

## Decision of the European Ombudsman in the inquiry into complaint 1021/2014/PD against the European Commission

Decision

**Case** 1021/2014/PD - **Opened on** 31/07/2014 - **Recommendation on** 10/03/2015 - **Decision on** 11/11/2015 - **Institution concerned** European Commission ( Draft recommendation accepted by the institution ) |

In 2012 and 2014 the then European Commissioner responsible for competition made public statements concerning an on-going investigation of a possible cartel. One of the companies being investigated complained to the Ombudsman that the statements were in breach of the principle of impartiality as the statements gave the impression that the Commissioner had already decided what the final result of the on-going investigation would be.

The Ombudsman held that some of the public statements made by the Commissioner could reasonably be perceived as suggesting that the Commission or the Commissioner had already decided the outcome of the on-going investigation and that this constituted maladministration. The Ombudsman made a recommendation which the Commission has for the most part acknowledged. The Ombudsman thus closed the case with a finding of maladministration arising from the former Commissioner's public statements from 2012 and 2014.

## The background to the complaint

1. The complainant is the French financial institution Crédit Agricole
2. In October 2011, the Commission carried out unannounced inspections at the complainant's premises and those of several other companies active in the sector of financial derivative products linked to the Euro Interbank Offered Rate. The Commission had concerns that the companies in question might have violated EU antitrust rules that prohibit cartels and restrictive business practices.
3. In March 2013, the Commission informed the complainant that it had decided to open a formal investigation concerning an alleged infringement of Article 101 TFEU by the complainant, together with a number of its competitors, in relation to interest rate derivatives denominated in Euro ('EIRD'). The complainant initially participated in settlement discussions, but formally



abandoned the settlement procedure in October 2013, as it refused to accept responsibility for the alleged cartel.

4. In December 2013, the Commission adopted decisions against four companies that had decided to settle by acknowledging their participation in a EIRD cartel. The fines imposed for this infringement totalled more than EUR 1 billion. The Commission continued its investigation, under the standard procedure, of an alleged EIRD cartel involving the complainant and two other financial institutions that had not agreed to settle the case.

5. On 25 April 2014, the complainant wrote to the Commission raising objections concerning its objectivity and impartiality. In particular, it referred to a number of statements made by the then Commissioner responsible for competition (the 'Commissioner') and which, in its view, could cast doubts on the impartiality of the investigation. [1] It also argued that the Commissioner had instructed his services to accelerate the procedure with a view to adopting a decision before the end of his mandate. On 19 May 2014, the Commission replied rejecting the complainant's objections.

6. On 21 May 2014, the complainant received from the Commission the Statement of Objections for its alleged participation in a EIRD cartel.

7. On 2 June and 7 July 2014, the complainant lodged this complaint with the Ombudsman.

8. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

**Allegation:**

The Commission breached its obligation of impartiality in its investigation into the alleged infringement of EU competition rules.

**Claim:**

The Commission should respect its obligation of impartiality in its investigation into the alleged infringement of EU competition rules.

9. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion.

10. The Ombudsman held that, in relation to the Commissioner's instruction to accelerate the procedure, there was no maladministration. She took this view in particular because such an instruction could not amount to a breach of the principle of impartiality, and because the complainant had in any case been allowed sufficient time to prepare its defence.

11. As concerns the public statements made by the Commissioner, the Ombudsman made a



preliminary finding of maladministration and issued a recommendation. [2] The Ombudsman received the Commission's opinion on the recommendation and, subsequently, the comments of the complainant.

## The Ombudsman's recommendation

**12.** The Ombudsman's recommendation was as follows:

*The Commission should (1) acknowledge the maladministration that has occurred in this case, apologise for it and (2) take steps to avoid similar problems in the future. In order to do so, the Commission should consider issuing guidelines on public statements by Commissioners about ongoing investigations.*

**13.** The findings underlying the recommendations were in particular:

**14.** As concerns the statement made on 24 July 2012 in MLex ( *"The evidence we have collected is quite telling, so I'm pretty sure this investigation will not be closed without results"* ) and the statement of 24 September 2012 made in the European Parliament ( *" The gravity of the infringement was "above the average", which would draw the amount of the sanction upwards"* ), the Ombudsman found that reading those comments gives the impression that it was almost established that a cartel existed and that the Commission was ready to impose fines. However, in 2012, the investigation at issue was at a very early stage; the Commission was still gathering evidence and it had not yet taken a decision to initiate formal proceedings. Particular caution was therefore required regarding comments and public statements at that stage.

Neither was the Ombudsman convinced by the Commission's further argument that the complainant was not referred to by name, and that it was not individually concerned by these comments, since many companies were under investigation at that time. Even if the complainant's name was not specifically mentioned, the statements in question referred to a small group of companies which were easily identifiable. By reading or listening to these statements, interested third parties could reasonably get the impression that the complainant's case had already been decided.

**15.** As regards the statement made on 28 January 2014 at the French Senate ( *"Il y a encore trois institutions bancaires et un broker qui continuent à être investigués parce qu'ils n'ont pas voulu participer à l'accord final: une institution française Crédit Agricole [...] dont l'investigation continue, et on ira jusqu'à la fin, et je dois dire comme on a beaucoup d'informations [rires] déjà, l'investigation n'est pas la plus difficile du monde, à partir de ce moment-là on finira cette investigation"* ) , the Ombudsman held that there was little doubt but that the then Commissioner considered that it was clear that the complainant had participated in a cartel. It can reasonably be inferred from the statement that, according to the former Commissioner, the evidence that the Commission had collected against the complainant was so strong that it was only a matter of time before a final decision confirming the infringement would be taken. The Commission failed to put forward any convincing argument to justify this statement. It merely noted that the



fact that an investigation concerning the complainant was ongoing was known to the public. However, the above-mentioned statement goes beyond what could be justified for the purposes of providing information on an ongoing investigation and creates the impression that the Commissioner had already made up his mind about the complainant's alleged participation in a cartel.

**16.** The Ombudsman considered it likely that the maladministration that she had identified would not affect the further handling of the complainant's case by the Commission, as the proceedings were still pending, the former Commissioner had left office and the new Commissioner for competition was now in charge of the case. However, with a view to avoiding similar situations in the future and assisting the Commission in reaching this goal, the Ombudsman considered it necessary to make a recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman.

**17.** In its opinion on the recommendation, the Commission submitted that it had not infringed any rule or principle of good administration. It regretted that the statements by the former Commissioner for competition might have been misinterpreted as demonstrating a lack of impartiality.

**18.** The Commission stressed that the Code of Conduct for Commissioners, as well as the ethical rules regarding the handling of competition cases and the Code of good administrative behaviour, already set out the principles of impartiality and objectivity guiding the work of the Commission more generally, including as regards public statements on ongoing cases.

**19.** The Commission also referred to the fact that the current Commissioner for competition has publicly declared that she will be cautious in making public statements on on-going cases, while she understands the need for citizens to be kept informed of competition enforcement activities and their impact on their daily life. She has declared her willingness to be transparent on general principles but she cannot be too specific about ongoing investigations.

**20.** In its comments, the complainant considered the opinion provided by the Commission to be unsatisfactory. The complainant stated in particular that the Commission's failure to admit the maladministration that had occurred and to issue guidelines on public statements showed its willingness to persist in its practices. The complainant referred, as an example of such guidelines, to the guidelines in place at the Anti-trust section of the US Department of Justice. The complainant also stated that two earlier instances, which occurred in 1997 and 2009, and concerned other former Commissioners responsible for competition, showed that the current rules in practice at the Commission are insufficient to guarantee that the impartiality of the Commission is safeguarded when making public statements on on-going investigations.

## The Ombudsman's assessment after the recommendation

**21.** In its response to the recommendation, the Commission did not present any arguments to refute the validity of the Ombudsman's assessment of the individual public statements at issue.



The Commission expressed its regret that the former Commissioner's statements might have been perceived as demonstrating a lack of impartiality. The Commission stopped short of acknowledging any maladministration in this regard and, accordingly, felt an apology was not warranted.

**22.** Given that the current Commissioner has explicitly recognised the need to be cautious as regards her public statements relating to on-going cases, the Ombudsman is satisfied that the Commission has acknowledged the key element in her recommendation. Furthermore, the Ombudsman has no reason to believe that the current Commissioner will not, as promised, act in a manner which complies with the principle of impartiality. In these circumstances, the Ombudsman is satisfied with the overall outcome and will close this inquiry on that basis.

## Conclusion

**23.** On the basis of the Commission's response to her recommendation, the Ombudsman is satisfied that the Commission has taken steps to avoid maladministration of this kind in the future. Accordingly, the Ombudsman has decided to close this inquiry. However, the Ombudsman reiterates her earlier finding of maladministration, as follows:

**The Ombudsman finds that, because of a number of statements made in 2012 and 2014 by the Commissioner formerly responsible for competition, the Commission was perceived to have already reached a conclusion regarding the complainant's participation in a EIRD cartel before the investigation was complete. This constituted maladministration.**

Emily O'Reilly

European Ombudsman

Strasbourg, 11/11/2015

[1] The statements were:

*"The evidence we have collected is quite telling, so I'm pretty sure this investigation will not be closed without results"* (MLex, 24 July 2012).

*" The gravity of the infringement was "above the average", which would draw the amount of the sanction upwards* (European Parliament, 24 September 2012).

*"Il y a encore trois institutions bancaires et un broker qui continuent à être investigués parce*



*qu'ils n'ont pas voulu participer à l'accord final: une institution française Crédit Agricole [...] dont l'investigation continue, et on ira jusqu'à la fin, et je dois dire comme on a beaucoup d'informations [rires] déjà, l'investigation n'est pas la plus difficile du monde, à partir de ce moment-là on finira cette investigation" (French Senate, 28 January 2014).*

*"Parfois il y a besoin d'utiliser les instruments traditionnels de la politique de concurrence, et Libor/Euribor, c'est le cas. Parce qu'il y a un cartel. Un cartel organisé autour de la manipulation d'un benchmark" (Public intervention, 21 February 2014).*

*"We have three banks and a broker being investigated on the Libor/Euribor case because they didn't want to settle and we are preparing the statement of objections and the next step will follow" (European Parliament, 18 March 2014).*

*"We will adopt a statement of objections more or less in the coming couple of months " (MLex, 28 March 2014).*

*"Settling companies must come clean and pay for their mistakes. (...) Although I expect hybrid cases to remain the exception, they allow us to use the settlement procedure without being held hostage to the strategies of the companies that prefer not to settle." (Speech, Brussels, 3 April 2014).*

*"Probably before the end of the mandate of this Commission there will be some news from this investigation" (Public declaration, 30 June 2014).*

[2] The full text of the Ombudsman's recommendation is available at <http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/59249/html.bookmark> [Link].