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European Ombudsman Closes Maladministration Inquiry into Public Statements by Former Competition Commissioner

In 2012 and 2014, Joaquín Almunia, the then Vice President of the European Commission and Commissioner responsible for competition, made public statements concerning an ongoing investigation of a possible cartel. *Crédit Agricole*, one of the companies under investigation, complained to the European Ombudsman that the Commissioner's statements breached the principle of impartiality by indicating that he had already made up his mind as regards the bank's involvement in the cartel before the investigation was complete.

In an unprecedented finding, in March 2015, the Ombudsman made a preliminary finding of maladministration and issued a recommendation that the Commission "*should (1) acknowledge the maladministration that has occurred in this case, apologize for it and (2) take steps to avoid similar problems in the future.*" The Ombudsman urged the Commission to "*issue guidelines on public statements by Commissioners about ongoing investigations.*"

On November 11, 2015, the Ombudsman closed the inquiry, reiterating her earlier finding of maladministration. Although the Commission had stopped short of acknowledging any maladministration and had failed to apologize or issue the recommended guidelines, the Ombudsman was satisfied that the Commission had taken steps to avoid maladministration of this kind in the future. Whilst the Ombudsman would not seek to interfere in the substantive interpretation of the competition rules, we do expect to see more active involvement from the Ombudsman in competition cases to ensure that the Commission exercises its enforcement powers in compliance with the fundamental principles of good administration, such as impartiality and fairness.

Background to the Complaint

In October 2011, the European Commission conducted unannounced inspections at the premises of several financial institutions, including *Crédit Agricole*, in relation to an alleged infringement of the EU competition rules concerning interest rate derivatives denominated in Euro ("EIRD"). In December 2013, the Commission settled with four of these institutions. The investigation continued with the non-settling parties under the standard cartel procedure.

In April 2014, *Crédit Agricole* raised objections with the Commission concerning its objectivity and impartiality. It referred to a number of statements made by Commissioner Almunia, which, in its view, cast doubts on the

impartiality of the investigation. Of particular note were statements that: “*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); and “*There are still three banks and one broker which remain under investigation because they did not want to settle: a French bank Crédit Agricole [...] whose investigation continues, and we will go to the end, and I must say, as we have a lot of information [laughs] already, the investigation is not the most difficult in the world, from that point, we will finish this investigation*” (French Senate, 28 January 2014).¹

The Commission rejected Crédit Agricole’s objections and, in June 2014, a complaint was lodged to the European Ombudsman. In particular, Crédit Agricole argued that a number of public statements made by the then Commissioner would seem to imply that the Commission, before it concluded (or even formally opened) its inquiry into the alleged cartel, had predetermined the existence of the alleged cartel and the liability of Crédit Agricole (and the other financial institutions).

The Ombudsman’s Assessment

The Commission argued that the statements at issue served the purpose of transparency and informing the public about an important case. It also claimed that according to the case-law, a complainant had to “*demonstrate that if the official concerned was biased against the applicant, that bias was reflected in the actual decision.*”² In this context, the Ombudsman drew a distinction between (1) a decision that can be found to be biased; and (2) behavior that can be perceived as biased. As regards the former, a breach of the principle of impartiality impacts the legality of the decision and can lead to its annulment. By contrast, the latter does not, necessarily, call into question the validity of the final decision. The Ombudsman observed that the principles of good administration require that the Commission not only take impartial decisions, but also be perceived to be impartial throughout the procedure. In

¹ The original text reads: “*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 remaining statements were as follows: “*Sometimes there is need to use the traditional instruments of competition policy, and in Libor/Euribor, this is the case. Because there is a cartel. A cartel organized around the manipulation of a benchmark*” (“*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); and “*Probably before the end of the mandate of this Commission there will be some news from this investigation*” (Public declaration, 30 June 2014).

² Draft Recommendation of the European Ombudsman in the inquiry into complaint 1021/2014/CK against the European Commission, Case 1021/2014/PD, 10 March 2015, para. 12.

this context the Ombudsman noted the Commission's position that, insofar as decisions are adopted by the entire college of Commissioners, the public statements made by a single Commissioner cannot impact upon the impartiality of the final decision. Rejecting the Commission's argument, the Ombudsman stressed that the present case did not concern the impartiality of a decision, but rather the perception of bias resulting from Commissioner Almunia's statements.

In terms of bias against Crédit Agricole specifically, the Ombudsman was not convinced by the Commission's argument that this was not an issue simply because Crédit Agricole was not referred to by name and not individually concerned by most of these statements. The Ombudsman held that the statements in question referred to a small group of easily identifiable companies and that by reading and listening to these statements, interested third parties could easily get the impression that the case had already been determined and that Crédit Agricole had been found liable.

As regards the specific statements at issue, the Ombudsman held that the statements made in 2012 gave the impression that the existence of a cartel had already been established and that the Commission was ready to impose fines. However, at that time the investigation was at a very early stage. The Commission was still gathering evidence and it had not yet taken a decision to initiate formal proceedings and, accordingly, particular caution was required regarding comments and public statements.

The Ombudsman considered certain of the statements made after four companies had settled with the Commission unproblematic. However, the Ombudsman took issue with Commissioner Almunia's statement before the French Senate, which created the impression that the Commissioner had already made up his mind about Crédit Agricole's alleged participation in a cartel and that the evidence that the Commission had collected against Crédit Agricole was so strong that it was only a matter of time before a final decision confirming the infringement would be taken.

The Ombudsman's Preliminary Finding & Recommendation

The Ombudsman found that the statements at issue created a public impression of bias and that the former Commission had already reached a conclusion about Crédit Agricole's alleged participation in the cartel before the investigation was complete. The Ombudsman made a preliminary finding of maladministration. While the Ombudsman did not anticipate that the maladministration that she had identified would affect the further handling of the 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, the Ombudsman made a Recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman, that:

The Commission should acknowledge the maladministration that has occurred in this case, apologize for it and 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.

The Ombudsman's Subsequent Decision

Responding to the Recommendation, the Commission expressed its regret that the former Commissioner's statements might have been perceived as demonstrating a lack of impartiality; however, it stopped short of acknowledging any maladministration or issuing an apology.

As regards issuing guidelines, the Commission stressed that existing rules³ already set out the principles of impartiality and objectivity guiding the work of the Commission more generally, including public statements on ongoing investigations.

The Commission also referred to the fact that the current Competition Commissioner, Margrethe Vestager, had explicitly recognised the need to be cautious as regards her public statements relating to ongoing cases.

In these circumstances, the Ombudsman was satisfied that the Commission had acknowledged the key element in her Recommendation. As the Ombudsman had no reason to believe that the current Commissioner would act in an inconsistent manner with the principle of impartiality, the inquiry was closed without further action required from the Commission, by simply reiterating the 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.*⁴

Another Missed Opportunity?

The Ombudsman's Decision is based largely on the belief that, unlike her predecessor, the current Competition Commissioner, Margrethe Vestager, will act in a manner which complies with the principle of impartiality. Indeed, the Ombudsman was satisfied that the Commission had acknowledged the key element in her Recommendation simply because the current Commissioner had explicitly recognised the need to be cautious as regards her public statements relating to ongoing cases.

While this apparent endorsement of Commissioner Vestager's approach a year into her mandate will, no doubt, be welcomed⁵, it remains to be seen whether the Ombudsman's involvement in this matter will have a lasting impact in terms of fostering "the highest standards of behaviour in the Union's institutions"⁶.

³ The Code of Conduct for Commissioners, the ethical rules regarding the handling of competition cases, and the Code of good administrative behaviour.

⁴ Decision of the European Ombudsman in the inquiry into complaint 1021/2014/PD against the European Commission, Case 1021/2014/PD, 11 November 2015, para. 23.

⁵ Commissioner Vestager took over the portfolio in November 2014.

⁶ See *Problems with the EU? Who can help you?*, The European Ombudsman, available at: <http://www.ombudsman.europa.eu/en/atyourservice/whocanhelpyou.faces>.

If the European Ombudsman really wants to develop as a “*forum for those wishing to challenge the way the Commission has conducted its own antitrust investigations*”⁷, its Decision in respect of Crédit Agricole’s complaint is a missed opportunity, particularly given that the Ombudsman has dealt with only a limited number of complaints regarding competition proceedings.

In *Intel*, the Ombudsman’s inquiry concerned a procedural issue. In the course of an investigation, the Commission met with Dell, a customer of Intel, to discuss issues pertaining to the case. Intel complained that the Commission failed to record, and include in the case file, a note of the meeting. The Ombudsman’s inquiry concluded that the Commission infringed principles of good administration by failing to make an adequate written note. At the time of the Ombudsman’s decision the *Intel* investigation was already closed, hence the deficiency could not be corrected and the Ombudsman could only close his inquiry by making a so-called critical remark⁸. No further action by the Commission was required.

The *Spanish football clubs* case concerned the Commission’s handling of a complaint. A representative of a number of investors and shareholders of European football clubs complained to the Commission that four Spanish football clubs had received unlawful State aid. The Commission did not decide on the complaint within the relevant deadline. The complainant argued that the then Competition Commissioner supported one of the four football clubs and, as a result, failed to make a timely decision on the complaint.⁹ Following her inquiry, the Ombudsman proposed that: “[DG Comp] *could adopt a decision on the Complaint or properly explain why it is not yet able to do so* [...]”¹⁰ However, six months later the Ombudsman observed that the Commission had failed to implement the proposal and that this amounted to a case of maladministration. The Ombudsman sent a draft Recommendation to the Commission, stating that: “*The Commission should undertake to make a decision on whether or not to start infringement proceedings as soon as possible and, in any event, not later than 30 June 2014.*”¹¹ On July 28, 2014, the Ombudsman closed the inquiry, satisfied that the Commission had finally acted in this case.

Another Ombudsman’s inquiry concerned the delay by the Commission in providing Infineon, an alleged member of a cartel concerning smart card chips, with access to key evidence that the Commission intended to use against that company.¹² The Ombudsman closed her inquiry by making a critical remark that: “*The Commission erred by not*

⁷ *Id.*

⁸ Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission, Case 1935/2008/FOR, 14 July 2009.

⁹ Decision of the European Ombudsman closing the inquiry into complaint 2521/2011/(MF)JF against the European Commission, Case 2521/2011/JF, 28 July 2014.

¹⁰ *Id.*, para. 6.

¹¹ *Id.*, para. 9.

¹² Decision of the European Ombudsman closing the inquiry into complaint 1500/2014/FOR against the European Commission, Case 1500/2014/FOR, 13 November 2014.

sending the Letter of Facts to Infineon at an earlier stage in its investigation¹³.” No action by the Commission was required.

Each of the above-mentioned above complaints to the European Ombudsman concerned the fairness of the Commission’s procedure and the independence of the institution; however, none of them appear to have led to any significant change in the Commission’s conduct. Some would argue this is not surprising as the role of the European Ombudsman is simply to “*make sure that the path towards the making of a decision was followed correctly*.”¹⁴ However, if the Ombudsman is to act as an effective “check and balance” on the Commission its Recommendations should be accompanied, where appropriate, with specific requests and followed by concrete actions so as to (1) ensure that when dealing with competition cases the Commission will comply with the key principles of good administration, such as fairness, impartiality, and transparency; and (2) avoid future cases of maladministration. In circumstances where the Commission has stopped short of acknowledging any maladministration or issuing an apology and was not required to do so, it seems highly unlikely that a speech by the current Competition Commissioner about the need to be cautious as regards her public statements relating to ongoing cases will prevent instances of maladministration by future Commissioners. Nonetheless, whilst the Ombudsman would not seek to interfere in the substantive interpretation of the competition rules, we do expect to see more active involvement from the Ombudsman in competition cases going forward to ensure that the Commission exercises its enforcement powers in compliance with the fundamental principles of good administration, such as impartiality and fairness.

¹³ Id., Conclusion.

¹⁴ Address to the Women’s Competition Network on “The Emerging Role of the European Ombudsman in Competition Cases,” Emily O’Reilly, European Ombudsman, 26 May 2015.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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