



Letter of the European Ombudsman concerning how the Court of Justice handled concerns about public comments made by an Advocate General of the Court concerning the draft EU Digital Markets Act

Correspondence - 09/12/2021

Case 1072/2021/NH - Opened on 19/07/2021 - Decision on 27/06/2022 - Institution concerned Court of Justice of the European Union (No further inquiries justified) |

Dear President,

Thank you for your reply of 2 August 2021 on the above complaint, which concerns comments made by an Advocate General. The comments had no connection to any pending case before the Court but concerned the merits of a draft EU legislative act. The question that the complaint raises is whether the conduct was in accordance with the Code of Conduct of the Court of Justice and whether the Court dealt with it adequately.

I understand that your reply is to the effect that the complaint is outside the jurisdiction of the Ombudsman. Your reply states that the "*complaint cannot give rise to an external examination of, and potentially to external indications of, the way in which the Court of Justice should deal with alleged violations by its Members of their duties of impartiality*". It goes on to state that "*to decide otherwise could prejudice decisions to be taken by the Court of Justice in the exercise of its judicial functions and might constitute interference in the independence of the judiciary.*"

I would like to assure you that I have no intention of interfering with the independence of the judiciary, which is the cornerstone of a Union built on the rule of law. It follows clearly from the Treaty that the Court, acting in its judicial role, is outside the mandate of the Ombudsman.

However, the Ombudsman also has a duty to citizens who complain to her Office. If the Ombudsman cannot inquire into their complaints, the Ombudsman should be in a position to explain clearly why that is the case.

Therefore, it is in this context that I request further clarification:

Firstly, it is in the public domain [1] that the European Anti-Fraud Office (OLAF) carried out an administrative investigation in 2016 into, among other things, whether a former Member of the Civil Service Tribunal had complied with his duties comparable to those that are at



issue in this case. OLAF recommended disciplinary proceedings for a breach of the Court's statute, and the corresponding provisions of the Code of Conduct.

Secondly, it is the General Court itself which stated in a 2019 judgement that the Code of Conduct does not concern, strictly speaking, the judicial functions of the Court. [2]

I would appreciate your comments on both of the above.

Moreover, I welcome that your reply of 2 August 2021 gave the Court's view nonetheless on the merits of the complaint. In accordance with the standard practice of my Office, the reply was shared with the complainant who made comments on the reply (enclosed). The complainant thinks, among other things, that the Court's reply does not address its concerns that the interview with the AG was conducted by a partner in a law firm acting as legal counsel for companies most directly concerned by the proposed Digital Markets Act. It would be most helpful if the Court could address the complainant's comments.

I would be grateful to receive your reply by 15 February 2022. Thank you once again.

Please note that I will publish this letter on the Ombudsman's website and, if you agree, would also propose to publish your reply.

Yours sincerely,

Emily O'Reilly

European Ombudsman

Strasbourg, 09/12/2021

[1] See, in particular, "EU court judge 'broke rules' by moonlighting at euro-quango", The Daily Telegraph, 4 April 2018; "Justizskandal bei der EU: Küsse, Lügen und ein hoher Richter", Stern, 23 May 2018.

[2] See judgment of 20 September 2019, Franklin Dehousse v Court of Justice of the European Union, Case T-433/17, paragraph 86: "*En outre, il est incontestable que, s'adressant à la fois aux membres en fonction ainsi qu'aux anciens membres de la Cour de justice de l'Union européenne, un tel code de conduite ne vise pas, stricto sensu, l'exercice de fonctions juridictionnelles.*" And paragraph 90: "*En définitive, le nouveau code de conduite ne saurait être qualifié, en tant que tel, ni d'acte de nature judiciaire, indispensable, comme le statut de la Cour de justice de l'Union européenne ou les règlements de procédure de la Cour ou du Tribunal, pour assurer l'exercice des fonctions juridictionnelles que les traités attribuent à la Cour de justice de l'Union européenne, ni d'acte de nature exclusivement administrative, relevant donc de la responsabilité de cette dernière*



lorsqu'elle assure le bon fonctionnement de ses services .”