

I. BACKGROUND – SUMMARY OF THE FACTS

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

In this context, the Commission launched a call for tenders for a study to collect data on how banks and national supervisors currently deal with ESG risks at EU and global level and to identify principles and best practices in this respect. The study will also analyse the state-of-play of green finance and of the market for responsible/sustainable investment and identify instruments and strategies to promote their scaling-up.

Following this tender, out of nine offers, the Commission chose the offer submitted by BlackRock Investment Management (UK) Limited (“BlackRock”). The evaluation committee found this offer to be technically the best based on the award criteria set out in the tender specifications. It was also the cheapest offer. The Commission signed the contract on 2 March 2020.

II. OMBUDSMAN CLOSING DECISION

Following complaints submitted to the European Ombudsman, the latter investigated the award of the study to BlackRock. It decided to close the complaint ref. 853/2020/KR, by concluding that there was no maladministration by the Commission. The Ombudsman stated that the Commission should nevertheless have been more vigilant in verifying that BlackRock was not subject to a conflict of interest that could negatively affect the performance of the contract. The Ombudsman also found that this case raises issues that should be examined by the EU legislators and made the following suggestions:

- 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.**

III. COMMISSION REPLIES TO OMBUDSMAN SUGGESTIONS

The Commission is pleased that the Ombudsman confirms that also in her view there was no maladministration in awarding the contract in question to BlackRock. As the Commission has maintained, the procurement procedure was conducted in line with the provisions of the Financial Regulation and the guidance to Commission staff in the Commission's internal Vademecum on applying the Financial Regulation with respect to public procurement.

A. AS REGARDS INTERNAL COMMISSION GUIDELINES ON POSSIBLE PROFESSIONAL CONFLICTING INTEREST

Recital 104 of the Financial Regulation refers to the situation where economic operators that might be in a situation of *professional conflicting interest*¹ should not be selected to implement a contract. The same recital refers to two examples, i.e. a company should not evaluate a project in which it has participated, and an auditor should not be in a position to audit accounts it has previously certified. In other words, a tenderer may not be selected in cases where it has already been involved in the precise subject matter of the tender. This is because for any exclusion or non-selection of a tenderer the contracting authority should follow objective criteria and factual elements, in order to abide by the basic principles of non-discrimination, equality of treatment and transparency.

Furthermore, in accordance with point 20.6 of Annex 1 on Procurement of the Financial Regulation, a contracting authority may conclude that an economic operator does not possess the required professional capacity to perform the contract to an appropriate quality standard where it has conflicting interests, which “*may negatively affect its performance*”, and therefore reject the tender.

The Vademecum on public procurement provides guidance to Commission services on the practical application of the provisions of the Financial Regulation within the limits of the Regulation.

Following the suggestion of the European Ombudsman, the Commission is currently reflecting on additional guidance in respect of the practical application of the notion of “professional conflicting interest” as well as the “conflicting interest of the operator”. The assessment of conflict of interest and conflicting professional interests is mainly based on a case by case analysis and requires a certain margin of discretion of the authorising officers to enable capturing the critical elements of each specific case and the economic sectors concerned. Therefore, any additional guidance would need to strike the right balance between allowing efficiency in the application of these notions as well as proportionality and objectivity in the assessment of exclusion of such conflicts. Taking these considerations into account, the Commission is reflecting on possible clarifications relevant to the procedure to follow when a professional conflicting interest may be at stake in a procurement procedure. Such guidance could be provided for instance through a non-exhaustive list of relevant examples.

B. AS REGARDS UPDATING THE FINANCIAL REGULATION

As already mentioned under point A, the Financial Regulation, which includes rules on public procurement closely aligned to those of the public procurement Directives, provides for the non-selection of bidders in case of a professional conflicting interest as well as the notion of “conflicting interest” when implementing a contract.

The contracting authority has to abide by the principles of equal treatment and non-discrimination, principles enshrined in the TFEU. Thus, the exclusion of economic operators

¹ According to the same recital: “*The notion of 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.*”

from tender procedures due to their participation in a specific market in which a tender is launched has to be based on objective criteria and facts that establish the existence of professional conflicting interest, without unnecessarily limiting the number of economic operators that can participate in tender procedures on the basis of subjective considerations.

Following the suggestion of the European Ombudsman in this respect, the Commission is currently reflecting on whether it is necessary to propose to the co-legislators amendments to the Financial Regulation in the current context (such as the obligation for tenderers to disclose conflicting interests). In order to take an informed decision in this respect, it aims to include the matter in a targeted public consultation on the upcoming revision of the Financial Regulation, which it plans to initiate shortly.

For the Commission



Member of the Commission