

Decision in case 1419/2016/JN concerning statements made by a European Commissioner in relation to an on-going OLAF investigation

Decision

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 Ombudsman's inquiry related to the failure of the European Commission to take appropriate action regarding statements made by a Commissioner about an on-going investigation into alleged fraud by a Czech company (the "Stork's Nest Case").

The Ombudsman found that the statements by the Commissioner were unwise and inappropriate, given that she expressed a view on the behaviour of a company which was at that time under investigation by the European Anti-fraud Office (OLAF). The Ombudsman asked the Commission to remind the Commissioner in question of the need to exercise due caution in future interviews.

The Commission did not share the Ombudsman's view that the statements of the Commissioner were inappropriate. However, it did agree that, as a general rule, Commissioners should exercise caution when making public statements. It referred, in that regard, to several new safeguards in the revised Code of Conduct for Commissioners.

The Ombudsman maintains her view that the statements in question were inappropriate. However, since the Ombudsman has already put her views on the statements in question on the record, and since the revised Code of Conduct for Commissioners has addressed the systemic issues raised by the complaint, the Ombudsman considers that no further inquiries by her are justified.

Background to the complaint

1. On 24 March 2016, 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). [1] 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 by OLAF) while that investigation was still ongoing. The complainant took the view that, in doing so, the Commissioner had breached her ethical and legal duties as a Commissioner. When the complainant received no reply from the Commission, he turned to the Ombudsman.

The Ombudsman's recommendation

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3. The Ombudsman considered that, in accordance with the Treaties, EU Commissioners have a special status, which requires them to be fully independent and to act in the general interest of the European Union only. They must also act with integrity.

4. 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.

5. The Ombudsman considered that in giving the radio interview in question, 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.

6. The Ombudsman disagreed with the Commission's position that the radio statements at issue were acceptable. In the Ombudsman's view, 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. The Ombudsman considered that 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.

7. The Ombudsman found that the Commissioner's statements in question contravened her Treaty obligations in relation to the independence of her position as a Commissioner. 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.

8. Accordingly, on 2 February 2018 the Ombudsman issued the following recommendation:

“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).”

9. In response to the Ombudsman’s recommendation, the Commission said that it “continues to disagree with the conclusion of a breach of the Treaty obligation of independence”. However, the Commission agreed that there was a need for appropriate caution in public statements by Commissioners. It considered that public trust in the Commission’s independence, integrity and discretion is of utmost importance. The Commission said that the Commissioner concerned shared these views.

10. Moreover, the Commission said that it had highlighted the importance of these principles with the recent adoption of the new Code of Conduct for Commissioners, and in particular the provisions in Articles 2(5) [3] , 5(1 [4] and 4 [5]), 9(3) [6] and 10(6) [7] . The Commission said that it was fully committed to respecting those principles and that the Ombudsman’s recommendation represented another important reminder in this regard.

The Ombudsman's assessment after the recommendation

11. By way of further background to this case, in December 2017 OLAF concluded its investigation and sent its Report to the Czech authorities and the Commission. In January 2018, the Ministry of Finance of the Czech Republic released a short summary of the conclusions of this Report. According to the Czech Ministry of Finance, the OLAF Report calls for nearly 1.65 million euros of European funding, provided to the Stork’s Nest project, to be withdrawn [8] .

12. The Ombudsman maintains her view that the statements of the Commissioner for Justice, made while OLAF was still investigating the case, were unwise and inappropriate. The Ombudsman thus regrets that the Commission still considers that the statements in question were compatible with the Commissioner’s duties. However, as the Ombudsman has already put her views on this matter on the record, she considers that no further inquiries by her on the specific statements are necessary.

13. As regards the systemic aspects of this case, namely the need for effective mechanisms to ensure that Commissioners exercise due caution when making public statements, the Ombudsman notes the Commission’s references to the revised Code of Conduct for Commissioners, which calls on Commissioners to exercise due caution when making public statements (see the excerpts from the Code quoted in footnotes 3 to 7 of this decision). She



trusts that these new safeguards, combined with the heightened awareness on the part of Commissioners that must surely result from the present case, will help ensure that similar issues do not arise in the future. In this context, the Ombudsman considers that no further inquiries are justified into the systemic aspects of this case.

14. The Ombudsman therefore closes her inquiry.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusions:

As the Ombudsman has already put on the record her views on the statements of the European Commissioner for Justice, Consumers and Gender Equality, and as the Commission has revised the Code of Conduct for Commissioners to ensure that such statements are not repeated, no further inquiries are justified.

The complainant, the Commission and the European Commissioner for Justice, Consumers and Gender Equality will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 05/06/2018

Annexes

Annex I - Working translation of relevant extracts from the interview [9]

“ ... [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]Journalist: 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]Journalist: 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]Journalist: 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]Journalist: 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]Journalist: 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]Journalist: 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."

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



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

[2] The Recommendation is available at:

<https://www.ombudsman.europa.eu/cases/recommendation.faces/en/89218/html.bookmark>

[3] Article 2(5) reads as follows: “ *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.* ”

[4] Article 5(1) reads as follows: “ *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.* ”

[5] Article 5(4) reads as follows: “ *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.* ”

[6] Article 9(3) reads as follows: “ *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.* ”

[7] Article 10(6) reads as follows: “ *Members shall abstain from making public statements or interventions on behalf of any European political party of which they are members, except when standing for election or participating in an election campaign in accordance with paragraphs (3) and (4). 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.* ”

[8] The summary is available (link checked May 2018) on the official website of the Czech Ministry of Finance at:

<https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2018/ministerstvo-financi-zverejnuje-zavery-z-30660>

[Link]

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