



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

Date: Wednesday, 15 July 2020

Remote inspection arrangements -- Commission 'Webex' call

Present:

For the European Commission:

Head of unit, DG FISMA

Head of sector, DG FISMA

Head of unit, DG FISMA

Deputy head of unit, DG FISMA

Policy officer, DG FISMA

Head of unit, DG FISMA

Policy officer, DG FISMA

Seconded national expert, DG FISMA

Budget assistant, DG FISMA

Finance and contract assistant, DG FISMA

Co-ordinator for Inter-Institutional Relations, Relations with the European Ombudsman, Secretariat-General

For the European Ombudsman:

Fergal Ó Regan, head of inquiries unit 2

Koen Roovers, case handler

Purpose of the inspection of documents / meeting

The Ombudsman is examining how the Commission assessed the risk of conflicts of interest posed by BlackRock Investment Management's bid, in relation to the specific tasks to be carried out under the study in question.

The inspection and meeting were requested by the Ombudsman to inspect the file on the 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 (reference: FISMA/2019/024/D) and to clarify certain matters with the relevant representatives of the Commission.

Introduction and procedural information

The Ombudsman's inquiry team gave a short presentation as regards the Ombudsman's mandate, as well as the provisions that apply as regards confidentiality when the Ombudsman inspects documents and requests information from the EU's administration.

The inquiry team noted that the Commission would receive a draft of the inspection/meeting report to review. The report will then be sent to the complainants.

Confidential information will be put in a separate annex that will not be shared with the complainants or the public.

Documents inspected

On 14 July 2020, the Commission shared the following confidential documentation, with personal data redacted, in reply to the Ombudsman's request:

- an index containing document references and descriptions, as well as Commission remarks meant to assist the Ombudsman in the inspection;
- a copy of the 'vade mecum on public procurement', a Commission document for internal use containing guidelines for staff when dealing with public procurement procedures;
- a copy of a Commission document for internal use containing guidelines for staff dealing with requests for public access related to procurement and grants;
- a copy of a document on the appointment of the Commission's evaluation committee for the tendering procedure with reference FISMA/2019/024/D;
- a copy of the Commission's record of opening of tenders for FISMA/2019/024/D;
- copies of BlackRock Investment Management's technical and financial offers submitted in the context of tendering procedure with reference FISMA/2019/024/D;
- a copy of the Commission's evaluation report of the offers received in the context of the tendering procedure with reference FISMA/2019/024/D;
- copies of letters exchanged between the Commission and BlackRock Investment Management, including two requests for clarification from the Commission, and two replies from BlackRock Investment Management (the first of which has two attachments);
- copies of the correspondence between the Commission and a Member of the European Parliament;
- a copy of the Commission's award decision;
- a copy of the service contract between the Commission and BlackRock Investment Management.

Publicly available information shared by the Commission included:

- a copy of the Financial Regulation¹;
- a link to the Commission's website with public information on the tendering procedure with reference FISMA/2019/024/D²;
- a link to information on the award of the contract³ to BlackRock Investment Management, which the Commission made public after replying to the complainant⁴.

¹ 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>.

² See: <https://etendering.ted.europa.eu/cft/cft-documents.html?cftId=5201>.

³ The contract is for a study on capacity building for the 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.

⁴ See: https://ec.europa.eu/info/sites/info/files/200612-information-awarding-contract_0.pdf.

Information exchanged

Before the meeting, the Ombudsman's inquiry team had shared with the representatives of the Commission a list of possible discussion points (questions set out below).

The Ombudsman's inquiry team was provided with the documents to be inspected on 14 July. The Ombudsman's inquiry team was therefore in a position to ask questions relating to the content of these documents during the inspection meeting of 15 July. As most of the documents are considered to be confidential by the Commission (in line with a request from BlackRock Investment Management and the Commission's own rules), the Ombudsman will, **for the purposes of this inspection**, consider the questions and answers relating to the content of these documents to be confidential. This view has no bearing on whether the documents in question, and the questions and answers relating thereto, may eventually be rendered public in accordance with applicable law.

By way of introduction, the Commission's representatives indicated that they understood the key issue at stake in the Ombudsman's inquiry to be the Commission's assessment of the risk of conflicts of interest in BlackRock Investment Management's offer.

Questions

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 Commission's representatives emphasised that the Financial Regulation sets out the rules, with which the Commission complies, for how public procurement procedures are conducted. The 'vade mecum on public procurement' provides further guidelines for Commission staff in this area. Any single step and decision in a procurement procedure, including a decision to reject a tender, has to be justifiable under this "rulebook". The Commission representatives indicated that, were the Commission to take a decision on the basis of elements other than those fully covered by the Financial Regulation, such a decision could be challenged in Court.

In particular, the Commission's representatives referred to:

- Recital 104 of the Financial Regulation mentioning two specific scenarios of possible conflicts of interest;
- Article 167 specifying the criteria to be followed during the award of contracts;
- Article 171 on the cancellation of the procurement procedure requiring the Commission to justify such cancellation; and
- Annex I on procurement.

The Commission's representatives explained that before awarding a contract, the Commission verifies that bidders are not subject to a conflict of interest that may negatively affect the performance of the contract⁵. In the present case, the evaluation committee did

⁵ In accordance with Article 167(1)(c) of the Financial Regulation.

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.

In this regard, the Commission representatives noted that DG FISMA and the evaluation committee had been well aware of BlackRock Investment Management's business model and its operations. They 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.

The evaluation committee had further determined that BlackRock Investment Management was not excluded from participating in award procedures based on one of the situations identified in Article 136 of the Financial Regulation (setting out 'exclusion criteria'), that it satisfied the selection criteria and that, in accordance with the award criteria, BlackRock Investment Management's offer had the best price/quality ratio.

Given these circumstances, the Commission's representatives noted that there were no legally defensible grounds to exclude BlackRock Investment Management from the tendering procedure. They explained that the professional conflicting interest of a tenderer had to be assessed in terms of whether it may negatively affect the performance of the contract.⁶ 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.

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

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.

The Commission's representatives recalled that the general conditions of the signed contract contain standard provisions concerning conflicts of interest. BlackRock Investment Management is required to take all the necessary measures to prevent any conflicts of interest. Should a conflict of interest arise during the performance of the contract, BlackRock Investment Management must notify the Commission in writing as soon as possible, and must immediately take action to rectify the situation.

In this context, it was considered a strength of the offer that it had set out how this important contractual obligation would be complied with. The Commission's representatives noted that, in contrast, none of the other offers indicated in as much detail how the bidders would guard against conflicts of interest during implementation. This despite the fact that a conflict of interest that may negatively affect the performance of the

⁶ Article 167 (1)(c) of the Financial Regulation.

contract could potentially arise for any organisation or individual. They could arise later, during the performance of the contract, at which point they would have to be addressed.

The Commission's representatives explained that the nature and context of the study, and the tasks to be undertaken, are the most important elements as regards whether risks of professional conflicts of interest arise (see also the answer to question 4).

It was underlined that the risk of conflicts of interest that may potentially affect the performance of the contract is taken very seriously in all contracts for studies and that the Commission would terminate the contract with BlackRock Investment Management should it not adhere scrupulously to the provisions of the contract.

Relevant staff within the Commission are now in regular contact with BlackRock Investment Management (if not weekly, then every two or three weeks). As such, progress made by BlackRock Investment Management on the contract is followed and – as is the case for all contracts – particular attention is paid to any potential emerging evidence of a breach of commitments by the contractor.

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

The Commission's representatives stated that the effectiveness of BlackRock Investment Management's information barrier⁷ is subject to periodic testing by its Legal & Compliance department, and by internal and external auditors. They also recalled that, were it to be necessary, Article II.24.1 of the contract gives the Commission and OLAF the right to check or require an audit on the performance of the contract.

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?*

The Commission's representatives confirmed to the Ombudsman's inquiry team that the 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 fact was not considered as an impediment for the decision to award the contract given: i. the nature of the contract, ii. the tasks and iii. the safeguards put in place by Blackrock Investment Management.

In this context, the Commission considered:

i. The nature of the study, which was described as being to a large extent of a technical and analytical nature and which it summarised as stocktaking and evidence gathering. In carrying out these activities, BlackRock Investment Management has to meet clear

⁷ BlackRock Investment Management's 'information barrier' "[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", see: https://ec.europa.eu/info/sites/info/files/200612-information-awarding-contract_0.pdf.

objectives that include, for example, organising two stakeholder workshops (where BlackRock Investment Management's findings would be checked) and identifying best practices.

The Commission's representatives said that BlackRock Investment Management has very little discretion as regards how it summarises and presents its findings. Most importantly, the contract does not require BlackRock Investment Management to provide advice to the Commission on future policy.

ii. The context of the study, namely that the study that BlackRock Investment Management is carrying out is only one of many reports, consultations and studies that the Commission has carried out and will be carrying out in the area of sustainable finance.

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?*

The Commission's representatives said that they were aware of BlackRock's involvement in the TCFD and the SFWG, but that this was not of concern in relation to the contract for the study. They 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.

In any event, the Commission is aware of the content of these work streams, and will closely follow progress on the study, including as regards BlackRock Investment Management's taking account of these work streams.

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

The Commission's representatives explained that it would not be right for them to 'speculate' on the motives of bidders. An assessment of the motives of tenderers was not foreseen in, nor in line with, the spirit of the Financial Regulation. They instead noted that

⁸ Recital 104 states: "[...] 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".

the evaluation committee had based itself on applying the legislation as adopted by the co-legislators including assessing:

- whether bidders meet the selection, exclusion and award criteria,
- whether bidders were subject to professional conflicting interests which may negatively affect the performance of the contract, and
- the price/quality ratio of their offers.

As regards the price/quality ratio, the Commission representatives recalled that given the technical quality of BlackRock Investment Management's offer, it would have been the most economically advantageous offer even if the price offered had been much higher.

As regards the comparatively low price of BlackRock Investment Management's offer, the Commission had requested BlackRock Investment Management to provide additional details⁹. Based on the information BlackRock Investment Management provided, there were no indications that the price of the offer was abnormally low. In particular, Blackrock Investment Management confirmed that it complied with environmental, social and labour law and that it was not in receipt of State aid.

End of report

Brussels, 17/07/2020



Fergal Ó Regan
Head of Inquiries Unit 2



Koen Roovers
Case handler, Strategic Inquiries Unit

Enclosure: Confidential annex to the inspection/meeting report in joint inquiry 853/2020/KR [REDACTED]

⁹ In accordance with Point 23 of Annex 1 of the Financial Regulation.