European Ombudsman

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European Ombudsman

Decision

of the European Ombudsman in joint inquiry 853/2020/KR on the European Commission's decision to award a contract to BlackRock Investment Management to carry out a study on integrating environmental, social and governance (ESG) objectives into EU banking rules

The case concerns the European Commission's decision to award to BlackRock Investment Management a contract to carry out a study on integrating environmental, social and governance (ESG) objectives into EU banking rules. The Ombudsman opened an inquiry after receiving complaints from MEPs and a coalition of civil society organisations. The inquiry assessed how the Commission evaluated the company's offer in the context of the call for tenders for carrying out the study.

The Ombudsman found that the company's offer gave rise to concerns. First, if a bidder has a direct or indirect financial interest in developments in a market, because it invests in that market, or manages investments in that market, there is a clear risk that those interests may influence the outcome of its work in its own favour. This applies to the company in question. Second, because of the weighting applied by the Commission in its evaluation, the low price the company offered optimised its chances of securing the contract. Winning the contract may enable the company to gain insights and assert influence over a growing investment area of major and increasing relevance to its clients and therefore to the company itself.

The Ombudsman agrees that there are legitimate concerns around the risk of conflicts of interest that could negatively impact the performance of the contract as the company manifestly has an interest in the development of future EU regulation that will impact on itself and on its clients. She concluded that the Commission should have been more rigorous, and brought a wider perspective to bear, as it moved to verify, in compliance with the rules, that the company was not subject to a conflict of interest that may negatively affect the company's ability to execute the contract. However, not doing so does not meet the threshold of maladministration, given the limitations of EU rules on awarding contracts in such situations on the Commission staff awarding the contract.

The Ombudsman suggests that the Commission updates its guidelines for public procurement procedures for policy-related service contracts, giving clarity to staff as to when to exclude bidders due to conflicts of interest that may negatively affect the performance of the contract. The Ombudsman also suggests the Commission reflect on whether a specific update to the applicable rules is also required to make them more relevant to the EU's current policy

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ambitions. The EU is planning a period of unprecedented levels of spending and investment, which will necessarily involve significant linkages with the private sector.

This Decision will also be forwarded to EU legislators. It is a matter for the legislators to agree the legal underpinning of the 'green transition' including the appropriate manner in which its development and rollout is influenced.

Background to the complaint

1. The European Commission is developing tools and mechanisms to integrate environmental, social and governance (ESG) factors into the EU's banking prudential (risk) framework and into banks' business strategies and investment policies.

2. This work follows up on a resolution of the European Parliament which called for a project to develop methodologies that could be used by supervisors to evaluate and measure environmental risks to which banks may be exposed, including risks related to the depreciation of assets due to changes in the regulatory framework.[1]

3. In this context, on 30 July 2019 the Commission issued an invitation to tenders for a study. The purpose of the study was to outline the current situation vis a vis such risks and to identify the challenges in dealing with this issue generally. The study is a first step in the development of future tools and mechanisms, on which the Commission is consulting more widely. (See Annex 1 for details on the purpose of the study, and the contractor's tasks).

4. Before the deadline on 9 October 2019 the Commission received nine offers, including one from BlackRock Investment Management (UK) Limited[2] (hereinafter 'BlackRock Investment Management' or 'the company'). BlackRock Investment Management is part of BlackRock Inc., which is the world's largest asset manager, with **$7.4 trillion in assets** under management. The company was the only large investment manager in the pool of bidders.

5. Between 11 October 2019 and the end of November 2019, the Commission assessed the nine offers. Between 28 November 2019 and 16 December 2019, the Commission clarified certain aspects related to the company's offer. On 30 January 2020, the Commission finalised its evaluation of the offers. **On 2 March 2020, the Commission and BlackRock Investment Management signed the contract.** On 1 April 2020, the Commission made public its decision to the company the contract. (See Annex 2 for more details on the time-line.)

6. On 17 April 2020, the complainants[3] wrote to the Commission expressing concerns about its decision to award the contract for this study to BlackRock Investment Management. As the Commission did not reply within a month, the complainants turned to the Ombudsman, who opened an inquiry into the Commission's failure to reply.

[1] Resolution of the European Parliament of 29 May 2018 on sustainable finance (reference: 2018/2007(INI). See: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0215_EN.pdf.
[2] BlackRock Investment Management (UK) Limited provides investment management services, including portfolio management, financial planning, and advisory solutions.
[3] A group of Members of the European Parliament (MEPs).

The inquiry

7. On 5 June 2020, the Commission replied to the complainants and subsequently published its detailed response to the points raised.[4]

8. On 11 June, the complainants submitted comments to the Ombudsman on the Commission's reply, calling on her to examine the substance of their complaint. The Ombudsman assessed the substance and decided there were grounds to pursue the inquiry.

9. Two similar complaints were subsequently added to the inquiry.[5]

10. The inquiry examines the decision to award the contract to BlackRock and how the Commission evaluated the company's bid. Specifically, the inquiry focuses on whether the Commission dealt with the risk of conflicts of interest adequately when it awarded the contract in this case.

11. The Ombudsman's inquiry team inspected documents in the Commission's file and held a meeting with representatives of the Commission to discuss the issues arising from the inspection. The complainants commented on the non-confidential version[6] of the report that was drawn up following that meeting.[7]

Arguments presented to the Ombudsman

By the Commission[8]

Conflicts of interest assessment

12. The Financial Regulation[9] sets out EU law for how public procurement procedures financed by the EU budget are conducted. The internal Commission document the 'vade mecum on public procurement' provides Commission staff with guidance in this area. 'Vade mecum' is a Latin term meaning guide.

13. The Commission referred to a number of provisions in the Financial Regulation as relevant to this inquiry (see Annex 3). Among these provisions is the requirement to verify that a bidder[10] "*is not subject to conflicts of interest which may negatively affect the performance of the contract*".[11] The Commission said that, before awarding the contract in question, it had verified that the company was not subject to any conflict of interest that may negatively affect the performance of the contract.

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[4] See: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200605-letter-evp-dombrovskis-mep-careme_en.pdf.
[5] One from two other MEPs, and one from a civil society group.
[6] See: https://www.ombudsman.europa.eu/en/report/en/132525.
[7] See: https://www.ombudsman.europa.eu/en/correspondence/en/135316.
[8] Annex 2 contains an overview of the administrative procedure that the Commission followed to award the contract.
[9] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1046.
[10] The Financial Regulation speaks of 'tenderers'. The European Ombudsman prefers to use the synonym 'bidder'.
[11] In accordance with Article 167(1)(c) of the Financial Regulation.

14. In this context, the Commission said that the Directorate-General responsible, namely 'Financial Stability, Financial Services and Capital Markets Union' (**DG FISMA**), as well as the evaluation committee[12] for the tendering procedure, were well aware of the company's business model and of its operations.

15. The Commission noted two mitigating factors. First, the company makes investments on behalf of others. Second, the company's investment portfolio is substantial and covers many diverse sectors, including investments in renewables as well as in fossil fuels, for example.

16. The Commission pointed out that it had also reflected on the fact that the company is a member of two organisations whose work should be examined under the contract.[13] This, the Commission argued, was not of concern, because the influence that the company has over these work streams is perceived to be limited due to the membership-based nature of these organisations.

17. Moreover, the Commission described the study as being "*to a large extent of a technical and analytical nature*", consisting of stocktaking and evidence gathering.[14] The Commission also said that the study produced will be only one of many reports, consultations and studies carried out by the Commission in the area of sustainable finance.[15] Because of this, and because of the nature of the tasks to be undertaken, the Commission concluded that there were no unmanageable risks in terms of the company's investment activities that could negatively affect its work for the study.

18. The Commission indicated that, under the terms of the contract, the company "*has very little discretion as regards how it summarises and presents its findings*". Also, it said that the contract "*does not require BlackRock Investment Management to provide advice to the Commission on future policy*".

19. The Commission concluded that the company i. was not excluded from participating in award procedures based on applicable criteria[16], ii. satisfied the selection criteria and iii. had presented an offer that had the best price/quality ratio compared to the other bids.[17]

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[12] A committee of five members from three different Commission departments.

[13] The contract requires the successful bidder to take account of the work of 12 organisations working on sustainable finance. The two of which BlackRock is a member are the Financial Stability Board's Task Force on Climate-related Financial Disclosure (TCFD) and the Sustainable Finance Working Group (SFWG) of the Institute for International Finance (IIF).

[14] The company also gets the opportunity to propose which other stakeholders will be involved, as it will be in charge of organising two stakeholder workshops.

[15] Such as reports from the 'High-level Expert Group on sustainable finance' (HLEG) and by a Technical expert group on sustainable finance (TEG). These Commission expert groups were established to provide advice on: (i) general considerations for including sustainability and ESG-factors in the financial sector, and (ii) including ESG-factors in specific areas/market segments. Another example is the report on an EU taxonomy that was adopted on 9 March 2020: https://ec.europa.eu/info/files/200309-sustainable-finance-teg-final-report-taxonomy_en. The Commission has also consulted broadly on the issue of sustainable finance.

[16] As set out in Article 136 of the Financial Regulation.

[17] In accordance with the award criteria, with the technical quality of the offers accounting for 70% of the overall score and the price accounting for 30% of the overall score.

Low price

20. According to the Commission's initial assessment, BlackRock Investment Management's price appeared to be *"abnormally low in relation with the volume of the market set in the tender specifications"*[18]. The Commission therefore asked it to clarify certain elements of its offer, as it is required to do.[19]

21. In this respect, the Commission asked the company to explain its financial offer and whether it benefited from exceptionally favourable conditions to provide the services, including, for example through the receipt of state aid. The Commission furthermore asked the company to demonstrate that it complied with applicable environmental, social and labour laws. Following its reply, the Commission also asked the company to demonstrate that the price offered was consistent with others it had offered to public sector clients.

Mitigating measures to prevent conflicts of interest

22. The Commission noted that assessing conflicts of interest is also important during the implementation phase of the contract. In this respect, it said that the company is required to take all the necessary measures to prevent any conflicts of interest. Should one arise during the implementation phase, the company must immediately take action to rectify the situation and notify the Commission in writing as soon as possible. If these terms were to be breached, the contract could be terminated.

23. The Commission pointed out that the company's offer had addressed how it would comply with its obligation to prevent conflicts of interest through an information barrier[20], between the advisory arm of the company, **Blackrock Financial Markets Advisory**, and the rest of the business, that ensures: *"physical segregation of the project activities from BlackRock's Investments group and that information related to the study does not flow to other parts of BlackRock's business"*[21].This was considered by the Commission as a strength of this company's bid, as none of the other offers indicated in as much detail how the bidders would guard against conflicts of interest during the implementation of the contract.

24. The Commission noted that the effectiveness of BlackRock Investment Management's information barrier is subject to periodic testing by the company's own Legal & Compliance department, and by internal and external auditors. If required, the contract furthermore would entitle the Commission, as well as the European Anti-Fraud Office (OLAF) to check, or require an audit on the performance of the contract.[22]

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[18] BlackRock Investment Management offered to do the contract for €280,000, whereas the initial estimated total value of the contract was €550,000.
[19] In accordance with Annex 1, point 23 of the Financial Regulation.
[20] https://www.blackrock.com/financial-markets-advisory/about-fma#information-barriers.
[21] See: https://ec.europa.eu/info/sites/info/files/200612-information-awarding-contract_0.pdf.
[22] In accordance with Article II.24.1.

By the complainants

Conflicts of interest assessment

25. The complainants argued that the contract should not have been awarded to the company in question, because it is subject to conflicts of interest which may negatively affect the performance of the contract.

26. First, the complainants argued that the company manages substantial investments in large fossil fuel companies and systemically important banks. As both sectors could be impacted by new rules on ESG issues at EU-level, the company may seek to influence policy-making in a manner that favours its investment management business. The contract could lend itself to this, because the contractor has, as the Commission admitted, some discretion as regards what evidence it takes into account, and the best practices it identifies (see point 18). Given what is required under the tender specifications[23], this is not just hypothetical, but likely to happen, they said.[24]

27. The complainants also argued that the company has predetermined views on issues related to the study, as BlackRock is a member of several lobby groups that have argued for a specific approach to the integration of ESG factors into EU rules for banks.[25]

28. The complainants suggested caution as regards the mitigating factors that the Commission identified. They said that even if the company acts only as a manager of its clients' investments, the conflict of interest still exists because of the mutual financial interest of company and clients. If investments do well, both benefit.

29. As to the diverse range of investments that the company has under management, including in renewables, the complainants said they were well aware that BlackRock had, in their view, recently sought to enhance its credentials as a sustainable investment manager.[26] They referred however to

[23] For the tender specifications, see: https://etendering.ted.europa.eu/cft/cft-document.html?docId=57784.
[24] Specifically, the complainants referred to the following from the tender specifications: "*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 [European Banking Authority's] work related to the CRD mandate [..]*". Action 8 of the Action Plan requires the Commission to "explore the feasibility of the inclusion of risks associated with climate and other environmental factors in institutions' risk management *policies*". The Commission's 'Action Plan on Sustainable Finance' was launched in response to the policy recommendations of the High Level Expert Group on sustainable finance (HLEG), see: https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report_en.pdf. BlackRock contributed at the time to the work of to the HLEG, see: https://bit.ly/3jkmloC.
[25] For example, BlackRock is a corporate member of the European Fund and Asset Management Association, that published a response to the ESMA Consultation Paper on integrating sustainability risks and factors in legislation relevant for fund managers, see: http://www.efama.org/Publications/Public/AIFMD/19-4018.pdf. BlackRock is also a member of the Association for Financial Markets in Europe (AFME), an interest representative for the financial sector that commented publicly on issues related to the study on ESG risks and objectives, see: https://www.afme.eu/Portals/0/DispatchFeaturedImages/20200226%20State%20of%20Play%20-%20Sustainable%20Finance%20-%20Final%20V2.pdf. BlackRock is also listed as a corporate member of the European Fund and Asset Management Association, that published a response to the ESMA Consultation Paper on integrating sustainability risks and factors in legislation relevant for fund managers, see: http://www.efama.org/Publications/Public/AIFMD/19-4018.pdf.
[26] See for example BlackRock's annual letter of 14 January 2020, titled "A Fundamental Reshaping of Finance": https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

analysis that claims that BlackRock manages 17 billion US dollars' worth of investments in coal plant developers, which, together with other investments in fossil fuels, make its investments in renewables, they claim, minor at this point in comparison.[27]

30. Second, the complainants referred to a professional conflicting interest, as the company is a member of two organisations whose work should be examined under the contract (see footnote 13). This, they argued, amounts to a professional conflicting issue as defined under the Financial Regulation[28] (see Annex 3), and should have been a disqualifying factor. The complainants note that the company has commented publicly on the merits of the proposals developed in the context of these two membership-based organisations. For instance, when the *Sustainable Finance Working Group of the Institute for International Finance* announced its own proposal on a taxonomy of sustainable investments, the CEO of BlackRock was one of only two industry representatives quoted in the press release.

31. Last, the complainants pointed out that while the Commission might gather input from various sources to inform its policy-making in the area of the study, there is a difference between being contracted to conduct an in-depth study, as in this case, and simply submitting one of many contributions to a broader Commission consultation (see also footnote 15).

Low price

32. The complainants said that they were also suspicious at the fact that a very high-quality bid, as the Commission itself deemed the successful bid to be, would be made at only 50% of the threshold price (see footnote 18).

Mitigating measures to prevent conflicts of interest

33. The complainants noted that the contract and the tender specifications specify that comprehensive evidence about banks' strategies on ESG, and in particular the manner in which they assess risk, should be gathered. The complainants say that they therefore presume that the contract will accordingly provide the company with access to information unavailable to others.

34. As regards the 'information barrier' that the company says it has in place[29], the complainants questioned whether the Commission had the means to monitor this properly.

35. The complainants also referred to public commentary[30] on another, recent contract between the company's consultancy arm that also carries out the

[27] See: https://urgewald.org/medien/blackrocks-new-policy-affects-less-20-coal-industry.
[28] See Recital 104 of the Financial Regulation
[29] To avoid information that its consultancy arm gets access to as a result of its work on the study being shared with the investment arm of the company.
[30] See: https://ourfinancialsecurity.org/2020/05/blog-can-blackrock-benefit-from-inside-information-from-fed-facilities/.

contract for the Commission, **BlackRock Financial Markets Advisory**, and a public authority, namely the Federal Reserve Bank of New York.[31] This contract mentions that "*certain BlackRock senior executives may sit atop of the information barrier between the [BlackRock's Financial Markets Advisory] Group and the rest of BlackRock. Because of the scope of their job responsibilities, these persons may have access to Confidential Information on one side of a wall while carrying out duties on the other side of the wall. BlackRock's Information Barrier Policies and Procedures require persons sitting atop of the wall to exercise particular caution to avoid the improper dissemination or misuse of confidential information in accordance with BlackRock's Information Barrier Policies and Procedures.*" The complainants warned that, based on the information that is publicly available, the possibility cannot be ruled out that BlackRock executives might also be sitting atop of the information barrier applicable to the contract with the Commission. If so, these BlackRock executives could according to the complainants be tempted to make use of contract-related, confidential information in investment management decisions.

The Ombudsman's assessment

Conflict of interest assessment

36. The Ombudsman fully understands that, to do its job well in this area, the Commission relies in part on the resources and expertise from the industry that it is also involved in regulating. Commissioner Dombrovskis has stated that it is his "*strong conviction that the green transition cannot happen without the full participation of the private sector, as public investments will simply not be enough*"[32]. It is therefore important that the Commission consults widely on, and gathers all the relevant information for, the issues on which it prepares policy proposals.

37. The issue in this case is whether it was appropriate for the Commission to select a company to conduct a study, the content of which will feed into policy that will determine how some of that company's business interests will be supervised and regulated.

38. While this was **not the first contract awarded to the company by the Commission**[33], and its value was relatively low, the Ombudsman believes it highlights the larger challenge of how the Commission can encourage the participation of the global private sector in certain policy areas, while guarding against any possible undue influence of that same sector.

39. In the context of public procurement for policy-related service contracts, the Commission must apply the rules as regards conflicts of interest that may affect

[31] BlackRock Financial Management, Inc. was selected by the Federal Reserve Bank of New York. The agreement sets out details as regards the "information barrier and conflicts of interest mitigating procedures', see in particular Article 18.4 and Exhibit G: https://www.newyorkfed.org/medialibrary/media/markets/SMCCF_Investment_Management_Agreement.pdf.

[32] https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200605-letter-evp-dombrovskis-mep-careme_en.pdf.

[33] See: https://ted.europa.eu/udl?uri=TED:NOTICE:164939-2017:TEXT:EN:HTML.

the performance of the contract fairly. All bidders that are not excluded from participating in award procedures and satisfy the selection criteria should be treated equally.

40. The Financial Regulation sets out that a contract shall be awarded provided that the contracting authority has verified that the bidder is not subject to conflicts of interest which may negatively affect the performance of the contract.[34] When doing this assessment, the Commission can exclude a bidder from a procurement procedure only if the situation of conflict of interest to which it refers is real and not hypothetical[35]. As the European Courts have ruled, the exclusion of a bidder where there is a conflict of interest is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of bidders and transparency[36].

41. The Ombudsman notes that in this case many, if not all, bidders might have had strategic considerations when bidding for the study. All bidders might also have had a 'concrete' interest in the outcome of study, if only that their analysis in the study is positively received by the Commission and other stakeholders.

42. The Ombudsman however notes that there is a difference between 1) the legitimate interests that bidders may have in enhancing their credentials as recognised experts in an area - through public sector work - in order to secure future contracts in that area, and 2) the interest that a bidder may have in influencing *developments* in a market on which the outcome of the public contract may have an impact. If a bidder has a direct or indirect financial interest in developments in a market, because it invests in that market, or manages investments in that market, there is a clear risk that its work may be influenced by those interests.

43. Changes in the EU's financial regulatory framework as regards environmental, social and governance issues are likely to have an impact on the ability of relevant market actors to achieve a good investment return on the assets they manage. In this case, the study's aim is to inform how the EU may adapt its regulatory framework, with a view to ensuring ESG goals are taken into greater account in financial policy (see footnotes 23 and 24). This, in the Ombudsman's view, could impact on the core business of companies such as BlackRock Investment Management. The company might furthermore benefit from insights gained into the EU regulatory system and from increasing its network of contacts that such a study would help to facilitate.

44. The Ombudsman notes that the Commission was aware of the company's business model and of its operations (points 14 and 15).

45. The interests of the company are served of course if the assets that it manages on behalf of its clients, or assets that it owns itself, increase in value.

46. The very fact of having a financial interest related to the market on which the outcome of the study may have an impact, could be sufficient to argue that

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[34] In accordance with Article 167 of the Financial Regulation.
[35] See judgment of 18 April 2007, *Deloitte Business Advisory* v *Commission*, T-195/05, paragraph 67: http://curia.europa.eu/juris/document/document.jsf?text=&docid=60915&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12664011.
[36] See judgement of 13 October 2005 , *Intrasoft International* v *Commission*, T-403/12 paragraph 76: http://curia.europa.eu/juris/document/document.jsf?docid=169641&doclang=EN.

there is a risk of a conflict of interest that may negatively affect the performance of the contract that is real, and not merely hypothetical. This is because the Commission needs the study to be carried out independently in order to inform and serve a policy process which must be in the best interests of the Union, and not that of any special interest. The result of the study should also be recognised as legitimate in the eyes of the public, a critical further reason for the avoidance of any perception of a conflict of interest. If the company doing the study is perceived to have a private interest that could be at odds with this, a risk is present.

47. The Ombudsman also notes that the company in question has tried to influence policy-making and regulatory processes in the area of environmental, social and governance objectives for banks.[37] Besides these direct interactions with policy-makers, the Ombudsman notes the company's involvement in industry-led bodies the work of which the successful bidder had to take account of (see point 30). Such lobbying activities are entirely legitimate. However, the fact that they exist indicates that the company has an interest in influencing policy developments in this area.

48. It is reasonable to assume that the Blackrock Financial Markets Advisory team is aware of the company's public policy preferences.[38]

49. The Ombudsman's understanding of the contract, based on the tender specification, is that it is designed to feed into policy-making and regulatory processes. Its 'technical and analytical' nature does not detract from that or diminish its future relevance. In addition, the Commission notes the high level of interaction between it and the company anticipated during the development of the study. While the Commission notes this in the context of its oversight of the contract, such interaction allows for further opportunities for the company to expand its contacts.

50. It is also important to note that the company has some discretion as regards how it summarises and presents its findings under the contract. This implies a conceivable risk that the company may allow its public policy preferences to influence its actions when "delivering on the terms of a service contract". The Commission argued that there is very little risk of this happening due to the "nature of the contract" which it described as being to a large extent of a technical and analytical nature. The Commission claims that the verification of the nature of the services to be provided is in itself sufficient to determine the existence of a professional conflicting interest. However, the Ombudsman believes that an assessment of any possible professional conflicting interests must be far more rigorous and forensic in cases such as this where a highly influential global company bids for a contract of relatively low commercial value to itself in terms of the price paid.

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[37] For example, the EU Transparency Register includes details of meetings that BlackRock had with the Commission: https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=51436554494-18. Details on meetings with BlackRock organised by DG FISMA, including on information related to ESG objectives, can be found here: https://www.asktheeu.org/en/request/documents_related_to_meetings_be.

[38] For examples, see footnotes 13, 24, 25, 26 and 37.

51. The Ombudsman therefore finds that these issues should have been examined in much greater depth during the conduct of the contract award procedure. Not doing so meant that the decision to award the contract to the company did not provide sufficient guarantees as to the elimination of legitimate doubts as to the risk of conflicts of interest that could negatively impact the performance of the contract, as the rules require.[39] However, not dealing properly with the risk of conflicts of interest does not in this specific case meet the threshold of maladministration due to the limitations of the Financial Regulation. The relevant definition in this rulebook of what constitutes a conflict of interest and the relevant article thereunder, in Recital 104 and Article 167 (see Annex 3), are too vague to be helpful in such a specific situation. The Ombudsman notes the decision to award such contracts under the Financial Regulation is made at a staff level, and not at the political level. In this context, given Commissioner Dombrovskis acknowledgment of the need for significant private sector input in the EU's green agenda, it does not appear that to date attempts have been made to explore the implications of this vis a vis the awarding of contracts. There is a major commercial interest for companies not just to secure contracts, but rather or also to gain influence over the EU institutions as they move to legislate in support of the green transition.

52. The Ombudsman is also of the view that the Commission's internal guidance document, the 'vade mecum on public procurement', falls seriously short on providing sufficient clarity to Commission staff on the issue of assessing conflicts of interest that could negatively affect a bidder's performance on the contract, particularly in the context of policy-related service contracts.

Low price

53. BlackRock Investment Management appeared to commit high quality and expensive resources to the bid. At the same time it proposed a financial offer of just over half of the initial estimated maximum value of the contract.

54. The rules and procedures laid down in the Financial Regulation compel the Commission staff to obtain, in writing, details on the price or costs which the bidder considers relevant and to give the bidder the opportunity to present its observations (see footnote 19 and point 21). The Ombudsman is conscious that the individuals responsible for conducting the procedure sought to act according to these provisions of the law.

55. Nonetheless, it is questionable as to whether the Financial Regulation would allow the right questions to be asked in this case. The Commission did not engage with the issues that go to the heart of the complaints through the appropriate interrogation of BlackRock Investment Management's bid and the possibility of a conflict of interest. It is self-evident that questions posed to a company of the size, wealth and global influence like BlackRock – it is the largest asset management company in the world - need to be tailored accordingly if an appropriate evaluation of its bid is to be carried out. On the issue of the very low price, for example, the company was asked in line with the Financial Regulation whether it was in receipt of state aid and whether it

[39] See Article 167 (c) of the Financial Regulation.

complied with applicable environmental, social and labour laws (the reason being that the company may have been in a position to undercut its competitors because it was not adhering to the same laws that apply to them). The Commission also asked the company to demonstrate that the price offered was consistent with others it had offered to public sector clients. It is not clear how the answer 'yes' to this question could have reassured the Commission as to whether the abnormally low price, plus the very high quality of the bid, was motivated by the strategic interest of the company to assert influence on developments in the markets in question and to gain insights into the EU regulatory system. On the contrary, the answer provided to it should have given cause for concern.

56. The Ombudsman is of the view that the Commission should have explored other possible risks related to the low price. For example, as noted above, there was a risk that the company was not pursuing the normal commercial objective of making a profit by winning a contract, or even seeking to improve its reputation as an expert in the area although this may have been a factor given its recent interest in the ESG area. Rather, the company may have sought to win this contract because it gave it an opportunity to influence and gain understanding, from the inside, of the Commission's policy-making in areas that affect its interests including its 2020 'pivot' towards ESG.[40]

57. The Commission told the Ombudsman that it is not its role to speculate on the motivation of a company in seeking a contract. The Ombudsman understands the reluctance to risk an unfair procedure through the introduction of what could be seen as subjective questions on motivation. However, the obligation to treat applicants equally does not relieve the Commission either of its obligation critically to examine all factors likely to impact on the execution of a contract, not all of which apply equally to every bidding company.

Mitigating measures to prevent conflicts of interest

58. As regards the 'information barrier' that the company has in place (see footnote 20), the Ombudsman is of the view that the very need for such an information barrier, in itself, indicates that the company is aware of potential conflicts of interest that could negatively affect its performance of the contract.

59. Even if the information barrier was successful in terms of preventing specific information obtained in the context of the contract being used directly to assist the company in its investment decisions, it would not in any way ensure that its staff working on the Commission project would not be influenced by the general strategic interests of the company. It is also possible that staff move between the two arms of the company as part of normal staff mobility.

60. The Ombudsman thus finds it questionable that an information barrier between the consultancy team and the rest of the company would truly mitigate the company's interest in the execution of this study and in the insights gained from conducting it (see also point 48).

[40] https://www.blackrock.com/institutions/en-us/insights/market-pulse/examining-esg-and-sustainability

Conclusion

61. In light of its obligations under the Financial Regulation and the information it had, the Ombudsman finds that the Commission should have been more vigilant in terms of verifying that the company was not subject to a conflict of interest that could negatively affect the performance of the contract. The decision to award the contract to the company did not provide sufficient guarantees to exclude any legitimate doubt as to the risk of conflicts of interest that could negatively impact the performance of the contract. It was questionable for the Commission to conclude that there were no legal grounds to exclude BlackRock Investment Management from the procurement procedure. However, **the Ombudsman feels this case raises issues which are best examined by the EU legislators**.

Suggestions

Based on the inquiry into these complaints, the Ombudsman makes the following suggestions to the European Commission:

1. **The Commission should provide clearer guidelines on possible conflicts of interest to assist its staff dealing with public procurement procedures for policy-related service contracts.**

2. **The Commission should reflect on whether a specific update to the Financial Regulation is needed, to strengthen the provisions on possible conflicts of interest.**

The complainants and the Commission will be informed of this decision.

Emily O'Reilly
European Ombudsman

Strasbourg, 23/11/2020

ANNEX 1 -- Purpose of the study, and tasks of the contractor

In the contract award notice, the Commission described the purpose of the study as "*to provide [..] input to facilitate the achievement of the following objectives:*

> *— integrating environmental, social and governance (ESG) risks into EU banks' risks management processes;*
>
> *— integrating ESG risks into EU prudential supervision;*
>
> *— integrating ESG objectives into EU banks' business strategies and investment policies. [..]*

[BlackRock Investment management] will have to carry out the following tasks:

> *I. identification and stocktaking of best practices/principles for the integration of ESG risks into EU banks' risk management processes;*
>
> *II. identification and stocktaking of best practices/principles for the integration of ESG risks into EU prudential supervision;*
>
> *III. analysis of the impediments to the development of a well-functioning EU market for green finance and sustainable investment and the identification of appropriate instruments and strategies to promote the scaling-up of green finance and of the market for sustainable financial products."*[41]

[41] See: https://ted.europa.eu/udl?uri=TED:NOTICE:165869-2020:TEXT:EN:HTML.

ANNEX 2 -- Time-line

	Actions of the Commission	Actions of BlackRock Investment Management
30/07/2019	The Commission published the invitation to tenders (reference: FISMA/2019/024/D).	
24/09/2019	The evaluation committee is appointed by the responsible authorising officer.	
09/10/2019	'Deadline for submitting offers' The Commission received nine offers.	The company submitted its offer.
11/10/2019	'Opening of tenders' Afterwards, the Resources unit checked the 'Early Detection and Exclusion System' as regards the tenders received.	
21/10/2019	The evaluation committee discussed the offers received, in particular non-exclusion and selection criteria.	
06/11/2019	The evaluation committee assessed minimum requirements and award criteria.	
20/11/2019	The evaluation committee assessed award criteria (final).	
28/11/2019	The authorising officer asked the company to clarify what seems to be an abnormally low price for its offer.	
06/12/2019		The company replied to the request for clarification.
12/12/2019	The authorising officer asked the company for further clarifications as regards the seemingly abnormally low price.	
16/12/2019		The company replied to the request for clarification.
30/01/2020	The evaluation committee finalised the evaluation report.	
06/02/2020	The authorising officer approved the content of the evaluation report.	

	The authorising officer awarded the contract to BlackRock Investment Management.	
02/03/2020	The Commission and BlackRock Investment Management signed the service contract (reference: FISMA/2019/024/D1/OP/ST). The duration of the contract is 12 months.	
13/03/2020	According the EU Transparency Register, the company met the Director General of DG FISMA, to discuss subjects related to "[Capital Markets Union], Sustainability and Fund regulation.	
01/04/2020	The Commission published the award of contract notice.	

ANNEX 3 -- Relevant provisions in the Financial Regulation

The Commission, in the inspection meeting with the inquiry team, highlighted the following provisions of the Financial Regulation[42] as relevant for the inquiry:

Recital 104, which says:

> *"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."*

Article 167 specifying the criteria to be followed during the award of contracts, which includes under (1):

> *"Contracts shall be awarded on the basis of award criteria provided that the contracting authority has verified the following: [..]*
>
> *(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."*

Article 171 on the cancellation of the procurement procedure, which says:

> *"The contracting authority may, before the contract is signed, cancel the procurement procedure without the candidates or tenderers being entitled to claim any compensation.*
>
> *The decision shall be justified and brought to the attention of the candidates or tenderers as soon as possible."*

Annex I on procurement.

[42] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018, see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1046.