[redacted]

From: [redacted]
Sent: 16 October 2020 11:02
To: [redacted]
Cc:
Subject:
Attachments:

Dear [redacted]

In attachment and below you find our questions and comments.

Please be so kind to let us know about this.

Thanks a lot

Best Regards

[redacted]

Regarding Question 1

The Comission states there is no legal grounds to exclude BlackRock from the tender procedure.

However, Article 167 of the Finantial Regulation on "Award of contracts" establishes that:

"1. Contracts shall be awarded on the basis of award criteria provided that the contracting authority has verified the following:

(a) the tender complies with the minimum requirements specified in the procurement documents;

(b) the candidate or tenderer is not excluded under Article 136 or rejected under Article 141;

(c) the candidate or tenderer meets the selection criteria specified in the procurement documents **and is not subject to conflicts of interest which may negatively affect the performance of the contract**. "

Moreover, recitals 104 and 105 of the Finantial Regulation, determine that:

"(104) It is appropriate that different cases usually referred to as situations of conflict of interests be identified and treated distinctly. The notion of a 'conflict of interests' should be solely used for cases where a person or entity with responsibilities for budget implementation, audit or control, or an official or an agent of a Union institution or national authorities at any level, is in such a situation. Attempts to unduly influence an award procedure or obtain confidential information should be treated as grave professional misconduct which can lead to the rejection from the award procedure and/or exclusion from Union funds. **In addition, economic operators might be in a situation where they should not be selected to implement a contract because of a professional conflicting interest.** For instance, a company should not evaluate a project in which it has participated or an auditor should not be in a position to audit accounts it has previously certified.

(105) In accordance with Directive 2014/24/EU, it should be possible to verify whether an economic operator is excluded, to apply selection and award criteria, as well as to verify compliance with the procurement documents in any order. As a result, **it should be possible to reject tenders on the basis of award criteria without a prior check of the corresponding tenderer with regard to exclusion or selection criteria**. "

It is not true that there were no legal grounds to exclude Blackrock from de tender.

Besides, if there is no impediment to award the contract given "the nature and context of the study and tasks to be undertaken", why did the comission requested information regarding a possible conflict of interest?

Regarding Question 2

- How will physical segregation prevent or stop the information flow?
- Who wil be the external auditor of the contract?

Regarding Question 3

- How will the Comission "test" the effectiveness of the "information barrier"?
- Has OLAF required an audit so far?

Regarding Question 4

It is not true that the contract doesnt require Blackrock to provide advice on future policy, as the Comission stated. The tender procedure title and its scope is: “Development of tools and mechanisms for the integration of environmental, social and governance (ESG) factors into the EU banking prudential framework and into banks' business strategies and investment policies”.

Regarding Question 6

- The spirit of the regulation, v.g. recitals 104 and 105, is to broaden the concept of “conflict of interest”, not the opposite.

- Regarding the abnormaly low price of Blackrock’s offer, what kind of information was provided and how did Blackrock justify the price?

Brussels, 14 October 2020

To:
Emily O'Reilly
European Ombudsperson

Subject of case: European Commission's decision to award a contract to BlackRock Investment Management (UK) Limited to carry out a study on integrating environmental, social and governance (ESG) objectives into EU banking rules

Follow up to the joint inquiry 853/2020/KR

Dear Ms O'Reilly,

I would like to thank you for your letter of 14 September 2020 in which you inform me that your inquiry team inspected the European Commission's file concerning the matter I complained about.

I have read with great interest the non-confidential copy of the report on this meeting and inspection. I would like to make comments on this report, since I am offered the possibility to do so. Please find my comments in Annex to this letter.

I would like to thank you again for your consideration and for your commitment to the transparency and integrity of our institutions,

Sincerely Yours,

[redacted]

Member of the European Parliament

ANNEX

COMMENTS FRO [redacted] ON THE REPORT ON THE EUROPEAN OMBUDSMAN'S INSPECTION OF DOCUMENTS AND MEETING

COMPLAINTS: 853/2020/KR, 1032/2020/KR and 1119/2020/KR

Joint inquiry title: European Commission's decision to award a contract to BlackRock Investment Management (UK) Limited ('BlackRock Investment Management') to carry out a study on integrating environmental, social and governance (ESG) objectives into EU banking rules.

1. Comments on the answers to QUESTION 1

On page 4 of the report, one can read that "*the evaluation committee did not identify any conflict of interest, which may negatively affect the performance of the contract, between BlackRock Investment Management's tasks under the contract, and its investment business, given the nature, context and tasks of the study*." The same conclusion is repeated on page 5 of the report: *"Given the nature and context of the study and the tasks to be undertaken, the Commission concluded that there were no unmanageable risks in terms of BlackRock Investment Management's investment activities that could negatively affect its work for the study*". I disagree with this assessment, given the obvious conflicting interests at stake. As I already wrote in my letter on 17 April 2020:

> "Taken together, BlackRock funds are indeed among the world's largest investors in banks and fossil fuel companies. More precisely, this asset management company is a top-three investor in all eight of the world's largest oil companies, and a top-10 investor in the 12 most systemically important banks in the world. The oil and gas sectors are likely to be directly impacted by tighter environmental rules. Decisions made by European banking regulators on ESG issues could have significant financial effects on the companies that BlackRock-administered funds are invested in. Hence, Blackrock may obviously seek to protect the industrial sector in which it invests heavily by influencing the decision-making in favour of softer environmental rules. (...)
> Moreover, the Greens/EFA group already informed the European Commission of another risk of conflict of interest: we sent the Commission evidence regarding BlackRock's role in the banking sector. BlackRock has significant holdings in several systemically relevant banks across the EU. We provided a list of systemically relevant banks and a table with BlackRock's holdings in those. In our views, the conflict of interest arising from these holdings would give sufficient justification to refuse the assignment of the study to this company".

This is why I would like to know if the Commission services duly took into account all these information when assessing the risk of conflict of interests, including information that was sent by the Greens/EFA group on BlackRock's role in the banking sector. This seems sufficient justification to reject BlackRock's application in line with Article 167(1)(c) of the Financial Regulation, as it may affect negatively the performance of the contract.
Can we have access to the documents of the assessment that have led to such a conclusion from the Commission? Can the Ombudswoman confirm that the assessment was well conducted?

On page 5 of the report, it is further explained that the Commission *"also noted that BlackRock manages investments on behalf of others, and that given the size of BlackRock's investment portfolio, it is likely to cover many diverse sectors including substantial investments in renewables as well as in fossil fuels.*" Again, I strongly caution against this assertion and what it implies.

First, as I recalled above, BlackRock is a top investor in all eight of the world's largest oil companies. I do not consider BlackRock's investments in renewables to be comparable in size. Its interests are clearly not the same. The above statement is therefore biased. Did the Commission calculate the size of BlackRock's investments in renewables and compare it with BlackRock's investments in fossil fuel companies in order to declare that?

Second, this answer implies that there is no risk of conflict of interests since BlackRock "*manages investments on behalf of others*". Here again, I strongly disagree with this assumption. I consider that the risk of conflict of interests still exists even if the company in question acts as an intermediary, because the conflicting financial interest remain the same. Therefore, does the Ombudswoman agree with the assumption that there is no risk of conflict of interests in a situation where a company manages investments on behalf of others?

2. Comments on the answers to QUESTION 2

On page 5 of the report, it is written that "*the Commission's representatives noted that the measures that BlackRock Investment Management included in its offer to prevent conflicts of interest, were considered an advantage as compared to other offers but not a determining element*." First, let me stress that, in my view, the assessment of whether there is a conflict of interest should not be taken in comparison to the other offers. There should be an independent assessment in order to determine whether the company in question is in a situation of conflict of interest or not, regardless of what the other companies have proposed or not. What does the Ombudswoman think about this "*advantage*" mentioned by the Commission services in this regard?

Furthermore, can I have access to the mentioned documents detailing the measures foreseen by BlackRock to prevent any conflict of interests? If not, may I know what these measures were about? Did the Ombudswoman have the occasion to check these measures? If so, does the Ombudswoman consider those measures indeed sufficient to prevent any risk of conflict of interest?

3. Comments on the answers to QUESTION 3

On page 6 of the report, it is written that "*the effectiveness of BlackRock Investment Management's information barrier is subject to periodic testing by its Legal & Compliance department, and by internal and external auditors*." I am wondering how such an "information barrier" (or "physical segregation") may be verified in practice by the Commission services and auditors. I sincerely doubt about the capacity of the Commission services to ensure that such prevention measures are actually complied with.

Does the Ombuswoman know what type of "periodic testing" is conducted by the Legal & Compliance department? Can I have access to the documents relevant to this testing process? If not, did the Ombudswoman have access to these documents? Did the Ombudswoman verify how often these tests are undergone? Does the Ombudswoman consider that these measures

are sufficient to verify that the information barrier is duly implemented and respected by BlackRock?

4. Comments on the answers to QUESTION 4

On page 6 of the report, the Commission services acknowledge that "*BlackRock Investment Management business unit that will conduct the study, namely BlackRock's Financial Markets Advisory (FMA), is an integral part of BlackRock Investment Management*." This confirms my findings and, therefore, my concerns. This is the heart of the conflict of interests. On the same page, the Commission explains that it was "*not considered as an impediment*" because of the nature of the contract and the context of the study. However, let me stress that none of these elements reassure me.

As regards the nature of the contract, it is clear that the study will influence in some way or another the decision making process of the Commission in this area, even if the study is described by the Commission as being "*of technical and analytical nature and which it summarised as stocktaking and evidence gathering*". Depending on the evidence gathered and best practices identified, the study may obviously be influential on the follow up by the Commission.

As regards the context of the study, namely that "*the study that BlackRock Investment Management is carrying out is only one of many reports*", this does not prevent in any way the conflict of interests at stake. The conflict of interests should be assessed independently of whether there are other studies being carried out or not. This is therefore irrelevant in my view.

5. Comments on the answers to QUESTION 5

On page 7 of the report, it is explained that the Commission services "*perceived the influence that BlackRock has over these work streams to be limited, because the TCFD and the SFWG are organisations with various members, of which BlackRock is only one. Conversely, it was felt that BlackRock Investment Management's work on the study was not likely to be influenced unduly by its participation in the two organisations*."

Here again, I strongly disagree with the "feeling" expressed by the Commission. BlackRock's participation in these organisations is clearly one of the many reasons for the risks of conflicts of interests in the award of this contract. What is the view of the Ombudswoman in this regard?

6. Comments on the answers to QUESTION 6

On page 8 of the report, one can read: "*as regards the comparatively low price of BlackRock Investment Management's offer, the Commission had requested BlackRock Investment Management to provide additional details. Based on the information BlackRock Investment Management provided, there were no indications that the price of the offer was abnormally low.*"

Given the huge gap between BlackRock's price and the others' price, one may legitimately doubt about this assumption. Can I have access to the "additional details" mentioned here? Did the Ombudswoman have access to these details? If so, does the Ombudswoman confirm that the details are sufficient to exclude any attempt from BlackRock to propose an abnormally low price in order to win the tender and influence public decision-making? Is the Ombudswoman

aware of a practice from BlackRock that would consist of systematically offering lower prices for public tenders compared to prices for private studies / private tenders? If so, how does the Ombudswoman assess such a practice in light of the risks of conflicts of interests?

To the European Ombudsman Concerning complaint 1032/2020/KR

Comments to the Inspection Report

Thank you for the opportunity to comment on the inspection report, dated 15 July 2020.

We will comment on the Commission's replies as they appear in the report, while focusing on the core part of our complaint: the Commission's unwillingness to take BlackRock's professional conflicting interests seriously when awarding the company the contract. We will pay less attention to the question of whether awarding the contract to BlackRock could be detrimental to its competitors on financial markets, and whether the safeguards proposed by BlackRock are sufficient to remedy that conflict of interest. We hope this issue will be covered by comments from other complainants. Also, it has not been possible for us to get access to the documents that would uncover the key aspects of that side of the complaint.

1. Were all applicable procedures duly respected, particularly as regards the evaluation of any conflicts of interest and the measures to prevent any such conflicts?

The reply is broadly speaking identical to one given by the Commission to a similar question put by the Change Finance coalition and a group of MEP's, respectively. Still, the Commission makes two statements we would like to comment on:

- The Commission says it is aware of BlackRock's investments and its business model, and suggests its portfolio "is likely to cover many diverse sectors". The wording indicates that the Commission is unaware of the proportions between BlackRock's investments in fossil fuels and renewables, respectively, and that it has made no effort to uncover the facts. According to our information, BlackRock's investments in fossil fuels and investments to a similar effect are substantially higher than its investments in renewables. Though the full picture of BlackRock's portfolio is not in the public domain, we believe it is possible to establish some proportions. Earlier this year, BlackRock made an attempt to boost its image as an investor with ambitions to contribute to fighting climate change. It did so by reducing its investments in coal and by announcing a multi-billion dollar renewable fund. In that connection, BlackRock made an effort of highlighting that since 2011, the fund has channeled 5.5 billion US dollars into 250 wind and solar projects since 2011. But looking at coal only, BlackRock has – for instance – 17 billion US dollars invested in coal plant developing companies – investments that will not be affected by its policy to scale down on investments in coal mining companies. In fact, BlackRock appears to be the largest institutional investor in coal developers. When you add to this the long list of investments in oil, steel, cement and gas companies, the investments in renewables dwindle in comparison.

In any case, even if BlackRock had sizeable investments in renewables, it does not render a critical view of the potential impact of its fossil fuels investments superfluous. Also, with the dossier in question – banking regulation and climate change – it is feasible for BlackRock to protect both its investments in renewables and its investments in fossil fuels through proposals that would serve both ends. On that background, it is indefensible that the

Commission does not seem to give BlackRock''s financial interests any serious consideration.

- The Commission lists the relevant legal acts, but the answers to the pertinent questions are evasive. The Financial Regulation clearly requires the contracting authority to investigate whether a 'professional conflicting interest' could be at play, and if so, move to exclude the bidder. We have argued earlier that the Vademecum leaves a lot to be desired in that the definition of 'professional conflicting interest' has been narrowed down to cases where "an operator is awarded a contract to evaluate a project in which it has participated or to audit accounts which it has previously certified." This narrow approach to 'professional conflicting interest leaves the door wide open to problematic decisions on awards, and it is not appropriately aligned line with the text nor the spirit of the Financial Regulation, which lists the two situations aforementioned as examples, not as an exhaustive definition. In this case, there is a professional conflicting interest, because BlackRock has a significant financial interest in the dossier.

Such a situation is clearly covered by the Financial Regulation, whereas the Vademedecum leaves for room for interpretation. Still, even with the narrow approach of the Vademedecum, the Commission has made a mistake. We will return to that below.

2. Does the Commission consider the measures presented by BlackRock Investment Management to prevent conflicts of interest to be adequate?

The Commission underlines that one of the appealing sides of BlackRock's proposal was the mechanisms proposed by BlackRock to prevent sensitive information from flowing to other parts of the corporation. This was considered a strength vis á vis the other bidders.

As we have not been informed about the identity of the remaining bidders, it is not possible for us to assess whether the same risks would apply to them. If, for instance, we are talking about a stand-alone think tank or consultancy, the same safeguards may not be needed.

3. Does the Commission have the necessary means to monitor the effectiveness of the measures aimed at preventing conflicts of interest?

The Commission highlights periodic testing and the right to require an audit of the performance.

We have asked the Commission for any document on the case that it would be prepared to make public. None of the documents received give details about the measures applied by BlackRock. It is therefore impossible to comment on the effectiveness of the measures, nor if periodic testing or the right to require an audit are sufficient measures to ensure that sensitive information does not flow to other parts of the BlackRock corporation. We would note, though, that the performing group is an integral part of BlackRock Investment, and presumably sit door-to-door with analysts and traders who could benefit from the information acquired when preparing the report.

According to the contract and the Tender Specifications, BlackRock is to gather comprehensive evidence about banks' strategies on ESG and in particular their ways of assessing risks. Presumably they will be able to access information that would otherwise

have been kept confidential, in that they are developing proposals for the European Commission – a capacity that will surely open doors that would otherwise have been kept closed.

4. Is it the Commission's understanding that BlackRock's Financial Markets Advisory (FMA), which is the team to carry out the contract, and BlackRock Investment Management, have a shared financial interest?

We are a little puzzled by the wording of this question. The contract was awarded to BlackRock Investment Management, and there seems to be no reason to distinguish between the two in this manner. This is confirmed by the Commission, which states that BlackRock's Financial Markets Advisory is an "integral part of BlackRock Investment Management". It follows that BlackRock's Financial Markets Advisory shares financial interests with BlackRock Investment Management.

The Commission goes on to explain why, in their view, the question of financial interest is immaterial altogether. According to the Commission, the "nature and context of the study" makes it unnecessary to consider whether a financial interest constitutes an impediment. We strongly disagree.

i. The nature of the study

The Commission's argument seems to be that since the contract involves a large amount of technical and analytical work, concerns over conflict of interest or professional conflicting interests are misplaced. That is not how we read the Tender Specifications (an integral part of the contract). We would like to highlight the following excerpt:

"The purpose of the study is to provide the Commission with a thorough analysis with regard to the following objectives: 1) the incorporation of ESG risks into EU banks' risk management; 2) the integration of ESG risks into prudential supervision; and 3) the integration of ESG objectives into banks' business strategies and investment policies.

For each of the three objectives the study should A) provide a comprehensive overview of the state-of-play at EU level and, where relevant, at global level; and B) **identify best practices/principles** as regards the arrangements, processes, tools, and strategies to achieve them.

The outcomes of **the study will feed inter alia into the workstream for the implementation of the Commission Action Plan on Sustainable Finance, in particular action 8, and in the EBA's work related to the CRD mandate** mentioned above" (emphasis added).

There is no doubt that the contract will indeed require technical work, but when it comes to identifying "best practices/principles", the discussion will inevitably be dependent on the views and interests of the analyst. What is 'best' depends on a plethora of criteria, and BlackRock seems to have ample space to pick them.

We believe that BlackRock comes to the table with a pre-determined view on these matters. BlackRock is a member of several industry driven fora that have argued for a specific

approach to the integration of ESG factors into prudential banking regulation. For instance, some have argued against the application of capital requirements on investments in fossil fuels as there is insufficient data to justify this" (AFME). Furthermore, some have uttered deep skepticism of the principles behind the Taxonomy regulation, and did their best to influence events in the run-up to the crucial votes. Finally, one lobbying association, which counts BlackRock as a corporate member, has argued against the integration of ESG factors into the rules on investment funds – the very exercise that BlackRock is to explore in the area of banking regulation. This is all well in line with the economic interests of the members of the organisations in question.

We acknowledge that it is not the role of the European Ombudsman to assess the validity of one or other approach. But we do believe it is the Ombudsman's role to consider questions of conflicts of interest (or professional conflicting interest) that may negatively affect the advice given to the Commission on future policy and lawmaking. If a contractor appears to have a direct economic stake in the matter, there is a strong risk that it will have a bearing on the final product.

And we do believe that is what is at stake here. When explaining the 'nature of the study', the Commission states that "the contract does not require BlackRock Investment Management to provide advice to the Commission on future policy". But the tender specifications say otherwise. That is exactly what the report is supposed to deliver, in that it is supposed to feed "into the work stream for the implementation of the Commission Action Plan on Sustainable Finance," as explained in the Tender Specifications.

ii. Context of the study

We have made our point on this question in our letter sent 14 July 2020.

We are aware that the Commission has retrieved advice from many sources on its Action Plan for Sustainable Finance. But only BlackRock has been asked to perform a major investigation on integration of ESG factors into banking regulation. Contributions to a consultation is a minor piece in the puzzle, in comparison, and in depth work done on other topics is not relevant here.

5. The contract requires BlackRock Investment Management to take account of the work of 12 organisations working on sustainable finance. BlackRock is a member of two of these organisations, which are membership-based organised, namely the Financial Stability Board's Task Force on Climate-related Financial Disclosure (TCFD) and IIF's Sustainable Finance Working Group (SFWG). In light of Recital 104 of the Financial Regulation8, does the Commission have concerns as regards BlackRock Investment Management's impartiality regarding this part of the study? If not, why not?

We find these questions very important. Following up on our comments to the Commission's reply to question 1 above, the reply to this question is another clear example of a careless approach to 'professional conflicting interest' from the Commission. According to the Financial Regulation and even according to the narrower approach in the Commission's Vademecum, asking an 'operator' to "evaluate a project in which it has participated" leads to a professional conflicting interest.

That is downplayed by the Commission in the reply, but not successfully. They consider BlackRock as but one member of the two groups mentioned, belittling its involvement.

To assess the level of involvement, in the absence of evidence on the internal dynamics of the two groups, the best indicator is to see whether BlackRock appears prominently in the external communication of the TCFD and the IIF's SFWG, and to explore if BlackRock itself makes an effort of promoting the ideas developed in the two fora.

Looking at the way BlackRock has used the formulas developed by the two industry led initiatives, we find BlackRock in a key position inside the groups, and we find BlackRock to be very outspoken about the merits of the proposals developed in those contexts.

For instance, when the IIF's SFWG announced its own proposal on a taxonomy of sustainable investments, the CEO of BlackRock Larry Fink was one of only two industry representatives quoted in the press release.

In an article written by Barbara Novick of BlackRock Inc. on 'a common language for sustainable investing', she underlines that BlackRock supports "the overall recommendations contained in a recent Report of the Institute of International Finance's (IIF) Sustainable Finance Working Group." A main point of that same article is to support making the framework developed by the TCFD for ESG disclosure reporting the global standard.

Having established the allegiance of BlackRock to the main proposals that have come out of the two industry fora, it may be worthwhile making a note of the role that the IIF's SFWG played in the recent debate in the European Union about a taxonomy of sustainable investments. Here, the IIF weighed in to promote a different formula than the one adopted, one that would be 'flexible' and market based, and one that should merely feed into a broader global process of harmonization.

It is risky, in our view, to hire BlackRock for a job where at least two industry led initiatives to which BlackRock has contributed and to which the corporation remains committed, are to be considered when preparing the report. We can hardly expect to see a critical review of the two complementary frameworks from a corporation who has voice clear support for both.

6. Did the Commission consider the motives that BlackRock Investment Management might have had to win the contract?

The inspection report confirms our suspicion that the Commission did not investigate BlackRock's professional conflicting interest. When compared to earlier information from the Commission, including the letters sent to the complainants, nothing new has surfaced to suggest that the Commission scrutinized or discussed in depth the 'professional conflicting interest' that stem from BlackRock's financial interests. The Commission claims to take such questions very seriously, but there is no indication in the text, or in the list of documents that suggest that the considerations over 'professional conflicting interests' were considered in the way required under the Financial Regulation.

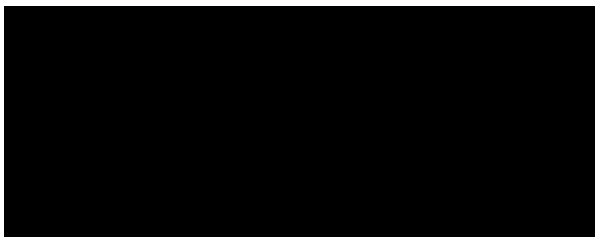
It is not the first time we see this approach from the Commission. To mention but a few examples:

* In October 2014 DG TAXUD awarded approx. €7 million to PWC, Deloitte and EY for management consultancy services “to carry out studies and comparative analyses in various tax and customs areas”, more specifically on tax avoidance. Given the track record of these companies in the area of taxation, and their role as high profile consultants of many companies seeking to avoid taxation, this is problematic.

* In a similar vein, the Commission contracted consultancy group Copenhagen Economics to do crucial research related to the pricing of medicine, notwithstanding the considerable work that same group has done for the pharmaceutical industry over the years.

In some corners of the European Commission, it seems there is little interest in giving ‘professional conflicting interest’ the attention it deserves. The risk is that the very industry groups that have a financial stake in a given legislative initiative, are allowed to set the agenda in the beginning. We believe the BlackRock case is a good opportunity to highlight these risks and to find a lasting solution to them.

Yours sincerely,



On behalf of Change Finance