

Reply to Request for Information (Complaint 1072/2021/NH)

1. In her letter of 19 July 2021, the European Ombudsman submitted to the Court of Justice of the European Union ('CJEU') a request for a reply to the above complaint. The CJEU sent its reply on 2 August 2021 ('reply of 2 August 2021').
2. In her letter of 9 December 2021, the European Ombudsman submitted to the CJEU an additional request for information in relation to the above complaint. In particular, the European Ombudsman invited the CJEU to comment on the European Ombudsman's competence to examine the above complaint in light of press articles mentioning an investigation by the European Anti-Fraud Office (OLAF) and of the judgment of the General Court of 20 September 2019, *Dehousse v CJEU* (T-433/17, EU:T:2019:632), as well as to react to BEUC's comments on the reply of 2 August 2021.

Preliminary remark

3. In light of the exchanges which have already taken place, the CJEU respectfully submits that it is necessary to avoid any misunderstanding on the meaning and scope of Articles 4 and 7 of the Code of Conduct for Members and former Members of the CJEU ('Code of Conduct'), which are alleged to have been violated in the above complaint.
4. It is settled case-law that in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part [for example, judgment of 28 January 2020, *Commission v Italy (Directive on late payment)*, C-122/18, EU:C:2020:41, paragraph 39 and the case-law cited].
5. As already indicated in the reply of 2 August 2021 (paragraph 25), the obligations of impartiality and discretion, as defined in Articles 4 and 7 of the Code of Conduct, serve a specific purpose, i.e. to ensure effective legal protection.
6. That interpretation is also confirmed by Article 47 of the Charter of Fundamental Rights of the European Union. The requirement of impartiality enshrined in that Article and echoed by Articles 4 and 7 of the Code of Conduct is intended to guarantee a fair trial.
7. In other words, the purpose of these obligations is specifically to protect judicial proceedings themselves from undue interference. They do not seek to protect any other – external – process, whether political or otherwise, from potential interference.
8. Given that specific purpose and as already pointed out in the reply of 2 August 2021 (paragraph 26), it would therefore, in any event, not be possible to establish a violation of Articles 4 and 7 of the Code of Conduct without assessing the impact of "expressions" of a Member, for instance during an interview, on his or her ability to contribute to the process of judicial decision-making.
9. Establishing such a violation without making such an assessment would not only give rise to a misapplication of Articles 4 and 7 of the Code of Conduct, but would also, at the same time, impose an unjustified limitation to the fundamental right to freedom of expression of a Member (see paragraphs 7 and 8 of the reply of 2 August 2021).

The European Ombudsman's competence to examine the above complaint

10. The CJEU fully respects the European Ombudsman's competence in relation to the CJEU's activities, which, as set out in Article 228(1) TFEU, covers all its activities "with the exception of the Court of Justice of the European Union acting in its judicial role".
11. The CJEU respectfully submits that the making of an assessment of the impact that "expressions" of a Member may have on his or her ability to contribute to the process of judicial decision-making, without which a violation of Articles 4 and 7 of the Code of Conduct cannot be established (see paragraph 8 above), falls squarely within the "judicial role" of the CJEU. This is confirmed by the overview provided previously of the procedures by means of which any such assessment is made (see paragraphs 12 to 17 of the reply of 2 August 2021). Those procedures are applied exclusively by the judiciary itself with the clear objective of safeguarding its independence.
12. The press articles mentioning an investigation by the European Anti-Fraud Office (OLAF) and the judgment of the General Court of 20 September 2019, *Dehousse v CJEU* (T-433/17, EU:T:2019:632) do not contradict that interpretation, since they do not relate to such an assessment.

BEUC's comments on the reply of 2 August 2021

13. BEUC's comments on the reply of 2 August 2021 start from the premise that a violation of Articles 4 and 7 of the Code of Conduct can be established merely because an "expression" of a Member of the CJEU might exert an influence on an external process, whether political or otherwise, or because of the factual circumstances surrounding that "expression" (the identity of the interviewer).
14. However, for the reasons set out in paragraphs 3 to 9 above, those circumstances do not suffice, as such, for a violation of Articles 4 and 7 of the Code of Conduct to be established, without an assessment being made of the impact of the "expression" of the Member concerned on his or her ability to contribute to the process of judicial decision-making.
15. For the reasons set out in paragraphs 10 to 12 above, such an assessment, or indeed any potential criticism of such an assessment, cannot be the subject-matter of a complaint to the European Ombudsman.
16. That being said, no such criticism has been raised in the above complaint (nor indeed in BEUC's comments on the reply of 2 August 2021), which appears to be based on an incorrect interpretation of Articles 4 and 7 of the Code of Conduct and is, therefore, unfounded in any event.
