

Decision on whether the Ombudsman could inquire into the handling by the Court of Justice of the European Union of concerns about compliance with its Code of Conduct for Members of the Court (case 1072/2021/NH)

Decision

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) |

The case concerned public comments made by an Advocate General of the Court of Justice of the European Union (CJEU) about the draft EU Digital Markets Act while the legislative process was ongoing. The complainant, a consumer protection organisation, took the view that the CJEU did not properly deal with this potential breach of its Code of Conduct.

The Ombudsman set out a series of questions to the CJEU. The CJEU argued that the Ombudsman did not have the mandate to inquire into the complaint because it concerned the judicial role of the Court.

The Ombudsman's view on her mandate differed from the view taken by the CJEU. However, as further inquiries would not be meaningful, the Ombudsman closed the case.

Background to the complaint

1. In March 2021, an Advocate General of the Court of Justice of the European Union (hereafter: "the CJEU") participated in an interview with a legal magazine and made comments about the draft EU Digital Markets Act, [1] while the legislative process was still ongoing.
2. Advocates General have the same rank as Judges of the Court of Justice. [2] Their role is to give an opinion, in full independence, on a case before the Judges deliberate on the case. While their opinions are not binding, they are often followed by the Judges.
3. The complainant is a civil society organisation representing independent consumer organisations in Europe. [3] The complainant took issue with the comments made by the Advocate General because, in its view, they could influence the ongoing political negotiations taking place as part of the legislative process. In addition, they may adversely affect the public



perception of the Advocate General's impartiality.

4. The complainant wrote to the President of the Court of Justice in April 2021 expressing the above concerns. The complainant considered that the Advocate General's remarks raised questions with regard to his obligations as a Member of the Court of Justice under the CJEU's Code of Conduct. [4] The complainant quoted Article 7(3) of the Code of Conduct, which states that “ *Members shall act and express themselves with the restraint that their office requires*”, as well as Article 4(2): “ *Members shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their impartiality*”.

5. The President of the Court of Justice replied that the CJEU had authorised the Advocate General to take part in the interview, and that his comments expressed his personal opinion. The President explained that Members of the judiciary, meaning Judges and Advocates General, are entitled to express their personal views. They should, however, show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question. In that regard, the President stressed that the comments made by the Advocate General did not have any link whatsoever to a case currently pending before the Court of Justice.

6. Dissatisfied with the reply by the President, the complainant turned to the European Ombudsman in June 2021.

The Ombudsman's mandate

7. It follows from Article 228 of the Treaty on the Functioning of the European Union that the Ombudsman can deal with complaints concerning the CJEU only if they do not relate to its 'judicial role'.

8. The Ombudsman considered that the complaint did not touch on the judicial functions of the CJEU and opened an inquiry. The decision took into account that, in its reply to the complainant, the President of the Court had stressed that there was no case pending before the Court of Justice linked to the comments made.

9. The Ombudsman asked the CJEU to reply to the complaint. The CJEU did not agree that the complaint was within the mandate of the Ombudsman, although it did reply to the complaint. The reply was shared with the complainant in order to gather its comments. Following this, the Ombudsman sent an additional letter to the CJEU concerning her mandate. [5] The Ombudsman received the Court's second reply as well as the second round of comments from the complainant. The correspondence between the Ombudsman and the Court is published on the Ombudsman's website.

Arguments presented to the Ombudsman



By the Court of Justice of the EU

10. The CJEU considered that the case fell outside the Ombudsman's mandate. It argued that any limitation to the right to freedom of expression of a Member of the Court is subject to certain procedures, which are applied by the judiciary itself. As such, the procedures constitute an expression of the independence of the judiciary, which requires that the court concerned exercise its functions wholly autonomously. The CJEU also considered that only comments made by a Member of the Court influencing his or her ability to contribute to the process of judicial decision-making could be considered as a violation of that Member's obligations of impartiality and discretion. This was not the case here.

11. Following the Ombudsman's request for clarifications, the CJEU further explained that the Code of Conduct has to be interpreted in light of the context and objectives pursued. The obligations of impartiality and discretion, as defined in Articles 4 and 7 of the Code of Conduct, serve a specific purpose: to ensure effective legal protection, that is to guarantee a fair trial. The CJEU said that the purpose of these obligations is specifically to protect judicial proceedings themselves from undue interference, and not other external processes such as political negotiations.

12. The CJEU also clarified that any assessment of whether a Member violated the Code of Conduct would be carried out by the judges. As such, such assessment is part of the judicial role of the CJEU and, the CJEU said, outside the Ombudsman's mandate.

By the complainant

13. The complainant disagreed with the CJEU's assessment that a Member of the Court would violate his or her obligations of impartiality and discretion only in case of potentially influencing the process of judicial decision-making. The complainant argued that the CJEU's response did not address the potential impact that remarks made by advocates general could influence the legislative process, and therefore undermine the principle of separation of powers. The Treaty gives no role to the CJEU in the process of adoption of EU legislation.

14. The complainant further argued that the obligations under the Code of Conduct (Articles 7(3) and 4(2)) should require all Members of the Court to refrain from expressing views that could interfere with or unduly influence the EU's legislative process. Should this interpretation not be in the spirit of the Code of Conduct, then the complainant put into question the effectiveness of the Code's provisions to prevent situations such as have arisen in this case. If this were indeed the case, why would the Code of Conduct also apply to former Members of the Court, who are no longer involved in the process of judicial decision-making?

15. In the complainant's opinion, it was insufficient for the CJEU to dismiss the issue of unduly influencing the EU legislative process, and the separation of powers between EU institutions, as merely "an external process". The EU's legislative processes, the complainant said, are an



integral part of the EU's functioning.

16. The complainant insisted that the Ombudsman had the power to inquire into its complaint because it did not concern a case before the CJEU acting in its judicial role. The complainant requested the Ombudsman to recommend to the CJEU that the Code of Conduct explicitly state that obligations of impartiality and discretion require Members to refrain from making statements that are susceptible to influence the EU legislative process.

The Ombudsman's assessment

17. The Ombudsman does not intend to interfere 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 CJEU, acting in its judicial role, is outside the mandate of the Ombudsman.

18. The Ombudsman welcomes the fact that the CJEU replied on the merits of the complaint, even though it considered the complaint to be outside the Ombudsman's mandate.

19. The Ombudsman understands the CJEU's argument that its Code of Conduct is designed to avoid any undue influence by one of its Members on the judicial process. She agrees with the complainant, however, that that view is rather restrictive as it does not take into account the potential influence that a Member of the Court could have on other processes, such as the legislative decision-making process at EU level.

20. The Ombudsman notes that in the same month as the facts of this case occurred, the Advocate General participated in an online event about intellectual property in the health sector. He also participated in another event in November 2021 concerning the Digital Markets Act, organised by an Italian think tank.

21. The question at issue is whether the Code of Conduct, in particular when it lays down principles concerning impartiality and discretion of Members of the Court, is an inherent part of the judicial work of the CJEU, or rather an administrative document setting out deontological duties for Members also when they act outside of the courtroom. The wording of the Code seems to imply the latter. A judgment by the General Court from 2019 also appears to support the view that the Code of Conduct does not have the purpose of establishing rules concerning the judicial activities of the CJEU. [6] The same judgment, however, concludes that the Code of Conduct cannot be classified either as an act of a judicial nature or as an act of an exclusively administrative nature. [7]

22. The Ombudsman's view on her mandate differs from the view taken by the CJEU. She believes that the Code of Conduct is a "hybrid" instrument: it covers the deontological duties of Members of the Court both when they act in their judicial capacity and when their actions may have an impact on other (non-judicial) processes. Otherwise, the Code would not apply to former Members since they can no longer act in a judicial capacity. In this case, the CJEU has argued that the comments made by the Advocate General did not influence his ability to



contribute to the process of judicial decision-making. As such, they should fall within the sphere of the non-judicial processes covered by the Code of Conduct. The case should therefore fall within the Ombudsman's mandate.

23. The CJEU has made clear, however, that it does not recognise the Ombudsman's powers to inquire into this case. While it is of the utmost importance that the Code of Conduct is complied with and that the CJEU remains vigilant in that respect, the Ombudsman believes that it is not meaningful to continue the inquiry, having regard to the stance of the CJEU.

24. Against this background, the Ombudsman closes the case with no further action.

Conclusion

The Ombudsman closes this case with the following conclusion:

No further action is justified.

The complainant and the CJEU will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 27/06/2022

[1] The European Commission proposed a Digital Markets Act in December 2020 to regulate the “gatekeepers” of the Internet; which are large online platforms with a dominant market position. For more information, see

<https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-op>
[Link]

[2] The Court of Justice of the European Union (the institution) is divided into two courts: the Court of Justice and the General Court. The Court of Justice deals with requests for preliminary rulings from national courts, certain actions for annulment and appeals, while the General Court rules on actions for annulment brought by individuals, companies and, in some cases, EU governments (usually on competition law, State aid, trade, agriculture, trade marks and EU personnel issues). Advocates General only serve in the Court of Justice, not in the General Court.

[3] “BEUC, the European Consumer Organisation”. The acronym stands for ‘ *Bureau Européen des Unions de Consommateurs*’ . For more information: <https://www.beuc.eu/> [Link]



[4] The Code of Conduct for Members and former Members of the Court of Justice of the European Union (2016/C 483/01), adopted on 23 December 2016, is intended to clarify the ethical and deontological standards that the Members and former Members of the Court are subject to. It is available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:483:FULL&from=FR> [Link]

The Court updated its Code of Conduct in September 2021.

[5] The Ombudsman noted, amongst other, that in the past, the European Anti-Fraud Office (OLAF) had investigated a case about compliance with the Code of Conduct.

[6] See judgment of the General Court of 20 September 2019, *Franklin Dehousse v [Link] Court of Justice of the European Union*, Case T-433/17, in particular paragraph 82: “ *Such a code of conduct, by its conception and content, is not intended to lay down, even in part, the rules governing the judicial activity of that institution* ” and paragraph 86: “ *such a code of conduct does not, stricto sensu, relate to the exercise of judicial functions* ”.

[7] Paragraph 90 of the judgment above.