

Reply of the European Commission to a recommendation and two suggestions for improvements made by the European Ombudsman in her closing decision to Complaint by MEP [REDACTED], ref. 1777/2020/KR

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 10 October 2019, the European Commission launched a call for expression of interest, with a view to selecting a total of 28 members of the High-Level Forum (HLF) on Capital Markets Union (CMU). The HLF's task consisted of proposing targeted policy recommendations for possible future actions in the area of CMU, to ensure that citizens and businesses can access capital markets across the EU on equal terms and irrespective of their geographical location.

The call for expression of interest stipulated the selection criteria taken into account in the assessment of applications and additional requirements successful candidates needed to meet. Individuals could be appointed either in a personal capacity (Type A members), acting independently and in the public interest, or to represent a common interest (Type B members). The selection procedure aimed at ensuring, as far as possible, a high level of expertise, a balanced representation of relevant know-how and areas of interest, as well as geographical balance and gender balance, while taking into account the specific tasks of the group, the type of expertise required, and the relevance of the applications received. The selection procedure did not indicate that a particular composition was sought in terms of Type A or Type B members. Moreover, nine public entities other than Member States' authorities were appointed as observers in the HLF; their representatives were permitted to take part in the discussions of the group and provide expertise.

II. EUROPEAN OMBUDSMAN'S CLOSING DECISION

Following a complaint submitted to the European Ombudsman, the latter investigated how the European Commission decided on the composition of the High Level Forum on the EU Capital Markets Union and how it handled alleged conflicts of interest of some of the High Level Forum's members.

The Ombudsman issued the following **recommendation** in accordance with Article 3(6) of the Statute of the European Ombudsman:

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.

In addition, the Ombudsman considered it useful to make the following **suggestions** for improvement to the Commission:

1. The Commission should ensure that the types of an expert group's members are specified in the expert group's 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.

III. THE REPLY OF THE EUROPEAN COMMISSION

The Commission takes note of the Ombudsman's conclusions.

The Commission is fully determined to undertake all necessary measures, including in calls for expression of interest, that seek to prevent or adequately mitigate possible conflicts of interest.

In this particular case, practical measures were taken to mitigate the risk posed by conflicts of interest. Those measures were sufficient to ensure a fair representation of all experts' views through open and transparent discussions in the group, as well as a diverse composition in terms of interests represented. The Chair of the Forum and the sub-chairs of the sub-groups were able to effectively steer discussions to ensure that all members' views were taken into account. In addition, the minutes of these discussions were made public, ensuring the openness, inclusivity and transparency of the Forum's discussions.

Furthermore, the Commission notes that in the Forum's decision-making process - the views of all experts including those that were in a minority were equally taken into account, notwithstanding a number of experts with common interests. The Commission notes that in the Forum's discussions, consideration was given to views irrespective of the number of members defending those views, as the Chairs (and sub-chairs) gave equal opportunity to all members to be heard at meetings and decision-making was based on consensus.

A. AS REGARDS THE RECOMMENDATION THAT THE COMMISSION SHOULD DILIGENTLY APPLY ITS RULES REGARDING CONFLICTS OF INTEREST OF EXPERT GROUP MEMBERS

The Commission agrees on the need to fully comply with the applicable rules regarding conflicts of interest of expert group members.

The Commission has taken note of the Ombudsman's finding that in the case of five Type A members it did not manage the potential risk of conflicts of interest according to its own rules, but instead relied on other risk mitigation measures. The Commission would like to reiterate that it had put in place a number of effective safeguards that ensured that the ultimate result of the High Level Forum's work was well-balanced and objective. These included, for instance and as noted above, the presence of an impartial Chair and sub-chairs who could steer and effectively moderate the process, the active participation in discussions of representatives of European regulators, supervisors and institutions with observer-status, and a decision-making process that was based on consensus rather than on majority-voting.

The Ombudsman further considered that the split between the two types of Forum membership deviated significantly from the balance that the Commission claimed it struck, and had made public. The Commission would like to recall 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. Moreover, the Commission sought to establish, to the extent possible, a good geographical balance and gender balance amongst group members.¹ The information on the members of the High Level Forum that was made public included the declarations of interest of the Type A members and thus provided an accurate picture of the group composition, providing for a more granular view than a categorisation per type of membership. It should also be kept in mind that through their application as Type A members, the experts concerned formally committed to acting independently and in the public interest. The Commission is not aware of any allegations that individuals did not comply with this obligation.

B. AS REGARDS THE ADDITIONAL SUGGESTIONS

The Ombudsman has made two additional suggestions:

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

The Commission notes that information on membership is already publicly available for all groups, including the High-Level Forum, on the Register of Commission Expert Groups and Other Similar Entities.² In particular, the Register provides for a complete list of members and observers, distinguishing them per type, and including valuable information such as the gender and nationality of individual experts, as well as the interests represented by stakeholders, including Type B members. In light of this, the Commission is of the opinion that transparency on groups' composition is already adequately ensured.

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.

In this particular case, it should be kept in mind that the recommendations issued by the High Level Forum provided an input to the Commission's Action Plan on Capital Markets Union. This Action Plan, adopted on 24 September 2020, 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. Consequently, making public the declarations of interests for as long as any such proposals are under consideration by the co-legislators would imply that those declarations would remain in the public domain for an extended period of time, which does not seem proportionate. In general terms, the Commission considers that a fair balance needs to be struck between the public interest to have access to the declarations of interest, on the one hand, and the right to privacy and data protection of the individuals concerned, on the other hand. The existing provisions³ indicating

¹ https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/191010-cmu-high-level-forum-call-interest_en.pdf

² <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3692>

³ C(2016) 3301, Article 11.6.

that declarations of interests are publicly available on the Register as long as the experts in question operate as Type A members of an expert group or sub-group appear to be balanced.

For the Commission
Johannes Hahn
Member of the Commission

