge base can be more consistently applied in Brussels and Member State capital based discussions.

### *3.1.2 External Challenges*

#### *Speaking with one voice*

Speaking with one integrated voice seems to be an efficient method but is it always effective? Interviewees with a long experience in diplomacy hold that indeed presenting coordinated positions lead to better final outcome than what could have been achieved otherwise. The premise of ‘27 countries = 1 voice’ is so central to EU values that it is nearly heresy to question it. However, in the FCTC speaking with one voice can at times be seen as tactically disadvantageous. In one example from an interviewee, during an INB meeting on illicit trade, the Presidency spoke on behalf of the EU in a position in disagreement with six non-EU countries. In consequence, the chair of the session summarised that six parties “want to go left” and one party “wants

to go right.” At this, the EU had to raise its placard to remind the chair that the EU is not 1 country, but 27 speaking with one voice. Other interviewees raised similar concerns that the EU loses the leverage of many influential countries reiterating the same position. In one example, an interviewee suggested that the EU could learn from a group of 10 African countries that have been very effective in negotiations due to their ability not only in agreeing on and sticking to a common position, but the ability to reiterate it 10 times, thereby strongly bringing the point across.

Speaking with one voice requires a total consensus between the Member States on a common position. If one Member State disagrees, a collective EU position cannot be put forward. The result is that common EU positions can devolve into the lowest common denominator. According to the authors Collin/Gilmore (2002), this is particularly the case when the most reluctant State is also a rather powerful member.<sup>32</sup> The consequence is that a common EU position may be less progressive than what would have resulted if Member State positions had been independently voiced. Generally for the EU, the benefits of speaking with one voice outweigh the costs of this potential pitfall. However the EU must balance public health aims with legitimate economic concerns related to tobacco production. Approached from this perspective the negotiations that go into developing a common EU opinion may in fact be a service to the multilateral negotiations as a whole.

#### *An inflexible negotiator*

As highlighted above, the EU’s internal coordination processes to achieve one common position are complex, challenging and wearisome at times. Once a common position is established, EU States are justifiably cautious about straying from it. Because so much coordination is done internally, when the EU meets with external parties, the EU proves to be very difficult to negotiate with.<sup>33</sup> One third country interviewee went as far as saying that “the EU is not an organisation built for multilateralism.” This interviewee highlighted the immovability of the EU in negotiations, such as the informal WHO European regional coordination meetings that feed into the FCTC COP processes where 53 countries come together at the regional level. From the perspective of a third country, the EU’s reluctance to compromise on points where the EU has already come to a common position may of course be frustrating. The perceived immovability of the EU presents new challenges, not only in multilateral negotiations, but also in bilateral relations between EU Member States and their traditional allies. This concern merits further consideration; on the other hand, the inflexibility of the EU’s common position is a major benefit achieved by EU countries that have chosen to work as a collective. The reluctance of the EU to compromise is not the same as avoiding debates on substantive issues, though third countries who are cut out by the EU’s collective strength may feel disenfranchised.

#### *Dual roles*

Member States clearly appreciate the added value that the European Commission brings, but they are always cautious not to let the European Commission encroach on

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<sup>32</sup> Collin/Gilmore 2001 : 2

<sup>33</sup> See also Keukeleire/MacNaughtan (2008)

what they feel are the sovereign issues of Member States. As noted before, the European Commission has been a central figure in supporting the INB process on illicit trade and has served as Chair for these discussions. This created a new situation in which the Commission assumed a dual responsibility which put additional pressure on the relationship between the Commission, the EU Presidency and the Member States. In multilateral negotiations, the most important functions of the Chair, as Blouvakos and Bourantis (2005) delineate in their work, comprise agenda management and brokerage services.<sup>34</sup> These entail both administrative-procedural and agenda-shaping components, but more importantly a responsibility to break negotiation deadlocks by instrumental use of the procedural power at their disposal.<sup>35</sup> Therefore, as Chair, the European Commission, or a Member State as the case may be, takes on a responsibility in the negotiations that is additional and not necessarily complementary to their position as a Party to the Convention. Having the European Commission or one of the EU Member States as a negotiation Chair could significantly strengthen the EU's influence over the outcomes in multilateral negotiations. Yet, the cost and benefits of such a role for the European Union (European Commission or a Member State) need to be considered on a case-by-case basis so as to achieve real added value and avoid unnecessary obstacles.

### *3.2.1 Opportunities for improvement*

#### *Leaving space for negotiators to negotiate*

Interviewees repeatedly stated there is a need for the EU to give more flexibility to the individuals who are negotiating on its behalf. The EU should try not to coordinate down to the last letters of any written statement. Not coordinating down to the last detail of each statement, makes the EU more approachable from the perspective of third countries, and it also makes the job of the EU's negotiator—whether it is the Presidency or the European Commission—easier. Of course sometimes a word is important, but as long as there is agreement on the essence of the EU's message, it can be left to the negotiator to wrap up the details in the subsequent negotiations. Interviews suggest that some smaller Member States who are not using English, French or German, are themselves not concerned with discussing the detailed wording of the texts in the EU coordination meetings. They find it much more important to discuss the general messages as inevitably some nuances will be lost in translation from the drafting language to each Member State's official language. In another proposition with regards to improving the EU's negotiating capacity, Van Schaik (2009) suggests that “the support provided to the lead negotiator could be strengthened by forming negotiating teams with experts from EU Member States” or “to appoint lead negotiators from among the Member State delegates to cover a specific negotiation issues.”<sup>36</sup>

#### *Sharing the burden of work equitably*

Interviewees who experienced working on the FCTC as the EU Presidency, recalled huge spikes in workload and stress during the Presidency, followed by the relief of

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<sup>34</sup> Blouvakos and Bourantis 2005: 3

<sup>35</sup> Ibid: 23

<sup>36</sup> Van Schaik 2009: 28. See also Keukeleire/MacNaughtan 2008.

passing the burden on afterwards. It may be that some efficiency gains can be achieved from this rotating responsibility, but this process seems to have contributed to an ‘on/off’ working culture, in which a continuous information flow cannot be sustained. This not only contributes to an inconsistency in the quality of the information shared between EU actors but it also impacts the quality of the Presidencies’ performance.

Presidencies’ performance is not only determined by the resources and experience that the Member State serving as President has to commit. It is also the result of the behaviour of other Member States who see the role of the Presidency as taking the workload on behalf of the other Member States. This cycle is self-perpetuating, it is accepted as *status quo* that the Presidency will take on what should be a shared task of 27 countries. Answers varied but a respondent from one Member State which considered itself to be quite active in the FCTC stated that during their Presidency, FCTC work took up about 40% of their time compared to about 5% when they were not serving as President of the EU. It may seem that when speaking with one voice, delegating responsibilities on a rotating basis is both efficient and fair, however it appears to be counterproductive if the capacity needed to fulfil this role is not available. Member States need to be more consistently involved, whether they hold the Presidency or not. In a time when EU Member States are concerned about losing their international visibility, this collective approach to sharing the work load with the Presidency could be an opportunity for the Member States to raise their profiles in this process.

#### *More continuous communication*

Similar to the challenge the European Commission faces in keeping the Member States up-to-date on its interactions with third countries, interviewees expressed regret that they are not aware of the on-going work in the FCTC Article working group with the Member States until after the working group has completed its task. This means that officials often become aware of the working group proposals only at the same time as the wider FCTC signatories are informed in lead up to a COP. Member States felt it would be beneficial to have more information on what is being discussed in these groups as discussions unfold. There is however the possibility that this gap in communication could be occurring on the side of the Member States between officials in the capitals and their health attachés in Brussels as Commission officials state that they do regularly inform Member States on working group developments. It should also be noted that when Member States serve as key facilitators they are also not known to communicate continuously with other EU Member States and the European Commission on the progress of the working group. It seems that more could be done to improve the transparency of these working groups to the benefit of all EU parties. Here the role of European Commission is central as it can optimize the use of the existing mechanisms to facilitate communication, for example, through the regulatory committee established under Article 10 of the EU Tobacco Products Directive. However, it should not go without consideration that all countries are invited to join these working groups and it does not follow that it should be the responsibility of working group participants to duly inform those States who choose not to exercise their right to participate in the first place.

#### **4. REFLECTING ON EU ROLES AND EXPERIENCE IN GLOBAL TOBACCO CONTROL GOVERNANCE—A MODEL FOR OTHER NON-TRADITIONAL ACTORS?**

This first international health treaty has been a learning process for all parties, inside the European Union, as well as for third countries. For the EU in particular, it has been an important learning process on how to conduct international negotiations in a policy field which is mostly shared in legal competence. Although, there is some uncertainty on how EU diplomacy will be organized in the future, the EU remains proof that nation states can and in fact have shared sovereignty, not only for the collective benefit of its own exclusive club, but with benefits for global governance.

In this study, we have explored the roles that the European Commission, the EU Presidency, and the Member States have played in the application of the Framework Convention on Tobacco Control. We have highlighted several apparent challenges that the EU faces in its engagement in multilateralism. Internally, the complex institutional arrangements for coordination between Brussels, Member State governments and Geneva require that all parties build their capacity for effective communication and knowledge-sharing. Establishing mechanisms for improved direct linkages between Brussels and Geneva health attachés would strengthen the EU's ability to achieve coherence and balance in common positions. Furthermore, more continuous year-round tracking of FCTC developments would also facilitate better informed EU internal discussions.

With regards to challenges the EU faces in external negotiations, it can be argued that more transparency on the positions of individual Member States could make the EU more compatible with multilateral negotiation processes without lessening the importance of speaking with one voice. But transparency is a double-edged sword. It could facilitate negotiations by allowing diplomatic pressure to be applied to individual states within the EU; however, if such transparency could potentially weaken the EU stance in negotiations, why would the EU agree to such a measure? Instead, it is perhaps more productive to give the EU negotiator, whether it be the EU Presidency or the European Commission, a more flexible mandate, thereby enabling them to resolve negotiation stalemates. One interviewee suggested that the EU should collectively indicate its direction, the goals it wants to achieve and its bottom-line, leaving the details to the negotiator. It requires strong political will to operate in this way. On the one hand, if the EU position is not clear enough, then the EU Member States will not have the confidence needed to allow for a representative to negotiate on their behalf. At the same time, if the details of the position are too clearly defined, then the negotiator will not have the means to move negotiations forward. Therefore, to improve its performance in the FCTC negotiations, the EU must strike a balance in the above trade-off between safe-guarding Member State priorities and diplomatic flexibility. The balance between preserving the interest of the EU and ensuring successful multilateral negotiations must also be considered when the EU makes decisions about additional negotiation roles and responsibilities, such as chairing multilateral negotiations.

Addressing these challenges would assist the EU as it improves its performance in global health diplomacy; however, our study finds that the progress that has already been made by the European Commission and the Member States in learning how to

work together as a team far outweigh these challenges that still lie ahead. The role that the European Commission plays as a bank of knowledge and capacity is seen as an unparalleled asset for the Member States. Likewise, through a more equitable sharing of the burden of work, Member States and the rotating EU Presidencies would further strengthen the EU as a global health actor and preserve Member State visibility in multilateral diplomacy.

Far from a rigid choreography dictated to the dancers by the legal competencies defined in the Treaty, the European Union Member States and European Commission are learning to improvise their “dance of the Tango” by feeling the rhythm of the negotiations and utilizing each partner’s specific talents. As the experience of working together has revealed how the European Commission and the Member States can best work together, it has shown external observers how the EU can function in multilateral diplomacy. For all those less familiar with the European institutional structure, the EU may seem to be confusing, but in practice it is a unique example of a highly organized system that provides processes and structures for the governance of common concerns that require joint action beyond the scope of Member States. As such the EU is a vital link between national and global governance for health.

Reflecting on this progress, the experience of the EU in respect of the FCTC shows us that while involving new kinds of actors in the multilateral system may start as a perplexing arrangement where roles are difficult to define and to understand, through practice we can learn how to work together so that real added value can be achieved. Although the EU is a unique entity, its experience in international diplomacy may provide a model for how other non-traditional actors, be they similar regional unions or actors from academia, business or civil society, might one day have a more integrated voice in multilateral negotiations.

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