



Decision on 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 (case 1777/2020/KR)

Decision

Case 1777/2020/KR - Opened on 26/11/2020 - Recommendation on 04/05/2021 - Decision on 27/10/2021 - Institution concerned European Commission (Maladministration found) |

This complaint-based inquiry 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 and, in 2020, produced a report with recommendations.

Following an extensive inspection of Commission documents and a meeting with the Commission as part of the inquiry, the Ombudsman identified two instances of maladministration:

1. A number of Forum members with links to financial institutions were considered by the Commission as being independent and representing the public interest. With the aim of mitigating the risks of conflicts of interest that the Commission had identified, it applied general measures. The Ombudsman carefully assessed these measures and deemed them to be insufficient.
2. Based on the flawed categorisation of Forum members, the Commission made public a split between Forum members that were supposed to be independent and Forum members that represented a common interest of different stakeholder organisations that deviated significantly from what it was in reality.

The Ombudsman issued a recommendation.

The Commission's reply to the Ombudsman's recommendation presented no new information and does not alter the inquiry findings.

The Ombudsman closes her inquiry by confirming her findings and recommendation.



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. [1]
2. In October 2019, the High Level Forum on Capital Markets Union was announced by the Commission [2] . The purpose of the Forum, an informal expert group [3] 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 two types of members: type A, who were appointed in their personal capacity to act independently and in the public interest; and type B , **who** represented a common interest of different stakeholder organisations. The Forum had three subgroups. [4]
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. The Forum was then closed.
4. Since their publication, the Commission has taken the Forum's recommendations into account for its 'CMU Action Plan' [5] . This Action Plan is expected to lead to legislative proposals that would be under consideration by the co-legislators until the end of the current Commission mandate or potentially even beyond.
5. 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. [6]
6. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman in October 2020.
7. On 26 November 2020 the Ombudsman opened her inquiry, and on 4 May 2021 she issued her findings and an accompanying recommendation [7] .
8. On 4 August 2021, the Commission provided its opinion [8] on the Ombudsman's findings and recommendation. No comments were provided by the complainant on that opinion. Managing risks of conflicts of interest and the perception thereof

The Ombudsman's recommendation

9. The Ombudsman identified two instances of maladministration:
 - 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.



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

10. In light of these findings, the Ombudsman recommended 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.

11. The Ombudsman also made two suggestions aimed at improving the transparency of expert groups' composition and the professional interests of external experts that are appointed to be independent and represent the public interest.

12. The Commission took note of the Ombudsman's finding that in the case of five Type A members it did not manage the risk of conflicts of interest according to its own rules. It however defended its use of alternative mitigating measures based on the same arguments it had given during the inspection meeting and which had been taken into account by the Ombudsman in her recommendation.

13. As regards the split between the two types of Forum membership that the Commission had made public, and the actual split, the Commission said that it did not pursue the objective of a specific representation of Type A and Type B members in the group, but rather needed to ensure the presence of the necessary expertise from the various sectors concerned, given the highly technical nature of the Forum's work.

14. The Commission indicated that it did not see a need to act on the Ombudsman's suggestions for improvement.

The Ombudsman's assessment after recommendation

15. The High Level Forum that was subject to this inquiry was an expert group. The Commission's horizontal rules for the creation and operation of expert groups are part of an established framework for Commission expert groups that is cross-cutting, meaning that it applies to all expert groups.

16. When the Commission revised its horizontal rules in 2018, it indicated that it did so in part because it saw a need to improve its rules to manage conflicts of interest in relation to individuals appointed as Type A members, that is in a personal capacity to act independently and in the public interest.

17. The Ombudsman's findings in this inquiry included that the Commission had not followed these rules. It is regretful that, despite having improved the rules in question in 2018, the Commission in this case defended applying alternative mitigating measures, which the Ombudsman had assessed in detail as insufficiently effective [9] .



18. As the Ombudsman is not aware that the issue identified in this case is more widespread, and given that the expert group in question is now closed, she is not pursuing this matter further. However, given the concerns raised about this case, it would have been reasonable for the Commission to reassure the Ombudsman that its expert group rules will be applied diligently going forward.

19. The Commission said that it had not pursued the objective of a specific representation of Type A and Type B members in the group and that the Commission's objective had rather been securing the necessary expertise that the expert group's mandate necessitated.

20. The Ombudsman notes that if the Commission had not sought to attain a particular group composition of Type A and Type B members, the Commission could have simply appointed the experts in question (namely those who had applied for Type A membership, but who had scored zero points on the selection criterion regarding the absence of conflicts of interest) as Type B members. Had the Commission followed its rules, this would also have been among the options. [10]

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion(s)/finding(s):

The Ombudsman upholds her findings of maladministration and her recommendation to the Commission, as follows:

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

Emily O'Reilly European Ombudsman

Strasbourg, 27/10/2021

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

[2] 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)

[3] 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.

[4] 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) .

[5] See: Capital markets union 2020 action plan: A capital markets union for people and businesses | European Commission (europa.eu) , 24 September 2020.

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

[7] See: <https://www.ombudsman.europa.eu/en/recommendation/en/141318> .

[8] See: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/148378> .

[9] See paragraph 32 of the Recommendation (see footnote: 7).

[10] See Article 11(3) of the Commission’s cross-cutting ‘horizontal rules’ established by Commission Decision, C(2016) 3301 final, of 30 May 2016. See:

[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2016\)3301&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2016)3301&lang=en) .