

Recommendation of the European Ombudsman in case 1419/2016/JN on the European Commission's failure to reply to a Czech citizen concerning statements made by the Commissioner for Justice, Consumers and Gender Equality in relation to the Stork's Nest Case ("Kauza Čapí hnízdo") on Czech radio

Recommendation

Case 1419/2016/JN - Opened on 12/12/2016 - Recommendation on 02/02/2018 - Decision on 05/06/2018 - Institution concerned European Commission (No further inquiries justified)

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The complaint arose from the failure of the European Commission to reply to the complainant's correspondence regarding statements made by the Commissioner for Justice, Consumers and Gender Equality with respect to the "Stork's Nest Case" (in Czech: "Kauza Čapí hnízdo") on Czech Radio. The complainant believed that the Commissioner's statements were unethical and not compatible with her obligations as an EU Commissioner.

The Ombudsman inquired into the issue and found that the Commissioner's statements were not compatible with her obligations as an EU Commissioner. The Ombudsman found maladministration on the part of the Commission collectively arising from its failure to recognise that the Commissioner's statements were not compatible with her obligations as a Commissioner. The Ombudsman recommended to the Commission that it remind the Commissioner of the need to exercise due caution in future interviews. The Ombudsman noted that the new Code of Conduct for Commissioners, due to come into effect on 1 February 2018, reminds Commissioners generally of their obligations when speaking publicly.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. On 24 March 2016, Mrs Jourová, the European Commissioner for Justice, Consumers and Gender Equality made a number of comments on Czech radio regarding the so-called "Stork's Nest Case" (in Czech: Kauza Čapí hnízdo) [2] . The case related to alleged EU subsidy fraud involving a farm and hotel complex called "Stork's Nest". The alleged fraud was, at that time, under investigation by the European Anti-fraud Office (OLAF) and by the Czech police. It was



also alleged that the leader of a Czech political party had links to the Stork's Nest Case.

2. In June 2016, the complainant, a Czech citizen, complained to the President of the European Commission about the statements made by the Commissioner during the radio interview. He considered that she had defended the leader of her political party (who, according to the complainant, had links to the case under investigation) while that investigation was ongoing. The complainant took the view that, in doing so, the Commissioner breached her ethical and legal duties as a Commissioner. The complainant also asked the Commission several specific questions. When he did not receive a reply after 15 days, he sent an email reminder in which he raised some additional questions. [3] Since the complainant had not received a reply by late September 2016, he turned to the Ombudsman.

The inquiry

3. The Ombudsman opened an inquiry into the complaint and identified the following issues:

1) The Commission failed to reply to the complainant.

2) The Commissioner for Justice, Consumers and Gender Equality made inappropriate statements during a radio interview.

4. As a first step in the inquiry, the Ombudsman asked the Commission to reply to the complainant and to send her a copy of that reply. The Commission then replied to the complainant. The Ombudsman did not consider the reply to be complete and asked that the Commission send a second, more complete, reply. The Commission then sent a second reply. The Ombudsman was not satisfied with the further reply. She then asked both the Commission and the Commissioner for Justice to address the second issue specifically. The Ombudsman received separate replies from the Commission and the Commissioner. The Ombudsman's recommendation takes into account the arguments and views put forward by the parties. [4]

The Commission's handling of the complainant's correspondence and the Commissioner's statements during a radio interview

Arguments presented to the Ombudsman

5. The complainant argued that the Commissioner's statements on Czech radio were unethical and incompatible with Article 17 of the Treaty on European Union [5] , Article 245 of the Treaty on the Functioning of the European Union [6] , the Code of Conduct and the Code of Administrative Conduct (specifically the obligation of loyalty, independence and non-intervention in areas outside the Commissioner's competence). The complainant pointed to a number of specific statements in the course of the radio interview which he regarded as being improper.



For example, when the Commissioner was asked if she believed there was an entitlement to the subsidy, she said: *“ I see it from the perspective of someone who knows the rules. This means, you must fulfil three conditions. You have to be a so-called eligible subject which can apply - in this case it was - if I have good information - a small or medium enterprise; you must fulfil what the subsidy is meant for, that is, it is some value for money, in this case it probably came in the form of jobs and the development of tourism in the region; and you must hold it for three or five years after the end of the financing. If these conditions were met, then de jure there will not be a problem. ”* [7] The complainant understood the Commissioner to be saying that she believed the applicant company was entitled to the subsidy.

6. More generally, the complainant considered that:

- o Commissioners should be entirely independent and serve the interests of the European Union only. The Commissioner's statements were influenced by her personal and partisan links with the head of her political party. In this context, he noted that in July 2014, prior to her appointment, the Commissioner had publicly stated that she would work for Czechs in Brussels “on the basis of an agreement on Czech national interests”.

- o The Commissioner took a position on the Stork's Nest Case before OLAF had completed its investigation. The Commissioner's views were thus, in his view, premature. He also stated that the Commissioner was attempting to influence an ongoing OLAF investigation.

7. In the first response (17 January 2017) sent to the complainant, the Head of Cabinet of the Commissioner in question apologised for the late reply and said:

“ As is clear from the interview transcript, Commissioner Jourová provided information about the general rules concerning applications for EU structural funding, based on her previous professional experience in this field, notably as former Czech Minister of Regional Development.

Commissioner Jourová's explanations of these general rules were without prejudice to the results of ongoing investigations into the matter by EU and Czech authorities. Indeed, Commissioner Jourová explicitly underlined the need to wait for the results of such investigations.

As regards your question on remarks made by Ms Jourova in July 2014, the event took place prior to her nomination as European Commissioner. ”

8. The complainant was dissatisfied with this response. He insisted that the Commissioner had interfered with an ongoing OLAF investigation. In his view:

- o The response did not contain any relevant arguments concerning the alleged misconduct.

- o Given her position, the Head of Cabinet could not be objective and impartial.

- o The Head of Cabinet was German and did not understand Czech. Therefore, she could not understand the interview, which had been conducted in Czech.



o The Commissioner had stated that “ *de jure there will not be a problem* ” in the Stork’s Nest case. It was thus, in his view, not true that the Commissioner’s statement had no impact on OLAF’s investigations. The Commissioner did not, he noted, say that her statements reflected merely her personal opinions. In any case, whether her opinions were strictly personal or not, they put pressure on OLAF to favour the leader of her political party. This, he stated, went against the EU’s financial interests, which the Commissioner was required to defend.

o From the Czech transcript of the interview, it was obvious, he stated, that the Commissioner did not provide just general information about how the EU funds projects. Rather, she gave her legal opinion concerning a specific case.

9. In a second response to the complainant dated 26 June 2017, signed by the Secretary General of the Commission, acting on behalf of the Commission’s President, the Commission stated that:

o The Commission should have replied to the complainant’s letters earlier. It expressed regret for this delay and noted that the Head of the Commissioner’s Cabinet had already apologised for the delay.

o It disagreed with the complainant’s allegations regarding a breach by the Commissioner for Justice of her obligations of loyalty and independence. Nor did it accept that the Commissioner had exerted undue influence on the OLAF investigation. The Secretary General said that, having read the interview transcript, he considered that the Commissioner had provided information about the general rules concerning applications for EU structural funding, based on her previous national professional experience in this field. Her comments were without prejudice to the results of ongoing investigations into the matter by the EU and the Czech authorities and she had explicitly stressed that the OLAF investigation was still ongoing.

o As regards the Commissioner’s interview in July 2014 and the alleged violation of the obligations of the Treaties and of the Code of Conduct for Commissioners, the interview had occurred prior to her nomination as European Commissioner. At the outset of their mandates, Commissioners solemnly swear, before the Court of Justice, that they will respect the European Union Treaties and the Charter of Fundamental Rights of the European Union, carry out their responsibilities in complete independence and in the general interest of the Union and respect their obligations during and after their term of office. In the performance of her duties as a Member of the Commission, the Commissioner’s independence and loyalty were never called into question.

10. In a letter [8] to the Ombudsman dated 6 November 2017, the Commissioner for Justice informed the Ombudsman that she did not wish to respond “in parallel” to the Commission. She said that it had never been her intention to create any doubts with regard to the independence of the investigations and their outcome.

11. On 22 December 2017, the Commission’s President sent an additional response to the



Ombudsman, in which he expressed the following views:

o The Commission considered that the Commissioner's statements had not breached the rules and principles applicable to Commissioners, in particular Articles 17 TEU and 245 TFEU and the obligation of discretion. The Commissioner provided information about the general rules concerning applications for EU structural funds, including her personal past experience in this field.

o The Commissioner's comments were clearly without prejudice to the results of ongoing investigations into the matter by EU and Czech authorities. She explicitly underlined this aspect - having first referred to the applicable rules - by saying: "*If these conditions were met, then de jure there will not be a problem*". Precisely this remark shows that she did not prejudge the conclusions of the investigation. Moreover, the Commissioner added: "*I am of course also curious about the investigations of OLAF and of the police.*" This demonstrates a total openness as regards both the outcome of these investigations and her own position. She further said that she hoped the issue would be quickly clarified. Accordingly, the Commissioner did not draw any conclusions with regard to the case.

o As for her remaining references to the Stork's Nest project, and to the general debate about the motives for setting it up and the public controls in place, the Commissioner simply referred to what had been said during that debate. She clarified that she had not listened to all the details, which confirms the fact that she did not draw definite conclusions.

o The Commission considered that Commissioners must not give the impression of having prejudged the outcome of an ongoing independent inquiry – neither when they speak officially on behalf of the College nor when they speak as an individual Commissioner (as the Commissioner did here). Moreover, they must not give the impression of putting into doubt the innocence of the person concerned. It is obviously difficult to strike this balance, particularly when a Commissioner knows the person concerned. In the Commission's view, the Commissioner maintained this difficult balance and did not make firm statements or draw conclusions.

o Given that OLAF carries out its investigations in complete independence, it is legally and practically excluded that the radio interview could have had any impact on OLAF's investigation. Consequently, any concern in this regard is factually not justified. Given that the complainant had nevertheless the impression that the interview could influence the investigation, the Commission would like to reassure him that the rules and procedures in place at European level fully guarantee OLAF's independence. [9]

o Regarding the issue of the Commissioner having said in a 2014 interview that, as a Commissioner, she would work in the interests of Czechs, the Commission repeated that the interview in question had occurred in July 2014, that is before Mrs Jourová took office. The Commission noted that the Ombudsman's letter of 27 September 2017 had referred exclusively to the interview of March 2016.



o The Commission said that no action was necessary arising from the Commissioner's statements. However, it acknowledged that it could have provided clarifications to the complainant earlier. The Head of Cabinet of the Commissioner and the Secretary-General of the Commission had already expressed their regrets and apologies for the late replies to the complainant.

o With regard to the allegation that the Commission had not provided a comprehensive reply to the complainant, the Commission said that both the Secretary-General and the Head of Cabinet had replied to the complainant's questions and explained the Commission's position. In the Commission's view, these replies were comprehensive and substantiated. The Commission's further comments provided supplementary explanations.

The Ombudsman's assessment leading to a recommendation

12. EU Commissioners have a special status. In accordance with Article 17 of the Treaty on European Union and Article 245 of the Treaty on the Functioning of the European Union, both the Commission and individual Commissioners are required to be fully independent and to act in the general interest of the European Union only. Commissioners must also act with integrity. They are required to “*refrain from any action incompatible with their duties or the performance of their tasks*”.

13. Given their specific status, Commissioners must adapt their behaviour so as to avoid **any** negative reflection on the European Union, the Commission and the dignity of their office. A Commissioner must avoid **any** conduct that might give the impression that the Commissioner or the Commission lacks or might lack independence.

14. The Ombudsman considers that in giving the radio interview in question, which also dealt with other matters, it would have been wise, appropriate and perfectly possible for the Commissioner to have simply refrained from commenting on the Stork's Nest Case. Given (i) the sensitive nature of the case, (ii) the fact that it concerned the EU's financial interests, (iii) that there was an ongoing OLAF investigation and (iv) that it also concerned the leader of her own political party then holding a senior Ministry, the Commissioner should have acted with particular reserve.

15. The Ombudsman disagrees with the Commission's assertion that the Commissioner limited herself, during the interview, to objectively describing and providing information on the relevant rules in light of her past professional experience at the Member State level. The Ombudsman further disagrees that the Commissioner's statements are acceptable because they did not contain any definite conclusions or firm statements, did not prejudice OLAF's findings or because the Commissioner had to avoid putting into doubt the innocence of her political party leader. It is clear from the transcript of the radio interview that the Commissioner publicly sided with the leader of her political party and defended him. The Commissioner conveyed her view that, as “someone who knows the rules”, the Stork's Nest project did fulfil the three specific



conditions governing the grant of EU funds in that kind of case. In particular, she expressed the view that the recipient of the EU funds was a “small firm” and not the much larger company owned by her political party leader. In the Ombudsman’s view, the Commissioner’s statement was unwise and inappropriate given her status as a Commissioner whose conduct must not create **any doubts** as to any potential conflict of interests affecting the exercise of her duties nor reflect negatively on the European Union. The Ombudsman does not accept that the Commissioner’s comments can be regarded as compatible with her obligations as a Commissioner.

16. Therefore, the Ombudsman finds that the Commissioner’s statements in the radio interview of 24 March 2016 contravened her Treaty obligations in relation to the independence of her position. The Commission, for its part, committed maladministration as a result of its failure to acknowledge that the Commissioner’s statements were not compatible with her obligations as a Commissioner.

Conclusion

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the European Commission:

The European Commission should collectively be mindful - and should remind the Commissioner in question specifically - of the need to exercise due caution in future interviews. The Ombudsman notes that Articles 2(5), 5(1 and 4) and 9(3) of the new Code of Conduct for Commissioners, due to enter into force on 1 February 2018, give expression to the legal requirement on Commissioners to exercise appropriate discretion in their public utterances (see Annex II to this Recommendation).

The European Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the European Commission shall send a detailed opinion by 2 May 2018.

Emily O'Reilly

European Ombudsman

Strasbourg, 02/02/2018



“ ... [J]ournalist: So when your boss, the head of the movement ANO, I mean your boss in your party, explained who owned the farm Stork's Nest at the time when he obtained a 50 million subsidy, did you find his explanation - that it was owned by his adult children and the brother of his partner - satisfactory?

... Commissioner: I see it with a little bit of distance and also, because I know Mr Babiš, I know that family is sacrosanct for him. From a human perspective, I quite understand that he did not want to expose them to the media pressure which justifiably impacts politicians who have chosen it and went into it [meaning politics], and we must be able to stand it because media have the right to ask. But it is true, and I know it from my own experience, that the moment it concerns your family, it is really difficult for the politician who cares about his family and its normal functioning.

... [J]ournalist: I am asking rather considering whether there was an entitlement to the subsidy?

... Commissioner: I see it from the perspective of someone who knows the rules. This means, you must fulfil three conditions. You have to be a so-called eligible subject which can apply - in this case it was - if I have good information - a small or medium enterprise; you must fulfil what the subsidy is meant for, that is, it is some value for money, in this case it probably came in the form of jobs and the development of tourism in the region; and you must hold it for three or five years after the end of the financing. If these conditions were met, then de iure there will not be a problem. And I am of course also curious about the investigations of OLAF and of the police. I hope that it is quickly clarified because it does not contribute to a good atmosphere or to good governance in the Czech Republic.

[J]ournalist: You believe that it was a small- or medium-sized enterprise without any ties to the giant Agrofert?

... Commissioner: I think that, as it was explained and I was not listening to all the details, but I think that it was a small firm that applied and that this specific point is the object of a very thorough analysis by the one who provides the subsidy. And the object of controls. And, as far as I know, both occurred in this case and it was not found that the one who applied was not entitled to apply.

...

... [J]ournalist: However, in our programme yesterday, the deputy for the movement ANO Kristýna Zelenková admitted that, in her opinion, it was a moral shortcoming of Andrej Babiš, and that he should accept some responsibility. What about the moral dimension, Commissioner?

... Commissioner: I think that the main emphasis was on the fact that there was simply the idea to build something, build something for people, for children, animals that will be basically in free nature.



... [J]ournalist: When you are saying, excuse me for interrupting, Commissioner "build something for his family"... I will use the quote of Mr Bělobrádek, a coalition partner, the head of a coalition party, who says that Andrej Babiš confirmed the suspicion that he intentionally [In Czech "účelově" implying the intention to circumvent the rules.] reassigned his ownership of the Stork's Nest through his family and that the situation is very serious and undermines the government's credibility.

... Commissioner: This is precisely what I do not see this way, that he wanted to build it for his family. I think that Mr Babiš's situation is such that he does not need to do anything like that, that he has managed to secure his family through his business activities. But there was simply this idea, and this is the core of the issue, that from European funds you can finance things, which are not for somebody whether he is rich or poor, but you make of it something that should have a positive impact on the public. This means the development of the region, employment...and here I think this opportunity was taken as this subsidy was available and that it fulfilled this goal well, also according to the assessors of the project.

... [J]ournalist: The question of course is whether the subsidy should have been awarded to this company. And Lubomír Zaorálek, Minister of Foreign Affairs from ČSSD, spoke on Czech Television yesterday about the fact that, at the time in question, tailor-made companies would be ordinarily set up to be able to access EU funds and he said that there would be consulting firms for this. And now I'll quote him: "I even suppose that former Minister Jourová, current Commissioner, was this consultant, who advised businessmen how to conceive a project or found a company to obtain a subsidy." End of quote. Is it the case? Did you advise how to set up a company to obtain...

... Commissioner: Yes, of course. I did not advise about how to set up a company but how to develop a concept with some general characteristics to submit it as a project. It was probably more of an economic analysis that I would do or an analytical study of the feasibility of such a project. But there was always some idea at the beginning about which somebody contacted me and said, asked, whether it was possible to get a subsidy somewhere. I would have doubts about intentional creation of companies because the company's financial health would be very thoroughly examined, and I do not know whether simply setting up company could satisfy that, but it of course depends on a case-by-case basis. At the ministry, I was never against the intentional foundation of civil society organisations or not-for-profits, when they had some socially beneficial project. I never found that this would be something, intentional sounds very badly, but something that would not be morally good because this approach was used to create many social businesses for disabled people for example. And I think that this was founded in the good control of the purpose for which it was established....

... [J]ournalist: Yes. But we will probably agree, Commissioner, that, if there is a company with anonymous shares, then attempts to verify whether European funds are received legitimately will specifically fail.

... Commissioner: Those are the paradoxes...that we - ANO - went into politics also with the idea that such things should not happen. At that time the rules functioned like this and it was



possible. So, I am saying again: the subsidy was assessed against the then applicable rules. ”

Annex II - Excerpts from Draft Commission Decision of 12.9.2017 on a Code of Conduct for the Members of the European Commission [11]

Article 2(5):

“ Members shall respect the dignity of their office and shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their independence, their integrity or the dignity of their office. ”

Article 5(1):

“ Members shall comply with the duty of loyalty towards the Commission and discretion in discharging their duties. They shall act and express themselves with the restraint that their office requires. ”

Article 5(4):

“ Members shall not make any comment that would call into question a decision taken by the Commission or which may harm the Commission's reputation. “

Article 9(3):

“ Members shall abstain from making public statements or interventions on behalf of any political party or organisation of the social partners of which they are members, except when standing for election/ participating in an election campaign in accordance with paragraph (2). This is without prejudice to the right of Members to express their personal opinions. Members so participating in electoral campaigns shall undertake to refrain from adopting a position in the course of the campaign that would not be in line with the duty of confidentiality or infringe the principle of collegiality. ”

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] http://www.rozhlas.cz/radiozurnal/dvacetminut/_zprava/1596895 [Link]

An English translation of relevant extracts from the interview is available in Annex I.

[3] The two sets of questions can be summarised as follows:



- 1) Do the Commissioner's statements represent the official position of the Commission given that she did not state that she was expressing her personal opinions only?
- 2) Does the Commission/its President agree with the Commissioner's conclusions?
- 3) Is it appropriate for the Commissioner for Justice to publicly state that "*de iure* there is no problem" while OLAF investigations are ongoing?
- 4) Do such statements not unduly influence OLAF's investigation?
- 5) Is the Commissioner's statement (made prior to her appointment), that she would work for Czechs in Brussels, based on an agreement on Czech national interests, compatible with her professional duties?
- 6) Are the Commissioner's actions in violation of Article 17 TEU, Article 245 TFEU and the Commissioners' Code of Conduct (obligation of loyalty towards the EU, obligation of independence and non-intervention in areas outside the Commissioner's competence)?
- 7) Should the failure to reply to his first email be understood as a tacit approval of the Commissioner's legal conclusions?
- 8) Do the Commissioner's conclusions represent the Commission's official position?
- 9) Should this case be understood as a precedent according to which the Commission may issue an opinion on cases under OLAF investigation irrespective of OLAF's "competing competence"?
- 10) If OLAF finds irregularities, whose legal opinion will take precedence: that of the Commissioner for Justice/European Commission or that of OLAF?

[4] The Ombudsman attempted to contact the complainant on 19 and 23 January 2018, to inform him that the inquiry was nearing completion, but did not receive any response.

[5] Article 17 TEU reads, in relevant part, as follows:

" 1. *The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. ...*

3. *... The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.*

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain



from any action incompatible with their duties or the performance of their tasks. ... ”

[6] Article 245 TFEU reads, in relevant part, as follows: “ *The Members of the Commission shall refrain from any action incompatible with their duties. Member States shall respect their independence and shall not seek to influence them in the performance of their tasks.*”

[7] The relevant extracts (working translation from Czech into English made by the Ombudsman’ Office) from the interview are contained in Annex I to this Recommendation.

[8] Sent in response to the Ombudsman’s letter of 27 September 2017 to the Commissioner inviting her to make any comments she wished on the complaint.

[9] The Commission refers to Article 3 of Commission Decision 1999/352 of 28 April 1999 establishing the European Anti-Fraud Office (consolidated version), which provides:

“ The Office shall exercise the powers of investigation referred to in Article 2(1) in complete independence. In exercising these powers, the Director-General of the Office shall neither seek nor take instructions from the Commission, any government or any other institution or body. ”

The Commission further refers to Article 17(3) of Regulation 883/2013 of the European Parliament and the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (consolidated version), which provides:

“ The Director-General shall neither seek nor take instructions from any government or any institution, body, office or agency in the performance of his duties with regard to the opening and carrying-out of external and internal investigations or to the drafting of reports following such investigations. If the Director-General considers that a measure taken by the Commission calls his independence into question, he shall immediately inform the Supervisory Committee, and shall decide whether to bring an action against the Commission before the Court of Justice. ”

[10] The Ombudsman forwarded the working translation prepared by her Office to the Commission which did not challenge its accuracy.

[11] C(2017) 6200,
https://ec.europa.eu/info/sites/info/files/draft-code-of-conduct-for-commissioners-2017_en.pdf