

**To:**

Ms Rosita Hickey  
Director of inquiries  
European Ombudsman  
1, avenue du Président Robert Schuman F - 67001 Strasbourg

**Cc :**

Ms Francesca Abbo  
Inquiries officer  
European Ombudsman  
Case-Handling Unit

Brussels, 20 September 2024

**Subject:** *Comments by Tobacco Europe and other interested stakeholders on the Report of the Ombudsman's meeting with representatives of the European Commission in the case "How the European Commission handled concerns regarding alleged conflicts of interest in a framework contract on tobacco control policy" (complaint: 571/2024/FA)*

Dear Ms Hickey,

We appreciate the work undertaken by the inquiry team and we thank you for the opportunity to share comments on the report of the Ombudsman's meeting with the representatives of the European Commission held on 28 June 2024.

Tobacco Europe asserts that the information provided by the European Commission's representatives to the Ombudsman inquiry team raises significant concerns regarding the misinterpretation of the principle of conflict of interest and its scope (1). We are equally concerned by the **lack of rigour in the evaluation and selection of ENSP as member of the consortium** (2), and the impact this case has on the revision of the Tobacco Control Policy Legislative Framework, due to possible lack of impartiality and objectivity in the deliverables under the Framework Contract (3).

1. The concept and scope of conflict of interest:

Although the stated meeting objective was for the Commission to provide clarification on how it verified that the ENSP was not in a conflict of interest when participating in the Framework Contract, it remains unclear how this assessment was conducted. The Commission focused exclusively on demonstrating that the ENSP had no ties with the tobacco and nicotine industry, while overlooking the broader concept of conflict of interest, and particularly 'a perceived conflict of interest'.

For context, the Framework Contract is part of Regulation (EU) 2021/522, which establishes the EU4Health Programme for 2021-2027. Preamble 35 of this regulation specifies that Regulation (EU, Euratom) 2018/1046 (the “Financial Regulation”) applies to this Programme and, therefore, to this Framework Contract.

Article 61(1) of the Financial Regulation prohibits financial actors and others involved in budget implementation from engaging in any action that could bring their own interests in conflict with those of the Union. This applies to all entities managing and executing the EU budget. Both the Commission and its advisors are indirectly, or directly, involved in the preparatory acts of budget implementation.

The same Article stipulates that appropriate measures shall be taken to prevent conflicts of interest from arising in the functions under the financial actors’ responsibility and that situations which may objectively be perceived as conflicts of interest shall be addressed.

Article 61(3) states that a conflict of interest exists where the impartial and objective exercise of the functions of a financial actor or other person, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest.

Article 167(1)(c) further stresses that prior to a contract award, the contracting authority must verify that economic operators participating in procurement procedures must not have conflicts of interest that may negatively affect the performance of the contract.

For the purpose of facilitating a uniform application of measures to avoid and manage conflicts of interest, the Commission issued guidance (the “Guidance”).<sup>1</sup>

The Guidance emphasises how the term “**objectively**” was added to the Financial Regulation to underline the importance of basing the **risk of perceived conflicts of interest on objective and reasonable considerations**. This includes verifiable factual indications that there are links between the functions and the interest at stake. This was notably emphasized in a Judgement of the Court of Justice<sup>2</sup> which stipulates the following “Evidence such as the claims in the main proceedings relating to the connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.’

Furthermore, in line with the Guidelines, a perceived conflict of interest covers objective circumstances affecting trust and confidence in a person’s or entity’s independence and

---

<sup>1</sup> Commission Notice Guidance on the avoidance and management of conflicts of interest under the Financial Regulation 2021/C 121/01

<sup>2</sup> Judgment of the Court of Justice of 12 March 2015, [eVigilo Ltd., C-538/13](#), [ECLI:EU:C:2015:166](#), paragraph 45

impartiality, even if the conflict of interest does not materialise. Thus, there is **no requirement of proof that a person or entity has gained an advantage**. Simply the **possibility that an entity could potentially benefit is enough to trigger a conflict of interest**.

In clause 3.2.3 of the Guidelines, it is stipulated that a perceived conflict of interest may notably occur when a person, regardless of their intentions, may reasonably see him or herself or **be seen as having competing personal and public interests** as these risk undermining the person's ability to fulfil their tasks and responsibilities in an impartial and objective manner.<sup>3</sup>

We note that the Commission refers to Article 5.3 of the World Health Organisation Framework Convention on Tobacco Control as the reference provided in the declaration on the absence of conflict of interest that has been signed by the members of the Consortium, including ENSP.

Considering the above, we are of the firm belief that the Commission misinterpreted the concept of conflict of interest and overlooked **all possible situations of conflicts of interest**.

Despite the ENSP signing two separate declarations—one specific to tobacco and another general one stating they are "not subject to conflicting interests which may negatively affect the contract performance"—the Commission neither fully considered the latter nor addressed the situation of **conflict of interest involving interests against the tobacco and nicotine industry** as part of its assessment, thus not fulfilling their responsibility.<sup>4</sup>

The ENSP actively lobbies for **very specific policy objectives** and is (explicitly) **interested in specific outcomes of the legislative process** which is supported by the work conducted by the Consortium of which they are a part of. Already in the tender specifications, the Commission stated that 'in submitting an offer, tenderers declare to have no conflict of interest in connection with the topic, **in particular** with regards to the provisions of Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC) and of the guidelines for its implementation'.

In the specific declaration on the absence of conflicts of interests in the field of tobacco, which refers to FCTC Article 5.3., the Commission narrowed the definition of conflict of interest to **only cover one angle**, i.e. interests to the benefit of the tobacco industry.<sup>5</sup>

---

<sup>3</sup> Examples include a risk or possibility of favouritism or hostility for reasons of political affinity

<sup>4</sup> In case 972/2023/KR, the Ombudsman considered the internal guidelines of the Commission on public procurement and concluded that the effectiveness of the changes made to the guidelines depends on how the relevant Commission staff members put them into practice, for example, by ensuring that all relevant information from the bidders is obtained.

<sup>5</sup> On a more procedural aspect we think the whole declaration is not up for purpose. While the Commission representatives explain it was drafted in the spirit of WHO FCTC 5.3., there was only mention to this in the first provision, but not

The clarification provided by the Commission<sup>6</sup> only confirms that it evaluated the situation only with respect to potential ties **with the industry, and not considering other personal or public interests**, which would have been necessary to ensure a total absence of conflict of interest.

In conclusion, Articles 61(1) and 167(1) of the Financial Regulation, together with the Guidance, establish a comprehensive framework aimed at preventing conflicts of interest in EU budget management, which we believe the Commission should clarify if it took sufficiently into consideration in the evaluation of ENSP.

2. The lack of rigour in the evaluation and selection of ENSP as member of the consortium:

In line with the Financial Regulation, the Commission must prevent and address any situation of conflict of interest in a serious and diligent manner. This contrasts with the information provided during the meeting, particularly the claim that a shared interest does not **'necessarily'** create a conflict of interest.

The Ombudsman has in previous cases<sup>7</sup> when assessing the Commission's measures to avoid conflict of interest<sup>8</sup>, mentioned that:

*the effectiveness of these changes [which the Commission made to its internal guidance on public procurement in August 2022<sup>9</sup>] depends on how the relevant Commission staff members put them in practice. For example, ensuring that all relevant information from bidders is obtained, or that measures sufficiently mitigate professional conflicting interests requires critical thinking from the Commission staff members assessing the different bids in a procurement procedure.*

Following the Ombudsman's comments, it is **not sufficient for the Commission** to merely have measures in place; they must **actively** pursue the avoidance of conflicts of interest. However, in this case, the Commission did not carry out a rigorous assessment and relied only on CVs and two declarations on honour. We question if this can be considered a **'careful'** assessment.

Contrary to what is set out for these cases, the ENSP appears to have proposed no **preventive measures**, and the Commission appears to have requested none either. The Commission had acknowledged being aware of previous statements from the ENSP asserting that NGOs are not bound by conflict-of-interest rules.

---

<sup>6</sup> "This provision was meant to ensure that members of the consortium do not have any links to the tobacco industry".

<sup>7</sup> Cases 972/2023/KR & 1292/2023/KR

<sup>8</sup> [Decision on how the European Commission dealt with concerns about conflicts of interest](#)

<sup>9</sup> Which included the following elements: 1) Setting a clear definition of 'professional conflicting interests', as well as some examples (including related to the subject of the Ombudsman's previous inquiry); 2) Setting out clearly what the conditions are for rejecting a bidder on the grounds of professional conflicting interests; 3) Describing how professional conflicting interests should be assessed, at what stage and what the possible consequences of actual or potential professional conflicting interests are; 4) Providing for flexibility for staff concerned to ask for additional information from certain bidders to better understand whether there are risks of professional conflicting interests; and 5) Laying down that staff concerned must assess mitigating measures included in bids to determine whether they are adequate.

In a recent ruling<sup>10</sup>, the General Court of Luxembourg highlighted that: considering a conflict of interests undermines equality between tenderers, the decision not to exclude a candidate who is the subject of an allegation of a conflict of interests can be adopted only on condition that the contracting authority is able to be certain that that candidate is not in such a situation.

In conclusion, by admitting the shared interest, the Commission acknowledges a potential issue and should have made **every possible effort to be certain** that a conflict of interest was not present.

### 3. Impact on the revision of the Tobacco Control Policy Legislative Framework

As a result of the concerns outlined above, and in the absence of a satisfactory clarification by the Commission, Tobacco Europe does not have sufficient guarantee that the deliverables of the framework contract are impartial and objective.

This failure may lead to several serious consequences, including the establishment of a troubling precedent. By broadly disregarding the risks of conflicts of interest, the Commission undermines its ability to recognize bias. While it rigorously addresses potential biases favouring the tobacco industry, it simultaneously allows other vested interests related to tobacco policy to engage in services linked to EU tobacco control, without implementing sufficient safeguards against undue influence.

### **Conclusion**

Tobacco Europe finds that the information provided by the Commission to the Ombudsman during the meeting held on June 28, 2024, is not satisfactory to prove the absence of conflict of interest involving the ENSP as a contractor in the Consortium responsible for the Evaluation of the Tobacco Control Acquis.

As highlighted in the above, the report reveals a significant misunderstanding by the Commission regarding, among others, the applicable legal framework, what constitutes a professional conflicting interest and what situations are pertinent to the evaluation of contractors.

We trust that further investigations are necessary considering the seriousness of the case and its potential impact on the entire industry. We believe it is crucial, and in the best interest of all parties, that any legislative process is subject to a comprehensive evaluation, incorporating the perspectives of all stakeholders, conducted by impartial, neutral and objective consultants.

Our concerns are notably shared by other stakeholders; their feedback related to the Ombudsman Report of 28 June is attached to this letter, **under Annex 1**.

---

<sup>10</sup> Vakakis Kai Syner Gates v Commission: EUR-Lex - 62015TJ0292 - EN - EUR-Lex (europa.eu)

We urge the Ombudsman to conduct a thorough investigation of this case, addressing our comments on the meeting report, and to take appropriate action to ensure the integrity and impartiality of the commissioned work, along with measures to prevent future shortcomings.

We remain committed to upholding the principles of transparency and professionalism throughout regulatory processes.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Darge', with a long horizontal stroke extending to the right.

**Nathalie Darge**  
**Director General Tobacco Europe**

**Enclosure:**

- **Annex 1:** Additional contributions from Stakeholders (supply chain representatives and National Manufacturers Associations)