



Report on the European Ombudsman's inspection and meeting concerning how the European Commission handled concerns about the composition of the High Level Forum on Capital Markets Union and alleged conflicts of interest of some of its members

Correspondence - 15/02/2021

Case 1777/2020/KR - **Opened on** 26/11/2020 - **Recommendation on** 04/05/2021 -

Institution concerned European Commission |

COMPLAINT : 1777/2020/KR

Case title : How the European Commission handled concerns about the composition of the High Level Forum on Capital Markets Union and alleged conflicts of interest of some of its members

Date : Wednesday, 13 January 2021

Location : The meeting took place via videoconference

Present

For the European Commission:

Head of Unit, DG FISMA

Deputy Head of Unit, DG FISMA

Policy Officer, DG FISMA

Policy assistant - Financial markets expert, DG FISMA

Head of Unit, DG FISMA

Policy Officer stakeholder relations and communications, DG FISMA

Co-ordinator for Inter-Institutional Relations, Secretariat General



For the European Ombudsman:

Koen Roovers, Case handler

Valentina Stoeva, Inquiries officer

Purpose of the inspection of documents / meeting

The Ombudsman is examining whether the Commission took all the necessary transparency measures as regards the work of the High Level Forum on Capital Markets Union (CMU HLF). Other important aspects under examination are how the Commission ensured that the composition of the CMU HLF was balanced and that CMU HLF's members did not have conflicts of interest.

The Ombudsman requested the inspection and meeting in order to inspect the file on the Commission's decision on the composition of the CMU HLF and to clarify certain matters in that regard with the representatives of the Commission.

Introduction and procedural information

The Ombudsman inquiry team set out the Ombudsman's mandate and the provisions that apply as regards confidentiality when the Ombudsman inspects documents and requests information from the EU administration.

The Ombudsman inquiry team informed the Commission representatives that they would receive a draft of the inspection meeting report for review, before the report would be made public and shared with the complainant.

Documents inspected

On 9 and 18 December 2020 and 6 January 2021 the Commission shared the following confidential information in reply to the Ombudsman's inspection request:

- individual applications to the CMU HLF members;
- individual evaluation sheets of the CMU HLF members;
- a list of invalid applications;
- email correspondence between the Commission and the CMU HLF members;
- note to the attention of Commission Vice-President Valdis Dombrovskis with short-listed applicants for the CMU HLF;
- minutes of 'Jour Fixe' meeting [1] with Vice-President Valdis Dombrovskis.

Publicly available information shared by the Commission included:

- agendas of the meetings of the CMU HLF;
- minutes of the meetings of the CMU HLF;
- call for expression of interest for the CMU HLF [2] ;
- rules of procedure of the CMU HLF [3] ;
- interim report of the CMU HLF [4] ;
- final report of the CMU HLF [5] ;
- feedback statement for the final report of the CMU HLF [6] ;
- list of members of the CMU HLF [7]
- link to press release of 18 November 2019 announcing the composition of the CMU HLF. [8]



The inspection file contains personal data of applicants. There are also documents that contain information that is of a sensitive and/or confidential nature. These documents will not be disclosed to the complainant or any other person without the prior agreement of the Commission and/or, where relevant, the respective data subject (i.e., applicant).

The inspection meeting report is drafted to ensure that no individual CMU HLF member is identified or identifiable (with the exception of the Chair). Information that is confidential or of a sensitive nature is included in annex, and will not be shared with the complainant or made public.

Before the meeting, the Ombudsman inquiry team shared with the representatives of the Commission a list of possible discussion points (which serve as 'questions' set out below).

Discussion 1.

The High Level Forum on Capital Markets Union (CMU HLF) had both 'Type A members' and 'Type B members'. 12 Type A members were selected in their personal capacity, meaning that they were appointed to act independently and in the public interest. 16 Type B members were selected to represent a common interest, or a policy orientation common to different stakeholder organisations. What inspired this particular composition for the CMU HLF? What was the motive for nominating 12 Type A members?

The Commission representative said that no targets or quotas for the CMU HLF composition had been set in advance. The objective was to achieve a broad representation of different groups of stakeholders comprising experts appointed in a personal capacity to act independently and in the public interest, and others representing a common interest or policy orientation.

When asked more precisely whether the Commission had made a decision to have 12 Type A and 16 Type B members beforehand, the Commission representative said that no such decision had been made. The precise split was the result of the evaluation process which had to take into account a number of different dimensions, including ensuring the necessary expertise in all relevant sectors, as well as broad geographical representation and gender balance.

The notion of Capital Markets Union is very broad and covers many sectorial areas. It aims at creating a single market for capital across the EU. Therefore, for the CMU HLF's recommendations to be comprehensive and useful, all capital market dimensions needed to be addressed by the CMU HLF. This required expertise from a very broad group of capital market experts.

For example, the CMU HLF had to take account of the perspective of small and medium-sized enterprises (SMEs), which should benefit from access to funding, and intermediaries, which help bring companies and investors into contact. The Commission representative added that in order to propose holistic recommendations, the CMU HLF had to include broad expertise (e.g. from insurers, asset managers, custodian banks, trading venues, etc.) and, given the



technical nature of the work, experts with deep knowledge of how financial regulation impacts on financial activity were required.

In this context, the Commission aimed at including experts with relevant expertise from as many Member States as possible and at least from all geographic areas of the Union.

The evaluation of applications involved several dimensions, including ensuring, as far as possible, a high level of expertise, a balanced representation of relevant expertise and areas of interest, as well as a geographical and gender balance, while taking into account the specific tasks of the group.

Applicants had to identify in which capacity - Type A or Type B - they applied and in which subgroup their expertise would fit best.

In one case - as far as the selected CMU HLF members are concerned - while the call for applications was still open and because of doubts, the Commission suggested to an applicant to reconsider the expressed preference for Type A membership, in favour of Type B membership.

2.a Before the meeting, Commission representatives had informed the Ombudsman inquiry team that there was no evaluation grid accompanying the evaluation sheets, and that a harmonised approach was achieved through detailed discussions of the merits of the applicants in meetings of the evaluators. The Ombudsman inquiry team had also been informed that no minutes or notes were kept of these meetings. How did the evaluators assess the selection criterion of absence of circumstances that could give rise to a conflict of interest?

The Commission representative noted that for each applicant, there had been two evaluators to avoid a single evaluator's potential bias. The evaluators were instructed to assess the selection criterion related to conflict of interest based on the declarations of interests (DoIs) that applicants for Type A membership had submitted. [9]

Evaluators could attribute zero to ten points for this criterion, zero being the lowest and indicating the presence of circumstances that could give rise to a conflict of interest, and ten being the highest and indicating the absence of circumstances that could give rise to a conflict of interest. [10] Evaluators had to use their best judgement and evaluate the magnitude and type of possible conflicts of interest. The Commission representative said there was no automaticity in attributing scores.

2.b What was included in the overall evaluation exactly?

The Commission representative said that all dimensions were taken into account to holistically assess whether there was a conflict of interest or not.

The completed and signed DoIs include information as regards 1. employment, consultancy and legal representation activities, 2. membership of managing bodies, scientific advisory bodies or equivalent structures, 3. research support, 4. financial interests, 5. intellectual property, 6. public statements and positions 7. interests of immediate family members and 8. other relevant information.

Evaluators were instructed to consider the DoIs in their entirety to ensure a holistic



approach. Evaluators assessed whether any of the above elements could compromise, or be reasonably perceived as compromising the individual's capacity to act independently and in the public interest when providing advice to the Commission in relation to the subject of the work performed by the expert group or sub-group in question.

In order to ensure a harmonised approach between the evaluators, the Commission representative said that there had been a number of coordination meetings between the evaluators. One meeting took place prior to 7 November 2019 (the deadline for submitting applications) and one after 7 November and before the end of the evaluation process. There were no minutes or notes on these meetings as the process was consensual.

The Commission received 120 valid applications [11] for the CMU HLF.

The evaluation sheets are dated 8 November 2019. This date was said to signal the start of the evaluation process. The evaluation process lasted several days.

At the end of the evaluation process, the outstanding issues were listed in a note which was addressed by DG FISMA's senior management to the Executive Vice President to seek his decision on the composition of the CMU HLF. The discussion focused exclusively on the issues set out in the note. The note included a short-list of CMU HLF applicants in annex and explicitly sought the EVP's agreement to the CMU HLF composition in the main body of the note.

The short-listed applicants were divided into three subgroups. To the extent possible, CMU HLF members were placed in the subgroup of their preference, provided their expertise and the assessment of their application supported this. [12]

The note was presented to the Executive Vice President's office on 12 November 2019. The short-list was approved by the Executive Vice-President in the Jour Fixe meeting (see footnote 1) on 14 November 2019. No additional points of relevance on the composition to the CMU HLF were raised orally during that meeting.

3. In line with Article 11(6) of the Commission's decision establishing horizontal rules on the creation and operation of Commission expert groups ('Horizontal Rules') [13], the declarations of interests (DoIs) of Type A members are normally made public, facilitating public scrutiny of the role of these experts. While this was the case for the Type A members of the HLF when the group was active, this was not the case once the CMU HLF's status in the expert group register was set at 'closed'. Given the follow-up that the final CMU HLF report recommended, was there no value in keeping the DoIs public for a longer period of time?

The final report produced by the HLF was published on 10 June 2020. Afterwards the CMU HLF's status in the Commission's expert group register was changed from 'active' to 'closed'. In accordance with the privacy statement provided in the Call for application [14], DoIs are removed from the register when the status of the group is marked as closed. The Commission representative did not see the value in keeping the DoIs of Type A members of the CMU HLF public for longer because the impartiality was ensured by the set up of the group (see the answer to question 6.a). The allocation of the members to Type A or Type B was published on the Commission website and the DoIs were available for the whole time



while the CMU HLF was active.

The outcome of the CMU HLF work is a report containing 17 very comprehensive and targeted recommendations, set out in detail in the annex (see footnote 5). The Commission representative recalled that to arrive at that result, extremely technical and specialised knowledge was required.

The report's recommendations were addressed to the Commission, Member States, and in certain cases were also best practices addressed to the industry.

After the final CMU HLF report was made public, the Commission launched a public participation feedback process, with a view to obtaining additional input from a broader range of stakeholders to complement the work of the CMU HLF. At the launch of this feedback process, the Chair of the CMU HLF, together with the Director-General of DG FISMA, answered questions from stakeholders in a dedicated Twitter Live event. The public feedback process lasted until the end of June 2020 and resulted in 73 contributions. Any individual or organisation had the opportunity to make its voice heard.

A number of Member States [15] and industry stakeholders set up similar expert groups that also provided recommendations to the Commission on how to make progress on the CMU.

The Commission has taken all this input into account in its work on a CMU action plan. According to the Commission representative, the CMU HLF's recommendations are seen as one of many inputs, although arguably they are more detailed than others are.

4.a Did applications that scored zero points on absence of circumstances that could give rise to a conflict of interest, pose a risk of conflicts of interest?

The Commission representative said that scoring served to identify the risk of conflicts of interest, and that applicants who received zero points therefore posed a risk of having a conflict of interest. However, according to the Commission representative, the final composition of the CMU HLF was balanced, including all required knowledge and expertise in various sectors of financial services, while ensuring that no specific position dominated. Safeguards in terms of voting modalities (consensus), presence of impartial Chair/Subchairs who could steer and effectively moderate the process and active participation by EU regulators/supervisors/institutions ensured that the ultimate result of the HLF was balanced and objective.

4.b One of the subgroup Chairs scored 8,5 points on the selection criterion for the absence of circumstances that could give rise to a conflict of interest. What caused this suboptimal score?

The Commission representatives said that this score reflected the impact of an employment activity of the applicant in question. [Further details are in the confidential annex].

The Commission representative recalled that the Chair of the HLF CMU, who was not part of any of the subgroups, had a long-standing dedication to public service and had exceptional experience in the area of European financial policymaking. The Chair was said to have been chosen to ensure the overall steer and with a view to balancing the positions of the subgroups, if needed.



5. Did the Commission follow up in writing with the applicants whose application had received zero points on absence of circumstances that could give rise to conflict of interest to discuss the risks identified? Did the Commission propose to these individuals the possibility to be appointed as a Type B member instead?

The Commission representative said that there was no follow up with applicants for Type A membership of the CMU HLF because the circumstances that could give rise to conflicts of interest were clear, based on their Dols.

A downside to removing the five applicants that scored zero points in the conflict of interest assessment would have been not to be able to use the expertise of these experts precisely in the areas where they had particularly valuable expertise. The Commission representative also recalled that, in any event, the setup of the CMU HLF sufficiently and effectively mitigated a possible conflict of interest (see in particular the answer to question 6.a), so no further remedy was deemed necessary.

Out of the shortlisted applicants, one applicant for Type A membership was recommended by the Commission to apply for Type B membership instead while the call for applications was still open.

The Commission representative confirmed that no rules would have prevented the Commission from proposing other applicants for Type A membership for Type B membership instead, and vice versa, after the deadline for applying for the CMU HLF had lapsed. However, according to the Commission representative, the mitigating measures put in place were effective and sufficient to address possible conflicts of interest, so it was considered unnecessary to do so.

6.a Did the Commission record any decisions resulting from the conflict of interest assessment referred to in Article 11 (2) of the Horizontal Rules with an explanation on the specific conflict that had been identified and the way it had been managed?

The Commission representative said that the Commission had expected upfront that there would be a lot of industry participation in the CMU HLF. In fact, the Commission could reasonably anticipate possible conflicts of interest of applicants occupying senior executive positions, as per the selection criteria. These possible conflicts of interest were considered in the design of the CMU HLF. The Commission's objective had been to have a high concentration of experts in the group with a thorough understanding of capital markets across the relevant areas (buy-side, sell-side, exchanges), so that the recommendations would be well informed.

Apart from the evaluation sheets, there were no other records kept as regards the conflict of interest assessment.

Any conflict of interest issues were managed through mitigating measures in the setup and decision-making procedure of the CMU HLF.

The three mitigating measures that were described in this respect are:

- 1.** The CMU HLF and its three subgroups had Chairs who were described as impartial.



It was added that the Chairs would be able to steer the discussion and in this way make sure that all views would be taken into account to avoid that the outcome could be biased towards individual members. The Chairs were selected to ensure objectivity and represent public interest.

2. All decisions were taken by consensus (not by majority).

Recommendations agreed in one of the three subgroups, would be introduced to all CMU HLF members in plenary, where they were adopted by consensus (no votes were taken). Agreement by consensus allowed the participating NGOs, academics and observers from European Institutions and Agencies to always intervene and ensure that the final outcome was not contrary to their interests. No recommendation was agreed unless all members and observers agreed to it.

3. There were a number of EU Institutions and Agencies that acted as observers (for example the European Central Bank, the European Investment Bank and the European supervisory authorities (EBA, ESMA and EIOPA) whose mandates, among others, focus on financial stability and consumer protection, respectively . [16]

Observers were said to have actively contributed to the CMU HLF's deliberations. [17]

These mitigating measures were said to have secured a balanced outcome of the work of the HLF.

6.b All the Type A members of one subgroup had suboptimal scores on the selection criterion related to conflict of interest (including a number of zero scores). Had this been considered as a vulnerability?

The Commission representative said that subgroup compositions could not have a bearing on the quality or nature of the CMU HLF recommendations, as all subgroup recommendations were deliberated in plenary and adopted by consensus (including with the participation of public institutions/organisations in their capacity as observers). In case there were any disagreements on a recommendation at plenary level, the Chair would ask the group to come to an agreement and the point would be brought before the plenary at a subsequent meeting. The Commission representative also noted that all recommendations were screened by the Chair, extensively discussed in plenary and challenged by a number of members across different subgroups. They were all agreed based on consensus across all members.

The Commission representative said that observers had taken extensive positions on many topics (for example, the ECB was active on prudential treatment, securitisations). CMU HLF members and observers were informed ahead of plenary meetings of the agenda. This allowed any CMU HLF member to understand, and if necessary, object to, recommendations coming from other subgroups. [18]

7.a In the case of one evaluation sheet, Commission evaluators noted that a conflict of interest had been identified. What did that conflict of interest concern?

The Commission representative said that a note in the comment section of the evaluation



sheet should not be taken as evidence that there were more concerns in terms of conflicts of interest than in relation to other applicants who had been given zero points in relation to this selection criterion. The decision to select experts was based on the total score achieved, not on remarks in the comment section.

A harmonised approach to assessing Dols concerned the manner in which scores were attributed to selection criteria. It had not been discussed where evaluators should make a written comment or the manner in which it should have been done.

7.b In one case, evaluators had noted that an applicant for a Type A membership had submitted a presentation instead of a cover letter. Did the evaluators' comment suggest this was an issue?

The Ombudsman inquiry team pointed out that this presentation appeared to be a company presentation.

the Commission representative said that the call for applications for the CMU HLF did not prescribe what form the cover letter should take, as long as the necessary information was provided. [19] Furthermore, irrespective of the form of the information provided, the applications were made by individuals in their own name, as required by the call for applications. The presentation in question was said to include all the essential elements, and was thus accepted.

In contrast, the Commission representative added, the rules required a Europass format CV, and so several applications that lacked a Europass CV had been declared invalid.

8. Did the Commission impose any specific restrictions on the participation of the Type A members that had scored zero points as regards the selection criterion of absence of circumstances that could give rise to conflicts of interest?

The Commission representatives said that there was no need to put such measures in place, and referred to the mitigating measures described under question 6.

In reply to a question as regards the workload of the CMU HLF, the Commission representative said that, in line with the selection criterion concerning availability [20], CMU HLF members could be absent from the work of the CMU HLF only on an exceptional basis.

In this context, one selected expert had indicated his/her unavailability for more than one of the CMU HLF meeting days. In response, the Commission gave the expert the choice either to be available, or to withdraw from the CMU HLF. The expert withdrew, and another expert was selected instead.

Brussels, 15/02/2021

Koen Roovers Valentina Stoeva



Case handler Inquiries officer

[1] Jour Fixe meetings are weekly meetings between the Commissioners (and in some cases between the Executive Vice-Presidents) with their respective services.

[2]

https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/1

[3] The CMU HLF Rules of Procedure were based on the standard rules of procedure for expert groups, which can be accessed here, for example:

<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=37726&no=>

.

[4] See: https://ec.europa.eu/info/publications/cmu-high-level-forum_en .

[5] See: https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en .

[6] See:

https://ec.europa.eu/info/files/200924-cmu-high-level-forum-feedback-summary-of-responses_en

.

[7] See: https://ec.europa.eu/info/publications/cmu-high-level-forum_en .

[8] See: https://ec.europa.eu/commission/presscorner/detail/en/mex_19_6297 (third item).

[9] Except for the Chair of the High Level Forum, who did not belong to any of the three dedicated sub-groups and was not subject to the written evaluation of applications per sub-group. His designated role was discussed orally and he was appointed following the decision by Executive Vice-President Dombrovskis, based on advice from DG FISMA management. His appointment was announced via a Commission Press Release (see footnote 8).

[10] Points awarded for the absence of circumstances that could give rise to a conflict of interest had a weighting of 10 percent in the overall score.

[11] 14 applications were deemed invalid.

[12] In an exceptional case, a specific member was placed in a different subgroup (indicated as second choice by the applicant), which the Commission considered to be a better fit.

[13] See:

<https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-3301-EN-F1-1.PDF> .

[14] When an individual is no longer member or observer or representative of a member or



observer of an expert group listed in the Register of expert groups, all personal data related to this individual, including a declaration of interests, is removed from the Register and is therefore not public anymore” p. 28

[15] France, Germany, Italy, the Netherlands, Spain, Poland and Sweden

[16] For a full overview of the CMU HLF observers, see:

<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3692&ne>

[17] The Commission representatives clarified that there was no description of the role of observers and that the CMU HLF Rules of procedure were shared with observers.

[18] In case of disagreements, the Chair would take the point off the agenda, and would put it on agenda for next time while members and observers would be invited to work out their differences.

[19] The CMU HLF call for applications refers to: “a cover letter explaining the applicant's motivation for answering this call and stating what contribution the applicant could make to the group”.

[20] This criterion was worded as follows: “ability to commit sufficient time to the HLF's work over the foreseen period (up to a maximum of 8 months, extendable by a maximum of 2 months)”.