



Emily O'Reilly

European Ombudsman

Decision

on how the European Commission handled concerns regarding alleged conflicts of interest in a framework contract on tobacco control policy (case 517/2024/FA)

The case concerned how the European Commission handled concerns regarding alleged conflicts of interest in a framework contract on tobacco control policy. The complainant, an umbrella organisation representing tobacco and nicotine product manufacturers in Europe, took issue with the participation of the European Network for Smoking Prevention (ENSP) in the consortium, which was awarded the framework contract. It argued that the ENSP is in a situation of conflict of interest due to its interest in tobacco prevention.

Having inspected the relevant documents and assessed the information provided by the Commission during the meeting with her inquiry team, the Ombudsman is reassured that the Commission adequately assessed that the ENSP is not in a situation of conflict of interest, in line with the relevant rules.

In view of this, the Ombudsman found that no further inquiries are justified in this case and closed the inquiry.

Background to the complaint

1. In recent years, the European Commission has launched a review of the EU tobacco control legislation,¹ including the Tobacco Products Directive and the Tobacco Advertising Directive.² This initiative stems from 'Europe's Beating Cancer Plan', which includes the Union's commitment to achieving a 'tobacco-free generation' by 2040 where less than 5 % of the population uses tobacco.³

2. In this context, the Commission, through the European Health and Digital Executive Agency (HaDEA), launched a procurement procedure for multiple framework contracts to provide services to support the implementation and further development of the EU's tobacco control policy and legislation.⁴ In January 2023, HaDEA awarded the framework

¹ As a first step, the Commission launched in May 2022 a public consultation on the evaluation of the legislative framework for tobacco control: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13481-Evaluation-of-the-legislative-framework-for-tobacco-control/public-consultation_en

² Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0040>; Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0033>.

³ For more information, see https://health.ec.europa.eu/system/files/2022-02/eu_cancer_plan_en_0.pdf.

⁴ reference HADEA/2022/OP/0011: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/tender-details/11077>

contract to a consortium led by a consultancy firm, Open Evidence. The European Network for Smoking Prevention (ENSP), a non-governmental organisation, is a member of the consortium. The ENSP's priority is to reduce tobacco use in Europe to less than 5 % by 2040.⁵ The membership of the organisation are myriad national associations and other entities active in tobacco control. The ENSP has observer status to the World Health Organization (WHO) Framework Convention on Tobacco Control.

3. The complainant in this case is an umbrella organisation representing tobacco and nicotine products manufacturers in Europe. In June and October 2023, the complainant raised its concerns with the Commission regarding the participation of the ENSP in the consortium. In particular, it claimed that the ENSP is in a situation of conflict of interest due to its interest in tobacco prevention. It claimed that its involvement compromises the objectivity and transparency of the framework contract. The complainant also raised concerns about the ENSP's statement in a press article that the concept of conflict of interest was not applicable to non-profit organisations.⁶

4. In its replies to the complainant, the Commission recalled the applicable rules regarding conflict of interest and explained that the ENSP signed a general declaration on honour and a specific declaration on honour concerning the absence of conflict of interest in the field of tobacco. The Commission explained that the ENSP's role in the contract is to "*facilitat[e] the necessary contacts with experts, when relevant, for the different specific contracts*".

5. Dissatisfied with the Commission's replies, the complainant turned to the Ombudsman in March 2024.

The inquiry

6. The Ombudsman opened an inquiry into how the Commission handled the complainant's concerns regarding the involvement of the ENSP in the framework contract on tobacco control policy. In particular, the Ombudsman found that the Commission had failed to address the complainant's specific concerns.

7. In May 2024, the Ombudsman received the Commission's reply on the complaint. In the reply, the Commission repeated information it had already provided to the complainant in their previous exchanges.

8. In June 2024, the Ombudsman inquiry team met with the representatives of the Commission to obtain further clarifications on how it had assessed the absence of conflict of interest of the ENSP under the framework contract. The Ombudsman shared the meeting report with the complainant and the complainant provided comments.⁷

9. The Ombudsman inquiry team also inspected the Commission's file on the case.

⁵ For more information, see: <https://ensp.network/mission-and-vision/>

⁶ For more information, see: <https://www.euractiv.com/section/politics/news/stakeholders-bicker-over-eu-tender-on-tobacco-control-policy/>

⁷ The meeting report is available here: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/192546>

Arguments presented to the Ombudsman

By the Commission

10. During the meeting with the Ombudsman inquiry team, the Commission representatives clarified that, as part of the evaluation of the tender, the evaluation committee assessed the declarations on honour and the CVs of staff members of the consortium to identify potential conflicts of interest. This included reviewing previous work carried out by consortium members for EU institutions and their expected roles under the contract.

11. The Commission representatives further acknowledged that the ENSP and the Commission have a shared interest in the field of tobacco control. The evaluation committee carefully assessed the situation and saw no conflict of interest in the fact that the ENSP is active in an area of public health where the Commission is also pursuing its stated objectives. In reaching this conclusion, the evaluation committee took into account the fact that the ENSP's tasks under the contract are limited to providing clinical and scientific expertise. More specifically, the ENSP's role under this framework contract is to give the lead tenderer access to a network of experts and national contact points, which will provide it with technical and factual data in relation to tobacco use. The Commission clarified that none of the members of the consortium, including the ENSP, will be involved in any policy decisions, which remain the sole responsibility of the Commission.

12. The Commission representatives further noted that, at the time of the meeting, the ENSP was not involved in any contracts awarded under this framework agreement. The Commission confirmed that, in any future procurements under this framework contract, it would again ensure that there are no conflicts of interest.

13. The Commission representatives also acknowledged that the consortium declared, under point (f) of the specific declaration on honour that "*staff members carrying out the activities under this contract have not been employed in the tobacco industry, nor have they had any professional involvement in any project related to tobacco, in the last four calendar years*". The Commission representatives explained that this provision is intended to ensure that members of the consortium do not have any links to the tobacco industry.

14. Finally, the Commission representatives informed the Ombudsman inquiry team that, in response to the complainant's allegations, it had consulted Open Evidence, which provided strong guarantees that there were no conflicting interests in this case. In this context, Open Evidence clarified that the ENSP's statement that the notion of conflict of interest does not apply to non-governmental organisations was taken out of context and misinterpreted.

By the complainant

15. In its comments on the meeting report, the complainant argued that the Commission failed to demonstrate that it had carried out a rigorous assessment of conflict of interest in the context of this framework contract, given the conflicting interest of the ENSP in tobacco prevention. Furthermore, the complainant contended that the Commission's assessment was too narrow, focusing solely on links with the tobacco industry, overlooking potential conflicts involving interests in tobacco and nicotine prevention, such as those of the ENSP, compromising the impartial execution of the contract.

16. The complainant supported its position by presenting additional concurring views from other stakeholders.

The Ombudsman's assessment

17. The Financial Regulation⁸ sets out that, when awarding a contract, the contracting authority (in this case the Commission) shall verify that all parties to a contract, including NGOs, are not in a conflict of interest situation which may negatively affect the performance of the contract.⁹ This means that the Commission should ensure that the contractor's interests do not affect its ability to implement the contract in an impartial and objective manner.¹⁰ When doing this assessment, it can exclude a contractor from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical.¹¹

18. The ENSP declared on its honour that it had no conflicting interests which could negatively affect the performance of the contract. Before the framework contract was awarded, the evaluation committee examined these declarations in light of the information provided by the consortium in its offer and concluded that there were no conflicting interests.

19. In view of the ENSP's interest in tobacco prevention, it was understandable that the complainant asked the Commission for clarifications on how it had assessed the absence of a conflict of interest. In its replies to the complainant, the Commission failed to adequately address the complainant's concerns.

20. In the meeting with the Ombudsman inquiry team the Commission acknowledged having a shared interest with the ENSP regarding tobacco control. The Commission nevertheless found that this shared interest would not compromise the ENSP's impartiality and ability to fulfil the framework contract. The Commission also took into account that the role of the ENSP is limited to providing the lead partner with experts and national contact points, which will provide technical, scientific and factual data in relation to tobacco use. This information is in line with the ENSP's tasks as outlined in the consortium's offer, which the Ombudsman inquiry team inspected.

21. Based on the information provided during the meeting and inspection, the Ombudsman is satisfied that the Commission has assessed properly that the ENSP is not in a conflict of

⁸ At the time of events, Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018R1046>

⁹ In accordance with Article 167 of the Financial Regulation. See also the European Ombudsman's decision in case 853/202/KR on the European Commission's decision to award a contract to BlackRock Investment Management to carry out a study on integrating environmental, social and governance (ESG) objectives into EU banking rules, 23 November 2020, available at: <https://www.ombudsman.europa.eu/en/case/en/57060>

¹⁰ Framework contract for services number — HADEA/2022/OP/0011 - sections i. 1. Definitions and ii. 7. Conflict of interest and professional conflicting interests

¹¹ See judgment of 18 April 2007, *Deloitte Business Advisory v Commission*, T-195/05, paragraph 67: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=60915&pageIndex=0&doclang=EN&mode=lst&dir=&oc=c:first&part=1&cid=12664011>.

interest situation which may negatively affect its performance of the contract. The ENSP shares an interest with the Commission on tobacco prevention, which is in the public interest, and which aligns with the objective of the contract. The inquiry has not revealed any element making it credible that, in the performance of the contract, this aligned interest of the ENSP with the Commission would affect its capacity to perform the contract in an impartial and objective manner. Rather, having a shared goal ensures that the ENSP would not act in a way that undermines those objectives. Therefore, the Ombudsman agrees with the Commission's assessment in this case.

22. In addition, the Commission has further clarified that, in any event, the ENSP has not yet been involved in any contract under this framework contract. The Ombudsman trusts that, as stated by the Commission during the meeting, for each new contract entered into under this framework contract, the Commission will verify that tenderers are not in a conflict of interest situation in relation to that specific contract.

23. Moreover, the Ombudsman finds that the letters exchanged between Open Evidence and the Commission, inspected by her inquiry team, demonstrate that the Commission did act on the complainant's allegations and asked Open Evidence for clarifications, including on the ENSP's statement that the concept of conflict of interest was not applicable to a non-governmental organisation. The Commission insisted that the ENSP's statement was taken out of context and that the ENSP confirmed that it considers itself bound by its declarations on the absence of conflicts of interest. Although the views of the ENSP cannot in any manner be attributed to the Commission, the Ombudsman believes it relevant to recall that the Commission must make a conflict of interest assessment in relation to all bidders in a procurement procedure, including non-governmental organisations.

24. In light of the above, no further inquiries are justified. That said, the Ombudsman finds it regrettable that the Commission did not acknowledge the ENSP's interest in tobacco control in its exchanges with the complainant and then failed to explain how it assessed this interest in view of the ENSP's role under the framework contract.

25. Regarding point f) of the declaration on honour with respect to absence of conflict of interest in the field of tobacco, the Ombudsman accepts the explanations provided by the Commission, that this provision is to be interpreted as to cover conflicts of interest only in relation to the tobacco industry, in line with the wording of the first part of the provision. The Ombudsman trusts that the Commission will clarify the declaration of honour for future contracts concerning this aspect.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

No further inquiries are justified in this case.

The complainant and the Commission will be informed of this decision.

A handwritten signature in black ink, appearing to read 'Emily O'Reilly', with a long horizontal flourish extending to the right.

Emily O'Reilly
European Ombudsman

Strasbourg, 04/02/2025