



Recommendation in case 1777/2020/KR on how the European Commission handled concerns about the composition of the High Level Forum on the EU Capital Markets Union and alleged conflicts of interest of some of its members

Recommendation

Case 1777/2020/KR - **Opened on** 26/11/2020 - **Recommendation on** 04/05/2021 -
Institution concerned European Commission |

The case concerned the High Level Forum on the proposed EU Capital Markets Union, a Commission expert group. The Forum gathered senior industry executives and top international experts and scholars to develop new ideas on related policies for the Commission.

The Forum had two types of members:

Type A - who were appointed in their personal capacity to act independently and in the public interest;

Type B - members who represented a common interest of different stakeholder organisations.

The complainant was concerned that a number of Type A members had links to financial institutions and could, as such, not be considered independent. After the Forum's recommendations were made public, these members' declarations of interests were no longer publicly available. In general, the complainant was concerned that the Forum's composition was insufficiently broad and diverse.

The Ombudsman inquiry found two instances of maladministration:

1. Instead of following its own rules on conflicts of interest for Type A members, the Commission applied general measures to mitigate risks of conflicts of interest. These measures were insufficient.

2. Consequently, the split between the two types of Forum members deviated significantly from the balance that the Commission claimed it struck, and made public.

Based on her inquiry, the Ombudsman recommends that the Commission diligently apply its



rules regarding conflicts of interest for individuals applying to be appointed as Type A members of expert groups. Other mitigating measures to address risks of conflicts of interest of Type A members may be taken in addition, but should not substitute the Commission's rules to this end.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The proposed Capital Markets Union (CMU) aims to create a single market for capital in the EU. The purpose of CMU is to get money – investments and savings – flowing across the EU in order to benefit consumers, investors and companies, regardless of where they are located. [2]
2. In October 2019, the High Level Forum on Capital Markets Union was announced by the Commission [3] . The purpose of the Forum, an informal expert group [4] created by the Commission department responsible for EU policy on banking and finance, the 'Directorate-General for Financial Markets, Financial Stability and Capital Markets Union' (DG FISMA), was to gather senior industry executives and top international experts and scholars to develop new ideas on the future of CMU policies. The Forum had three subgroups. [5]
3. The Forum's recommendations were addressed to the Commission, EU Member States, and in certain cases best practices were also addressed to the industry. Since publication, the Commission has taken the Forum's recommendations into account for its 'CMU Action Plan' [6] , for example.
4. At the end of June 2020, the complainant, a Member of the European Parliament (MEP), along with five other MEPs, wrote to the Commission to raise concerns about the Forum. The Commission replied to the MEPs. [7]
5. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman in October 2020.

The inquiry

6. The Ombudsman opened an inquiry [8] into the following aspects of the complaint:

1) Whether the risks of conflicts of interest of Type A members were adequately managed and whether the composition of the Forum was sufficiently broad and diverse?

2) Whether the work of the Forum was sufficiently transparent?

For her assessment, the Ombudsman drew on her previous work in this area. [9]

7. In the course of the inquiry, the Ombudsman inspected documents that the Commission took into account for assessing the conflicts of interest of applicants to become Type A members. At the start of 2021, the Ombudsman's inquiry team met with representatives of the Commission to clarify certain matters in relation to the Forum. Based on the inspection and the subsequent discussion, the Ombudsman's inquiry team drafted an inspection



meeting report [10] on which the complainant submitted comments [11].
Managing conflicts of interest of Type A members and the Forum's composition

Arguments presented to the Ombudsman

By the Commission

8. Individuals applying to be on the Forum had to indicate whether they were applying to become Type A or Type B members. Their application also included a cover letter by the applicants in their own name [12], a CV in Europass format [13], a form with relevant information concerning the selection criteria, and a form in which applicants indicated their subgroup preferences. Applicants for Type A membership were also asked to fill out and sign a declaration of interests (DoIs) in which they disclosed any circumstances that could give rise to conflicts of interest. [14]

9. The precise split between Type A and Type B members on which the Commission eventually decided was the result of the evaluation process which took into account several factors, including:

- i. ensuring the necessary expertise in all relevant sectors,
- ii. broad geographical representation,
- iii. gender balance.

After evaluating the valid applications [15], the Commission selected 12 Type A and 16 Type B members.

10. One of the selection criteria, which the Commission included in its call for expressions of interest, was that applicants should occupy a top senior executive position [16], or be a reputable academic of international standing specialised in an area of relevance to capital markets [17]. [18]

11. The Commission appointed two evaluators per application to avoid a single evaluator's potential bias. The evaluators met before the application deadline, and afterwards, in order to ensure a harmonised approach to the conflicts of interest assessment and to the attribution of scores to the selection criteria. No written record was kept of these meetings, which were described as consensual in nature.

12. The evaluation of the applications for Type A membership of the Forum included a conflict of interest assessment based on these applicants' DoIs. These DoIs included information about:

- i. Employment, consultancy and legal representation activities;



- ii. Membership of managing bodies, scientific advisory bodies or equivalent structures;
- iii. Research support;
- iv. Financial interests;
- v. Intellectual property;
- vi. Public statements and positions, and
- vii. Interests of immediate family members.

13. The evaluators assessed whether any of the information submitted by the applicants in relation to these elements could compromise, or be reasonably perceived as compromising, the applicant's capacity to act independently and in the public interest when providing advice to the Commission in relation to the work of the Forum. The evaluators were instructed to use their best judgement when assessing the magnitude of possible conflicts of interest. Evaluators could attribute a score between zero and ten for this criterion, zero indicating circumstances that could give rise to a conflict of interest , and ten indicating the absence of such circumstances . [19]

14. Of the Type A members that were selected, five were awarded a score of zero for the conflicts of interest assessment. [20] The following measures were applied to mitigate any risks of conflicts of interests:

- I. The chair of the Forum and the chairs of the subgroups were appointed as Type A members and considered impartial. They had to make sure that all Forum members' views were taken into account.
- II. The Forum took decisions by consensus. Recommendations agreed in one of the three subgroups were presented to all Forum members in plenary, where they were adopted only if all Forum members agreed to them (no votes were taken). [21]
- III. There were a number of observers from EU institutions and agencies whose mandates, among others, include objectives such as ensuring financial stability and consumer protection . [22] While there was no description of the role of observers, they all had received a copy of the rules of procedure applicable to the Forum.

15. Based on the evaluation of all selection criteria, a shortlist was drafted. Short-listed applicants were divided into three subgroups. To the extent possible, applicants were placed in the subgroup of their preference, provided their expertise and the evaluation of their application supported this [23] .

16. At the end of the evaluation process, the outstanding issues (none of which related to the conflicts of interest assessment of Type A members), were listed in a note that was addressed by DG FISMA's management to Executive Vice-President Valdis Dombrovskis, who



approved the shortlist.

17. 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, which was explained as including representatives of:

- companies that purchase investment securities [24] (the "buy side"),
- companies that assist investors with all activities related to the sale of securities to the buy-side [25] (the "sell side"), and
- markets where stock buyers connect with stock sellers ("exchanges").

The Type B members also included two representatives of consumers and financial services users.

18. The Commission stated that the composition of the Forum was broad and diverse, and that the selected Forum members were equipped with the knowledge and expertise needed to carry out the Forum's mandate.

By the complainant

19. The complainant argued it was questionable that the five Type A members who scored zero based on their conflicts of interest assessments were not disqualified for Type A membership, given their "*clear and current links to financial institutions*".

20. The complainant said that the Commission's idea of a broad and diverse membership, meant covering all relevant sectors of the financial industry and, to a degree, geographical and gender balance. This approach, she argued, had two shortcomings, namely that it failed to take account of: (i) the potential divergence between the public interest and the vested interests of the financial sector, and (ii) the importance of a sufficiently broad and diverse set of stakeholders.

21. The complainant said that a broad and diverse composition of the Forum should actually include (i) the financial industry, (ii) academics and other experts in an individual capacity, (iii) non-financial businesses, including SMEs, (iv) civil society organisations, including trade unions, (v) retail investor representatives and (vi) public supervisory authorities.

22. The complainant argued that the selection criterion that applicants should be "*highly experienced industry executives*" or "*top international experts*", may have caused experts with relevant knowledge from smaller organisations to either not apply, or, if they did, not be awarded a high enough score to be selected.

The Ombudsman's assessment leading to a



recommendation

23. It is essential for ensuring both the highest level of integrity of experts and public confidence in the Commission's activities that the Commission thoroughly assesses whether applicants for Type A membership of expert groups have interests that could compromise their independence when they advise the Commission.

24. In the conclusion of a previous inquiry (OI/6/2014/NF) into the composition and transparency of the Commission's expert groups in 2017, the Ombudsman noted the Commission's new conflict of interest policy for individual experts appointed as Type A members as a key improvement. [26]

25. The Commission assessed the declarations of interests (Dols) of the Type A applicants [27] . In the cases of five applications, circumstances were identified that could give rise to conflicts of interest. This led the evaluators to award a score of zero for this criterion.

26. The Ombudsman notes that Type A applicants whose interests may pose conflicts of interest should not automatically be disqualified. The rules [28] prescribe one of the following measures to manage the risk of conflicts of interest, depending on the circumstances:

- The application shall be rejected [29] ;
- The individual shall be appointed as a Type B member, after consultation of the stakeholders concerned [30] ; or
- The individual shall be appointed as a Type A member subject to specific restrictions [31] .

27. None of these measures were taken in this case . All of the Type A applications that included interests that were deemed to compromise the applicant's ability to be independent were retained. [32] After the application deadline had passed, the Commission did not seek to appoint any of the applicants as Type B members instead. Finally, the Commission did not put in place any restrictions. [33]

28. In her inquiry OI/6/2014/NF, the Ombudsman suggested that the Commission put in place an individual definition of what would be a broad and diverse composition for each expert group in order to make the review of a group's composition practically possible. [34] In this case, the Ombudsman notes the balance that the Commission struck was 12 Type A members and 16 Type B members .

29. In her inquiry OI/6/2014/NF, the Ombudsman also determined that if a Type A member is incorrectly assessed to be independent, even though the expert has, or is seen to have, very close links to a vested interest, this will be problematic as regards the overall balance of an expert group. [35]

30. In this case, of the 12 Type A members, the Commission established that five had interests that compromised, or could reasonably be perceived as compromising, their capacity to act independently and in the public interest. The Ombudsman thus takes the view that only seven Type A members could truly be considered as Type A members [36] ,



whereas 21 members were either Type B members, or incorrectly adjudged to be Type A members. In other words there were **three times more Type B than Type A members** . This reality is a significant deviation from the balance that the Commission claimed it had struck.

31. The Ombudsman notes that instead of dealing with the individual risks of conflicts of interest in line with the applicable rules, the Commission attempted to address these risks with mitigating measures of a general nature (see paragraph 14). The Commission thus acknowledged that there was a problem that needed to be solved.

32. The Ombudsman questions whether these measures effectively managed the risks that the Commission had identified for the following reasons:

I. Regarding the role of the chairs of the Forum and the subgroups, the Ombudsman accepts that chairs can use their role to steer discussions and make sure that members' views are taken into account. However, given the very unequal split between the those that could truly be considered to be Type A members and the other Forum members, the Ombudsman doubts whether this measure sufficiently mitigated the risks that were present in the Forum's composition.

II. Regarding whether the consensual nature of the Forum's decision-making would effectively mitigate the risks in the Forum's composition, the Ombudsman finds that this presumption ignores the reality of group dynamics. It is more difficult for experts in a small minority to have their views taken into account in a setting in which a significant majority of experts that hold interests in common.

III. Regarding the presence of observers at the Forum deliberations, the Ombudsman notes that there was no description of the role of observers and that the rules of procedure that applied, which had been shared with the observers, stipulate that observers "*shall not participate in the formulation of recommendations or advice of the group*" [37] . The Ombudsman is of the view that the presence of observers did not remove the risks that were present in the Forum's composition.

33. Therefore, the Ombudsman finds that these general measures had limitations and did not sufficiently and effectively mitigate the risks of conflicts of interest of which the Commission was aware.

34. In light of the above, the Ombudsman finds that the Commission did not follow its own rules for managing conflicts of interest for Type A experts, and did not apply other measures that sufficiently and effectively mitigated the risks that had been identified. This was **maladministration** . This resulted in an actual composition of the Forum that deviated to a significant extent from the balance the Commission said it had struck for the composition of the Forum. This also constituted **maladministration** .

35. Therefore, the Ombudsman makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.



Transparency measures applied to Forum

Arguments presented to the Ombudsman

36. In relation to the Forum's work, the Commission published: agendas and minutes [38] ; the applicable rules of procedure [39] ; the call for expression of interest, the application form and its annexes, the interim and final reports and a list of members [40] ; a feedback statement for the final report of the Forum [41] ; and the press release announcing the composition of the Forum [42] . The Commission also made public the declarations of interests (Dols) of the Type A members [43] .

37. When the final Forum report was made public on 10 June 2020, the Forum's status was changed from 'active' to 'closed' and the Dols of its Type A members were removed from the Commission's expert group register to protect personal data. [44]

38. To obtain additional input from a broader range of stakeholders, and to complement the work of the Forum, the Commission launched a public participation feedback process, from the time the final Forum report was made public until the end of June 2020. At the launch of this feedback process, the chair of the Forum, together with the director-general of DG FISMA, answered questions from stakeholders at a dedicated online event. Any individual or organisation had the opportunity to put their views forward, resulting in 73 contributions.

39. When the complainant became aware of the Forum's recommendations, the Dols of the Forum Type A members were no longer available. She therefore relied on her own research to find out more about the interests of the Forum's Type A members.

The Ombudsman's assessment

40. In her inquiry OI/6/2014/NF, the Ombudsman emphasised the importance of transparency of the Commission's expert groups, listing the following key improvements following the inquiry:

- Public calls for applications as a standard means of selecting members;
- Mandatory registration in the Transparency Register;
- Links between the entries in the expert groups register and the Transparency Register;
- Consistent categorisation of organisations;
- Description of mandate and advice needed for each new group;
- Meaningful and complete minutes of meetings;
- Publication of dissenting opinions; and
- Arrangements for public deliberations.

41. Regarding the Forum, the Commission did ensure an adequate level of transparency, including on a number of points mentioned above.

42. The Ombudsman notes that the final report from the Forum does not refer to Type A, or Type B members, but just to 'members'. The Ombudsman finds that this distinction should



have been made apparent in the final report, as it is the key defining aspect of Forum's composition.

43. As Dols of the Forum's Type A members contain relevant information for policy makers, legislators and the public, the Ombudsman is of the view that there would have been value in keeping the Dols in the public domain for a reasonable period beyond the active phase of the Forum, for example, covering the period in which the Commission's CMU action plan [45] was under consideration by the co-legislators.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the European Commission:

To ensure the highest level of integrity of experts that are appointed in their personal capacity to act independently and in the public interest (Type A members), the Commission should diligently apply its rules regarding conflicts of interest of such members.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by [three months deadline expressed as a date].

Suggestions for improvement

1. The Commission should ensure that the types of an expert groups' members, are specified in the expert groups' final report.

2. If the Commission considers making proposals for public policy based (in part) on an expert group's proposals, it should make public the declarations of interests of the Type A members of the expert group for as long as any such proposals are under consideration by the co-legislators.

Emily O'Reilly European Ombudsman

Strasbourg, 04/05/2021

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom): <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31994D0262>.

[2] What is the capital markets union? | European Commission (europa.eu)

[3] Commission expert groups are created and operated in line with the cross-cutting rules established by Commission Decision, C(2016) 3301 final, of 30 May 2016. See: C_2016_3301_F1_COMMISSION_DECISION_EN.pdf (europa.eu)



[4] There are two types of Commission expert groups; formal, meaning set up by Commission decision, and informal, meaning set up by an individual Commission department that has obtained the agreement of the Commissioner and Vice-President responsible, and of the Secretariat-General.

[5] The three subgroup areas were: "1. The creation of an ecosystem enabling greater cross border capital raising, with special focus on innovative SMEs. [...] 2. How to develop a European capital market architecture, with special focus on how new financial technologies can support this process. [...] 3. Investment choice and accessibility to capital markets services to promote greater retail investors' participation. [...]. See: Call for applications for the selection of members of the high level forum on capital markets union (europa.eu) .

[6] See: Capital markets union 2020 action plan: A capital markets union for people and businesses | European Commission (europa.eu) .

[7] See: <https://www.ombudsman.europa.eu/en/correspondence/en/141315> .

[8] See: Letter from the European Ombudsman to the President of the European Commission concerning the work of the High Level Forum on Capital Markets Union | Correspondence | European Ombudsman (europa.eu)

[9] See: <https://www.ombudsman.europa.eu/en/decision/en/86030> .

[10] See: <https://www.ombudsman.europa.eu/en/report/en/138224> .

[11] See: <https://www.ombudsman.europa.eu/en/correspondence/en/141314> .

[12] The Forum call for expression of interest 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*". In one case, evaluators had noted that an applicant for Type A membership had submitted a presentation instead of a cover letter. Although the presentation carried the logo of the applicant's employer, it was deemed to suffice as it included all the required elements.

[13] See: Home | Europass (<https://europa.eu/europass/en>)

[14] Except for the Forum's chair. His designated role was discussed orally and he was appointed following the decision by a Commission Executive Vice-President, Mr Dombrovskis, based on advice from DG FISMA's management. His appointment was announced via a Commission press release, see: https://ec.europa.eu/commission/presscorner/detail/en/mex_19_6297 .

[15] Of the 134 applications received, 14 were deemed invalid.

[16] The call for expression of interest lists the following examples: "*President, Chief Executive*



Officer, Chief Financial Officer, Chief Operating Officer, Board Member, Chair, Secretary-General or similar function, with an undertaking active in an area of relevance to capital markets or with a potential interest in capital markets (e.g. corporates, including SMEs) ”.

[17] The call for expression of interest specified that academics needed to have “ *a proven record of publications in reputed journals and/or advisory experience in international organisations*” .

[18] Points awarded for this criterion had a weighting of 60 percent in the overall score.

[19] 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.

[20] One of three sub-group chairs scored 8.5 out of 10 on this criterion.

[21] Meeting agendas were shared ahead of plenary meetings, informing Forum members of recommendations coming from the subgroups. In case of disagreements, the chair took the point off the agenda for a later discussion so that differences could be worked out in the meantime.

[22] For a full overview of the Forum observers, see: Register of Commission expert groups and other similar entities (europa.eu) .

[23] Of the shortlisted applicants for Type A membership, one had been recommended by the Commission to apply for Type B membership instead, while the call for applications was still open (so prior to the evaluation of applications).

[24] For example insurance firms, mutual funds, hedge funds, and pension funds, that buy securities (that is, investments that can easily be bought, sold, or traded on public exchanges) for their own accounts or for investors with the goal of generating a return.

[25] For example companies involved in: (i) underwriting (that is, taking on risk for a fee) for initial public offerings (IPOs), meaning offering shares of a private company to the public in a new stock issuance, (ii) providing clearing services, meaning ensuring the correct and timely transfer of funds to the seller and securities to the buyer, and (iii) generating research material and analysis.

[26] See: Decision of the European Ombudsman in her strategic inquiry OI/6/2014/NF concerning the composition and transparency of European Commission expert groups | Decision | European Ombudsman (europa.eu) .

[27] See Article 11(2) of the Commission’s horizontal rules.

[28] See Article 11(3) of the Commission’s horizontal rules.



[29] In such case the competent Commission department shall inform the individual about the outcome of the conflict of interest assessment.

[30] The decision resulting from the assessment referred to in paragraph 2, including any arrangement for resolving the conflict of interest shall be taken at least at Head of Unit level and shall be recorded with an explanation on the specific conflict that has been identified and the way it has been managed. Information registered must be adequate, relevant and not going beyond what is necessary for the purpose of the management of the conflict of interest.

[31] For example, expert could be excluded from certain meetings and/or activities carried out by the group, in particular participation in drafting opinions or recommendations or the expert's abstention from the discussion on specific items on the agenda and/or from any vote taken on those items.

[32] The Commission had only declared certain applications invalid, for example those that lacked a CV in a specific format.

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

[34] Paragraph 22, see: Decision of the European Ombudsman in her strategic inquiry OI/6/2014/NF concerning the composition and transparency of European Commission expert groups | Decision | European Ombudsman (europa.eu) .

[35] Paragraph 26, see: Recommendation of the European Ombudsman in her strategic inquiry OI/6/2014/NF concerning the composition of Commission expert groups | Recommendation | European Ombudsman (europa.eu) .

[36] The Ombudsman notes this includes the four Type A members that were appointed as chairs. These members were considered to be 'impartial' by the Commission.

[37] See p.3 of the rules of procedure: index.cfm (europa.eu)

[38] See: Register of Commission expert groups and other similar entities (europa.eu) .

[39] The Forum 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=>
.

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

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



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

[43] See Article 11(6) the Commission's horizontal rules.

[44] The Forum members had been informed in a privacy statement, provided in the call for expression of interest, that when an individual is no longer member 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.

[45] See footnote 6.