

Decision of the European Ombudsman closing the inquiry into complaint 1500/2014/FOR against the European Commission

Decision

Case 1500/2014/FOR - **Opened on** 03/09/2014 - **Decision on** 13/11/2014 - **Institution concerned** European Commission (Critical remark) |

The Ombudsman's inquiry concerned an alleged delay by the Commission in providing Infineon, a German IT company, which the Commission suspected to be a member of the Smart Card Chips cartel, with access to key evidence that the Commission intended to use against that company.

The Ombudsman inquired into the issue and found that the Commission had, without any good reason, delayed in providing access to that evidence, despite the fact that it was fully aware of the importance and relevance of that evidence. By incurring that delay, the Commission risked compromising its investigation.

The Ombudsman therefore criticised the Commission for the delay in giving Infineon access to that evidence.

The background to the complaint

1. Infineon, a German semiconductor manufacturer, was a party in the Smart Card Chips cartel investigation conducted by the European Commission. On 3 September 2014, the Commission adopted a decision imposing fines on various members of the cartel. Infineon was fined 82 784 000 euros [1] .

The inquiry

2. On 28 August 2014, Infineon sent a complaint to the European Ombudsman alleging that the Commission had breached its rights of defence in the course of the Smart Card Chips cartel investigation. The Ombudsman identified the following allegation and claim:

Allegation



The European Commission infringed the complainant's rights of defence by using a "fast track" procedure with the intention of adopting a decision imposing a fine on the complainant.

Claim

The Commission should respect the complainant's rights of defence by issuing a new Statement of Objections before adopting a decision on the matter under investigation.

3. On 3 September 2014, the Ombudsman wrote to the complainant explaining that her preliminary view, based on the arguments and evidence provided to her at that time, was that there were no apparent grounds to request the Commission to send her an opinion on the matter complained about. The Ombudsman requested the complainant to submit observations in relation to this preliminary position.

4. On 29 September 2014, Ombudsman received the complainant's observations. On 16 October, on the basis of her analysis of the complainant's observations, the Ombudsman requested the Commission to provide her with an opinion in relation to one aspect of the complaint, namely, why the Commission waited until 28 July 2014 to send a "Letter of Facts" to Infineon. As the complainant informed the Ombudsman's services that it intended to lodge an application to the General Court by no later than 17 November 2014 seeking the annulment of the Commission's decision of 3 September, the Ombudsman requested the Commission to provide an opinion by no later than 6 November 2014. On 6 November 2014, the Commission sent its opinion to the Ombudsman, who immediately forwarded to the complainant for its observations. The complainant sent its observations to the Ombudsman on 7 November 2014.

Allegation of infringement of rights of defence

Arguments presented to the Ombudsman

5. In its complaint to the Ombudsman, Infineon noted that the ten-year limitation period for imposing fines under Article 25 of Regulations 1/2003 would expire on 9 September 2014, for one member of the alleged Smart Card Chips cartel (company X). As a result, the Commission intended to adopt, before 9 September 2014, a decision covering all the parties under investigation, including Infineon. According to Infineon, this time pressure had led the Commission to adopt a "fast track procedure" which had significantly impeded Infineon from exercising its rights of defence. Specifically, at a very late stage in the inquiry, namely on 28 July 2014, the Commission sent a new "Letter of Facts" to Infineon. That Letter of Facts contained key evidence against Infineon, namely an electronic version of an internal email of a competitor (company Y), the content of which seemed to implicate Infineon in the cartel. Due to the Commission's wish to adopt a decision by early September, Infineon was given a very short, five working-day, deadline to submit its views on that new evidence.



- 6.** In its response to the Ombudsman's request for clarifications, the complainant first noted that, on 3 September 2014, the Commission had adopted a decision finding that Infineon had taken part in a cartel. The decision imposed a fine of 82 784 000 euros on Infineon.
- 7.** The complainant then stated that it was clear, from various comments by the Commissioner for Competition, and the decision imposing the fine on Infineon, that the decision was indeed adopted in view of the expiry of the limitation period concerning company X.
- 8.** The complainant then stated that, as a result of this rush to adopt a decision by early September, there was a danger that the Commission had taken a "quick and sloppy decision".
- 9.** As regards the Letter of Facts of 28 July 2014, the complainant noted that it contained key evidence that the Commission intended to use against Infineon, in particular an "electronic version" of an internal email of company Y, which seemed to implicate Infineon in the cartel. The complainant failed to see why the Commission provided Infineon with this key evidence so late in the investigation, especially since the Decision that the Commission sent to Infineon on 3 September 2014, revealed that this new evidence had been provided to the Commission by company Y as early as 10 January 2014.
- 10.** In this regard, the complainant noted that it had raised questions about the authenticity of the internal email of company Y in its reply of 22 July 2013 to the Commission's statement of objections, in its comments of 13 November 2013 on the Commission's first Letter of Facts of 9 October 2013, in its presentation during the oral hearing on 20 November 2013 and in its letter to the Commission of 16 January 2014. As a result, according to the complainant, the Commission should have provided it with a copy of the electronic version of the internal email of company Y at a much earlier stage in its inquiry. However, the complainant stated, the Commission's case team inexplicably delayed sending that key evidence to Infineon until the end of July 2014.
- 11.** The complainant then stated that when, on 28 July 2014, it received the Letter of Facts containing the electronic version of the internal email of company Y, it was impossible for it to conduct a thorough and diligent examination of the email. It noted, in this respect, that the Commission imposed on Infineon a short, five working-day deadline to respond to the Letter of Facts. Moreover, that rapid response was requested during a traditional holiday period.
- 12.** The complainant then argued that, because of the lack of time afforded to it, Infineon had not made "a deeper analysis" of the electronic version of the internal email of company Y. It then insisted that if the Commission had provided Infineon with the electronic version of the email in January 2014 (instead of waiting for more than six months), Infineon could have carried out a thorough assessment of the technical properties of the electronic version of the internal email of company Y.
- 13.** After examining the clarifications of the complainant, in particular the new information that the Commission had certain key evidence in its possession as early as 10 January 2014, the Ombudsman took the view that it was necessary to request an opinion from the Commission.



14. In her letter requesting an opinion from the Commission, the Ombudsman noted that the Commission had, on 3 September 2014, adopted a decision in which it found that there was an infringement of EU competition law by Infineon and others. In this context, the Ombudsman found that there were no longer grounds to examine the complainant's claim that the Commission should issue a new Statement of Objections before adopting a decision. The Ombudsman considered, however, that it was possible and useful to inquire into certain procedural aspects of the complainant's allegation. Specifically, the Ombudsman considered it useful to inquire into why the Commission did not send the Letter of Facts to the complainant earlier than 28 July 2014. In this respect, the Ombudsman observed that if the Letter of Facts had been sent to Infineon earlier, there would have been no reasons why the Commission could not have chosen to provide Infineon with a longer period to respond to the Letter of Facts, thus eliminating any risk that Infineon would not be given enough time to respond to the Letter of Facts. Thus, in her letter requesting the Commission to provide an opinion, the Ombudsman requested the Commission to explain, in detail, why it waited until 28 July 2014 to provide Infineon with a copy of the electronic version of the internal email of company Y, at which point the Commission felt constrained to give the complainant a very short deadline for responding to the Letter of Facts.

15. The Ombudsman took the view, however, that it was not possible for her to inquire into another aspect of the allegation, namely whether the five working days allowed to Infineon to respond to the Letter of Facts was sufficient. In the letter informing Infineon of her request to the Commission for an opinion, the Ombudsman first noted that her inquiry is subject to a strict time limit. Article 1.3 of the Statute of the Ombudsman states that the Ombudsman may not intervene in cases before courts. Article 10.3 of the Ombudsman's Implementing Provisions states that if legal proceedings are instituted in relation to matters under investigation by the Ombudsman, the Ombudsman closes the case and the outcome of any inquiries carried out up to that point is filed without further action. The complainant has informed the Ombudsman that it intends, at or before 17 November 2014, to appeal the Commission's Decision of 3 September 2014.

16. The Ombudsman notes that a definitive finding by the Ombudsman as to whether or not a deadline of five working days was sufficient to allow Infineon to respond to the Letter of Facts would have to be based on a clear understanding, on the part of the Ombudsman, of the relative complexity of the technical issues raised in the Letter of Facts. The Letter of Facts contains an electronic version of the internal email of company Y. The relevance of the electronic version of the internal email of company Y is that it would prove, provided the electronic version is itself not fabricated, that the printouts of the internal email of company Y, already provided to Infineon in the course of the Commission investigation, were authentic. The analysis of the authenticity of an electronic version of an email can indeed be a very technical exercise. All the more so when the party that Infineon implies fabricated the electronic version of the email is a major IT company, which presumably is very competent in IT matters. The Ombudsman thus takes the view that it would require at least a reasonable period of time for her services to investigate and conclude on whether Infineon needed more than 5 working days to respond to the Letter of Facts. As is evident from paragraph 15 above, that time is not



available to the Ombudsman in this inquiry.

17. In its opinion sent to the Ombudsman, the Commission first raised an issue of procedure. It took the view that the complaint should have been declared inadmissible by the Ombudsman since it was not, "preceded by the appropriate administrative approaches to the institutions and bodies concerned", as required under Article 2(4) of the Ombudsman Statute. Indeed, the Commission noted, Infineon could have requested an extension of the deadline granted to comment on the second Letter of Facts. However, it chose not to do so.

18. As regards the substance of the complaint, the Commission noted that the internal email of company Y is one of the pieces of evidence that a competitor submitted to the Commission in its investigation of the Smart Card Chips cartel. The Commission then noted that, in a cartel investigation, the Commission sends its objections to the parties in a Statement of Objections. This document contains the Commission's provisional conclusions. In the case at hand, the Commission sent a Statement of Objections to the complainant on 18 April 2013. Immediately afterwards, the Commission gave the complainant access to its file. In this context, the complainant received a CD-ROM, which included a PDF version of the internal email of company Y. The complainant replied to the Statement of Objections on 22 July 2013.

19. The Commission then noted that since certain parties - including the complainant - were alleging that a competitor (company Y) had provided it with non-authentic evidence, the Commission decided that it would be useful, in view of ensuring the rights of defence of the undertakings under investigation, to inform all parties of these allegations before the oral hearing. Company Y then provided the Commission with some additional documents, which were made accessible to the other parties by means of a Letter of Facts of 9 October 2013. Two PDF versions of the internal email of company Y (one printed in a non-EU State and another printed in Belgium) were annexed to that Letter of Facts.

20. The complainant made comments on the evidentiary value of the internal email of company Y, both in its reply to the Statement of Objections and its reply to that Letter of Facts.

21. The authenticity of the internal email of company Y was also debated at the oral hearing, which took place on 20 November 2013.

22. Following the oral hearing, various parties continued to provide the Commission with additional submissions, further clarifying or extending their claims. Upon the Commission's request, on 10 January 2014 company Y provided the Commission with the electronic version of the internal email of company Y.

23. On 25 July 2014, by means of an email containing a second Letter of Facts, the Commission provided the parties, including the complainant, with the electronic version of the internal email of company Y, together with two other documents, inviting them to submit any comments within one week from the receipt of that letter. The Commission sent a CD containing the said documents to Infineon, which received it on 28 July 2014.



24. The Commission then stated that it is open to parties receiving a Letter of Facts to request an extension of the time limit for responding to the Letter of Facts. In case of any disagreement between the party and the DG Competition, the matter may be referred to the Hearing Officer. The Commission then stated that the complainant informed the Commission, by email of 31 July 2014, that there would be no need to request an extension of the time limit imposed.

25. On 4 August 2014, and without asking for any extension, the complainant provided its comments to the Letter of Facts of 25 July 2014, in the form of a 48 pages reply (redacted text).

26. The Commission then stated that it is not obliged to give a party to its proceedings access to all information that it receives from the other parties after issuing the Statement of Objections. If the parties were entitled to receive all such information and to comment upon it, this would indeed lead to a never-ending stream of comments and reactions. It follows, however, from the case law that whenever the Commission intends to rely on information received from one of the parties (which could be a passage in that party's reply to the Statement of Objections or a document annexed to such a reply) in order to prove the existence of an infringement, the other parties must be given the opportunity to give their views on that piece of evidence. Therefore, whenever the Commission decides to rely in its final decision on information received from a party, it will give the other parties concerned access to this information and invite them to comment.

27. It follows that the Commission's assessment as to which documents in the file the parties need to have access to depends on the content of its final decision. This is, the Commission stated, the assessment that the Commission carried out in the Smart Card Chips investigation. DG Competition only completed its assessment and defined the scope of the infringement for which it intended to hold the parties liable in June 2014. At that point, and with a view to proposing to the Commissioner a course of action for the final decision, DG Competition verified, under the supervision of the Hearing Officer, that the envisaged draft decision did not contain any new objections nor refer to documents that had not yet been made accessible to the parties. At that stage, the Commission's services identified three documents that the Commission could rely upon in the envisaged decision and to which no access had yet been given. One of these three documents was the electronic version of the internal email of company Y. The Commission then provided these documents to the parties through the Letter of Facts of July 2014. This Letter of Facts referred to three documents of limited length, whose content was largely known by the complainant. Apart from the electronic version of the internal email of company Y (which in a PDF version had already been communicated twice to the parties), the Letter of Facts contained the Commission's own translations of certain documents on which the parties had already provided comments (11 pages) and a (redacted text) "new" document).

28. Thus, the Commission fails to see how providing the electronic version of the internal email of company Y in July 2014, and not earlier, would in any way have affected the complainant's rights of defence, insofar as the complainant has been effectively granted the opportunity to give its views on that piece of evidence.



29. As regards whether providing the electronic version of the email in July 2014, that is to say some weeks before the date of adoption of the Decision, could have resulted in the complainant having been provided too short a deadline for making its comments, the Commission recalled that this electronic document concerned a relatively short piece of evidence (1 page) that the complainant knew very well, as it had already provided several comments on it. In its correspondence with the Commission of 31 July 2014, the complainant indicated that it would have that electronic document analysed (redacted text). The complainant therefore did not see any need to request an extension of the deadline fixed by the Commission. The Commission noted that the complainant alleges in its complaint that, "due to the short deadline (5 days) and the holiday period, it was only possible to obtain some preliminary findings" from the forensic IT expert. However, in its reply of 4 August 2014, the complainant did not refer to (redacted text) "preliminary' findings". (redacted text)

30. In its observations on the Commission's opinion, the complainant stated that the Commission has not put forward any valid justification for withholding the "electronic version" for more than six months. The Commission has not mentioned a single reason why the email had not been disclosed in January 2014.

31. The complainant added that there was no need for the Commission to "complete its assessment" before giving access to the "electronic version". Quite to the contrary, the Commission could have carried out its examination of the "electronic version" while Infineon was in the process of analysing it. This would have been in line with the normal practice, which would have ensured that the Commission could have taken Infineon's comments on these (purely technical) questions into account. Such an obvious approach would have caused only minimal efforts (and virtually no costs), and would have avoided an infringement of Infineon's rights.

32. The complainant also commented that a number of the Commission's statements were incorrect, as well as misleading.

33. The complainant notes that the Commission alleges that the complainant "*indicated (to) the Commission by e-mail of 31 July 2014 that there would be no need to request an extension of the time limit ... running ... until 4 August 2014*". In addition, the Commission seems to suggest that, given that Infineon had submitted a 48 pages reply (redacted text), the time-period of five days was sufficient. These statements are not only misleading, but also incorrect. The complainant stated that its email of 31 July 2014 did not imply, in any manner, that the deadline of five working days would be sufficient to examine the "electronic version" properly. Although it had not indeed explicitly requested the Commission (or the Hearing Officer) to extend the five working day deadline, this was due to the fact that, in a state of play meeting with the Commission on 22 July 2014, the Commission emphasised, several times, that it would expect a very quick response to the Letter of Facts. During the meeting (redacted text) the Commission made it very clear that a decision would be taken at the first Commission meeting after the summer break (that is, on 3 September 2014). Against this background, the complainant stated that it could only have expected an extension of a few days, if at all.



34. The complainant again insisted that, because of the lack of time a deeper analysis had not been made of the electronic version of the email. It argued that if the Commission had provided Infineon with the electronic version of the email in January 2014 (instead of holding it back for more than six months), Infineon could, without any doubt, have carried out a more thorough assessment of the technical properties of the e-mail.

35. According to Infineon, the internal email of company Y is the main piece of evidence the Commission has used against Infineon. The question of its authenticity played a pivotal role during the administrative procedure. It is clear from the final decision that Infineon would not have been accused of an infringement if the Commission would have come to the conclusion that the email was not authentic. The importance of the question of authenticity of that email is also shown by the fact that the Commission obviously saw the need – at a very late stage of the investigation – to disclose the electronic version to Infineon. This underlines the fact that the Commission considered the question of authenticity of this mail as highly relevant for the outcome of the proceedings.

36. By way of conclusion, the complainant stated that the Commission has disregarded Infineon's rights of defence by holding back important evidence, thereby causing artificial time pressure and giving Infineon a deadline which was far too short. It insisted that the Commission has now failed, in the context of the Ombudsman's inquiry, to give a single valid reason for this approach. The complainant therefore believes that there has been a clear case of maladministration.

37. As regards the admissibility of its complaint to the Ombudsman, the complainant pointed out that, during the last weeks of the investigation, it informed the Commission, on a number of occasions, that the timing of the investigation would infringe Infineon's rights of defence.

The Ombudsman's assessment

Admissibility

38. Article 2(4) of the Ombudsman Statute states that a complaint must be preceded by appropriate administrative approaches to the institutions and bodies concerned. In line with this requirement, the Ombudsman will declare any complaint which is not preceded by such prior administrative approaches to be inadmissible.

39. In its opinion submitted to the Ombudsman, the Commission took the view that the Ombudsman should have declared the complaint to be inadmissible since, in the Commission view, the complaint was not preceded by the appropriate administrative approaches to the Commission, as required under Article 2(4) of the of the Ombudsman Statute .

40. The Ombudsman recalls that, after examining the clarifications of the complainant, she considered that it was possible and useful to inquire only into certain aspects of the complainant's allegation. Specifically, the Ombudsman considered it possible and useful to



inquire into why the Commission did not send the Letter of Facts to the complainant earlier than 28 July 2014. This aspect of the complaint has certainly been the subject of prior administrative approaches to the Commission. Suffice to note that in its response to the Letter of Facts dated 4 August 2014, Infineon informed the Commission that "*we are also very surprised to learn that decisive documents which the Commission may consider relevant in its decision and may use as evidence against Infineon have been presented to us only now with an unacceptable delay of several months from the date the Commission has received these documents itself*". The specific subject matter of the Ombudsman's inquiry is therefore admissible.

The Delay in Sending the Letter of Facts

41. As regards the substantive issue under consideration, namely why the Commission waited more than six months to provide Infineon with an electronic version of the internal email of company Y, the Ombudsman notes that whenever the Commission intends to rely on evidence received from third parties in order to prove the existence of an infringement of the EU competition law rules, the parties against whom proceedings having been initiated must be given the opportunity to give their views on that piece of evidence [2] .

42. If new evidence reinforcing the objections already set out in the Statement of Objections becomes available to the Commission after a Statement of Objections has been issued, and after the parties concerned have been given access to the file for the purposes of allowing them to respond to the Statement of Objections, that new evidence can be made available to the parties through the sending of a Letter of Facts.

43. A Letter of Fact containing new evidence can be issued at any time between the issuance of the Statement of Objections and the adoption of a decision. It is, in principle, possible that the Commission will, at a late stage of its inquiry, take a view that new evidence, not previously relied upon by the Commission to substantiate the objections set out in Statement of Objections, will reinforce the conclusions drawn in the Statement of Objections. If the Commission arrives at such a conclusion late in an inquiry, it would be entirely appropriate, as soon as reasonably possible after arriving at such a conclusion, for the Commission to issue a new Letter of Facts.

44. Issuing a Letter of Facts very late in an inquiry, however, creates obvious risks for the eventual proper completion of a Commission investigation.

45. First, if a Decision closing an investigation must be taken within a very short period after the Letter of Facts is sent (which was the case in the Smart Card Chips Cartel Investigation), the Commission will have no choice but to grant the parties a very short deadline for responding to the Letters of Facts. While there is no statutory deadline for responding to a Letter of Facts, any deadline imposed should reflect the relative complexity and the volume of evidence provided. If a party that has been found to have infringed the competition law rules successfully argues before the EU Courts that it was not given, in light of the complexity and/or volume of evidence contained in a Letter of Facts, sufficient time to respond to a Letter of Facts, the Court may be led to annul at least that part of the Commission Decision which relied only on that evidence.



46. The risk that this will occur in any particular case will depend on the nature and extent of the evidence set out in the Letter of Facts, and on the length of the deadline imposed to respond to the Letter of Facts. If the evidence is limited in extent, and uncomplicated, the risk may be minimal, even if a very short deadline is imposed. However, if the evidence is extensive or complicated, or both, the risk incurred by granting a very short deadline to respond to a Letter of Facts may be substantial.

47. The Ombudsman takes no definitive view as regards how complicated it is to verify the authenticity of an electronic version of an internal email supplied by a major IT firm. Suffice to note, however, for the purposes of the present decision, that the argument that it is a complicated issue is plausible [3] .

48. The Commission is required to take account of any response to a Letter of Facts when it drafts its Decision closing its investigation. If a Letter of Facts is sent very late in an inquiry, the Commission will have a very limited period of time to analyse and take account of the responses to the Letter of Facts. While it is certainly possible that the Commission will dedicate the resources necessary to analyse and take account of a response to a Letter of Facts, it cannot be ignored that a certain risk may arise, due to the time constraints involved. Specifically, there is a risk that errors or omissions may occur in the analysis and that those errors or omissions will vitiate the decision closing the investigation. This is all the more likely if the evidence dealt with in the Letter of Facts is complex and the response to the Letter of Facts is complex. The Ombudsman notes, with concern, that since the responses to the Infineon Letter of Facts were received on 4 August 2014, the Commission's services had less than one calendar month to analyse the response to that Letter of Facts for the purposes of finalising its decision closing its investigation (which was adopted on 3 September 2014).

49. In the Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR [4] , the Ombudsman noted that it would not constitute good administration for the Commission to risk the successful outcome of an inquiry through a failure to make a proper record of an interview relating to the matter under investigation. The Ombudsman took the view that, irrespective of whether the risks did or did not subsequently give rise to a breach of a party's procedural rights, it did not constitute good administration for the Commission to incur such risks (by failing, in that case, to draft a proper interview note). The Ombudsman applies a similar analysis in the present case. The Ombudsman takes no view as regards whether the risks outlined in paragraphs 45-48 above actually gave rise to a breach of the complainant's procedural rights, or gave rise to errors or omissions in the Decision of 3 September 2014. It suffices, for the purposes of the present inquiry, to note that obvious risks arose, and that irrespective of whether those risks did or did not subsequently give rise to a breach of a party's procedural rights, or to errors or omissions in the Commission Decision, it did not constitute good administration for the Commission to incur such risks unnecessarily.

50. The Commission should, of course, not be criticised for incurring the above risks if those risks were unavoidable.



51. For example, if the Commission had obtained the evidence contained in the Letter of Facts only shortly before the Letter of Facts was issued, the Commission could not be criticised for incurring the above risks. In the present case, however, the Commission received the electronic version of the internal email of company Y, on 10 January 2014, that is more than 6 months before it sent the Letter of Facts to the complainant.

52. The Ombudsman also notes that the risks incurred by sending the Letter of Facts in late July 2014 could have been deemed unavoidable risks if it were not immediately evident to the Commission, from January to July 2014, that the Commission would, when adopting its decision closing its investigation, have to rely on the evidence provided to it on 10 January 2014. However, the facts brought to the attention of the Ombudsman prove that it was abundantly obvious, immediately when that evidence was obtained by the Commission, that the Commission would rely on that evidence in its decision closing its investigation.

53. In this regard, the Ombudsman notes that the internal email of company Y was already considered to be relevant evidence by the Commission in its Statement of Objections of April 2013 [5] .

54. The Ombudsman also notes that the complainant states that it started to raise questions about the authenticity of the internal email of company Y in its reply to the statements of objections of 22 July 2013. It raised these concerns again in its comments of 13 November 2013 on the Commission's first Letter of Facts of 9 October 2013, and again in the presentation during the oral hearing on 20 November 2013. It mentioned them again in its comments of 16 January 2014.

55. Indeed, as noted in paragraphs 19 to 23 above, the Commission itself states in its opinion, that since certain parties - including the complainant - were alleging, in their responses to the Statements of Objections, that company Y had provided the Commission with non-authentic evidence, the Commission decided that it would be useful, in view of ensuring the rights of defence of the undertakings under investigation, to inform all parties of these allegations before the oral hearing in November 2013. For this purpose, the Commission states, it provided company Y with extracts from the other parties' replies to the Statement of Objections, with a request to comment on these allegations. The comments received from company Y, including some additional documents, were made accessible to the other parties by means of a first Letter of Facts of 9 October 2013. Two PDF versions of the internal email of company Y (one printed in a non-EU State and another printed in Belgium) were annexed to that first Letter of Facts. The complainant made comments on the evidentiary value of the internal email of company Y, both in its reply to the Statement of Objections and in its reply to that Letter of Facts. The Commission also states that the authenticity of the internal email of company Y was also debated during the oral hearing of 20 November 2013. The Commission also expressly states company Y provided the Commission with the electronic version of the internal email of company Y, on 10 January 2014 in response to a Commission request to do so. As a result, it cannot be sustained that the Commission did not immediately realise the importance and relevance of the evidence provided to it by company Y on 10 January 2014. There was thus no good reason which would explain why the Commission waited until 28 July 2014 to send that



evidence to Infineon.

56. In light of the above conclusions, the Ombudsman will close her inquiry by making a critical remark.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission erred by not sending the Letter of Facts to Infineon at an earlier stage in its investigation.

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

Emily O'Reilly

Strasbourg, 13 November 2014

[1] See the Commission Press release of 3 September 2014 (available at http://europa.eu/rapid/press-release_IP-14-960_en.htm [Link]).

[2] Article 27 of Regulation 1/2003 states that the Commission shall give the parties under investigation the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Article 27 goes on to state that the rights of defence of the parties concerned shall be fully respected in the proceedings. In this respect, they shall be entitled to have access to the Commission's file.

[3] The Commission contended that the complainant had sufficient time to respond to the Letter of Facts given that it had access to the print outs of the email in question when it was granted access to the file in 2013. This argument is particularly disingenuous. The Letter of Facts of 28 July 2014 sought to provide evidence of the *authenticity* of the internal email of company Y. The fact that Infineon was made aware, in 2013, of the substantive content the internal email is completely irrelevant to the issue of proving the *authenticity* of that email. The Commission also made reference to the fact that the internal email of company Y was relatively short (it was a one page email). This argument is also disingenuous. The fact that the email was one page long would appear to be completely irrelevant in terms of determining whether that email was or was not authentic.

[4] See paragraph 98 of the Decision, available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark> [Link]



[5] The Commission sent a Statement of Objections to the complainant on 18 April 2013. Immediately afterwards, the Commission gave the complainant access to its file. In this context, the complainant received a CD-ROM, which included a PDF version of the internal email of company Y.