



**FINANCIAL
TIMES**



ADJUDICATION

GREG CALLUS

EDITORIAL COMPLAINTS COMMISSIONER

Financial Times Limited

INTRODUCTION

1. This is an Adjudication of a complaint made by Addleshaw Goddard, a law firm with a long-standing specialism in media law, on behalf of their client, Corporation Financière Européenne SA (“**CFE**”). The complaint is made to me on appeal from the decision of the Editor of the *Financial Times*, Roula Khalaf.
2. The complaint concerns the first of two articles by the FT’s Rome Correspondent, Miles Johnson, on essentially the same subject:
 - a. On Tuesday, 7 July 2020, a short article headlined “*Italian mafia bonds sold to global investors*” (“**the First Article**”)¹;
 - b. On Thursday, 9 July 2020, a longer magazine article headlined “*How the Mafia infiltrated Italy’s hospitals and laundered the profits globally*” (“**the Second Article**”)².
3. The complaint is made under Clause 1 (Inaccuracy) of the IPSO Code, which is incorporated into (and appended to) the FT Editorial Code of Practice³. However, it is made only in respect of the First Article: the complainant has acknowledged that “*The true position is set out to a tolerably clear standard in the Second Article*”.
4. In summary (but by no means a substitute for the full text of the two articles), the organised crime group ‘Ndrangeta in Calabria, Italy set up front companies providing services in the Italian health sector. Italian health authorities would purchase these services and invoices would be raised. While still unpaid, the invoices would be sold to a special purpose vehicle, who in turn would bundle into a pool, and issue bonds linked to the pool. Financial intermediaries would facilitate the private sale of such bonds to investors, not being aware of the underlying link between some of the bonds and criminal-owned companies.

¹ <https://www.ft.com/content/bcebd77c-057b-4fdo-bd99-b97e0e559455>

² <https://www.ft.com/content/8850581c-176e-4c5c-8b38-debb26b35c14>

³ https://ip-about-us.cdn.prismic.io/ip-about-us/9446c8ac-3fe5-4920-83d9-7561b50ec5b2_20210302+FT+Editorial+Code+of+Practice.pdf

5. The text of the First Article is set out below, with Paragraph Numbers inserted for ease of reference in this Adjudication:

- [1] *International investors bought bonds backed by the crime proceeds of Italy's most powerful mafia, according to financial and legal documents seen by the Financial Times.*
- [2] *In one case, the bonds — backed in part by front companies charged with working for the Calabrian 'Ndrangheta mafia group — were purchased by one of Europe's largest private banks, Banca Generali, in a transaction where consulting services were provided by accountancy group EY.*
- [3] *About €1bn of these private bonds were sold to international investors between 2015 and 2019, according to market participants. Some of the bonds were linked to assets later revealed to be created by front companies for the 'Ndrangheta.*
- [4] *The 'Ndrangheta is less well-known outside Italy than the Sicilian mafia but has risen over the past two decades to become one of the wealthiest and most feared criminal groups in the western world, engaging in crimes ranging from industrial-scale cocaine trafficking to money laundering, extortion and arms smuggling.*
- [5] *Europol, the EU's law enforcement agency, has estimated that the activities of the 'Ndrangheta, which is not made up of a centralised organisation but hundreds of autonomous clans, generate a combined turnover of €44bn a year.*
- [6] *Other investors in the bonds included pension funds, hedge funds and family offices, all looking for exotic ways of earning high returns at a time of record-low interest rates, according to people involved in the deals.*
- [7] *The bonds were created out of unpaid invoices to Italian public health authorities from companies providing them with medical services.*
- [8] *Under EU law, overdue invoices owed by state-connected entities incur a guaranteed penalty interest rate. This makes them attractive for special purpose vehicles, which place them into a large pool of assets and issue bonds backed by the expected cash flows from the future settlement of the invoices.*

- [9] *Most of the assets securitised in the deals were legitimate but some were from companies later revealed to be controlled by certain 'Ndrangheta clans, which had managed to evade anti-money laundering checks to take advantage of international investor demand for exotic debt instruments.*
- [10] *One bond deal purchased by institutional investors contained assets sold by a refugee camp in Calabria that had been taken over by organised criminals. They were later convicted for stealing tens of millions of euros of EU funds.*
- [11] *Almost all were private deals not rated by any credit rating agency or traded in financial markets. CFE, a Geneva-based boutique investment bank, constructed the vehicle that sold bonds to investors including Banca Generali.*
- [12] *When contacted by the FT, Banca Generali said it was unaware of any problems with the underlying assets that backed the bonds it had purchased for its clients and that it had relied on other intermediaries to conduct anti-money laundering checks on the underlying portfolios.*
- [13] *“Banca Generali and Banca Generali Fund Management Luxembourg are getting to know right now of the mentioned bad news,” the company said. It “rel[ied] on the notion that the transaction was eligible when [they] entered the securitised portfolio”, it added in an emailed statement.*
- [14] *CFE said it had never knowingly purchased any assets linked to criminal activity. It added that it conducted significant due diligence on all the healthcare assets that it handled as a financial intermediary, and that it also relied on the checks of other regulated professionals who handled the invoices after their creation in Calabria.*
- [15] *Both companies said that any legal issues that emerged after the invoices had been acquired were immediately reported to the Italian authorities. CFE said that the total amount of invoices later revealed to be linked to organised crime made up a very small proportion of the total amount of assets it had handled connected to the Italian health systems.*
- [16] *EY, which was not required to conduct due diligence on the assets in the securitisation when providing consulting services for the structuring for one of the vehicles purchased by Banca Generali, declined to comment.*

[17] *This article is part of a forthcoming FT Weekend Magazine investigation”*

6. There was significant pre-publication correspondence between the FT’s Rome Correspondent and CFE. It involved eight emails from the FT, and seven responses from CFE, covering the period 29 June 2020 and 7 July 2020, and coming to some 25 pages in Annex 3 to the complaint.
7. Following publication of the First Article, there was a further volley of correspondence: a 3-page letter of complaint from CFE on 8 July 2020 (the day between the First and Second Articles), with a 2-page letter of rebuttal from Nigel Hanson, Senior Legal Counsel at the FT on 9 July 2020.
8. Almost 9 months later, on 25 March 2021, Addleshaw Goddard acting for CFE wrote the Letter of Complaint to the FT Editor, complaining of a breach of Clause 1. The complaint under Clause 1 says of the First Article (at paragraph 2.5) that it:

“gives the misleading and inaccurate impression that our client’s business is tainted by criminality. Specifically, the First Article conveys the following imputations to your readers:

(a) that our client is knowingly engaged in marketing so-called "mafia bonds" (i.e. bonds derived from assets comprising the proceeds of crime) and that in doing so it knowingly facilitates the activities of organised criminals; or

(b) that our client turned a blind eye to the involvement of organised crime in the asset class in which it was dealing, and in doing so, tacitly condoned criminal conduct; or

(c) that our client recklessly or negligently failed to identify that the assets in which it was dealing were tainted by criminality and in doing so fell below the standard of a competent financial services provider.”

9. The complaint was rejected by the Editor, Roula Khalaf, by a letter of Monday 19 April 2021. That letter alerted the complainant to its right of appeal, and that appeal was duly lodged with me on Friday, 30 April 2021.

FRAMEWORK

Clause 1 of the IPSO Code

10. Clause 1 of the IPSO Code, as it applies to the FT by virtue of the FT Editorial Code of Practice, provides as follows:

“1.1 The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.

1.2 A significant inaccuracy, misleading statement or distortion must be corrected promptly and with due prominence, and - where appropriate - an apology published. In cases involving [the FT Editorial Complaints Commissioner], due prominence should be as required by the regulator.

1.3 A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.

1.4 The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.

1.5 A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.”

11. The bulk of Adjudications I have produced in my almost-7-years as Commissioner have concerned Clause 1, and I have endeavoured to build up a consistent body of precedent (not binding, but useful in ensuring consistency) as to how Clause 1 operates.

12. In the *Berkley Adjudication*⁴ at [8] (repeated thereafter in several other Adjudications), I explained the important difference between Clause 1.1 (a duty to take care prior to publication) and Clause 1.2 (a refusal to correct *significant* errors post-publication):

“However, it is important to understand what exactly constitutes a breach of Clause 1 (Accuracy):

[...] Clause 1.1 will only be breached if the Press has not taken care to avoid publishing inaccurate information. It is a rule against slapdash journalism that is negligent about setting out the facts. It is not a rule which is breached by the mere presence of any inaccuracy however minor. It is breached only by such inaccuracies that a careful newsroom could and should have avoided publishing.

[...] Clause 1.2 will only be breached if the Press has refused to properly correct, clarify or apologise for a ‘significant inaccuracy, misleading statement or distortion’. Clause 1.2 is therefore different to Clause 1.1 in two material respects: first, the inaccuracy must be ‘significant’; and second, the breach is not one of negligent omission, but intentional refusal to amend”.

13. I have also repeatedly applied what I first held in the *Portes Adjudication*⁵ at [23]-[27], namely that there are three different types of error in Clauses 1.1 and 1.2: ‘inaccuracy’ (in the strict sense), ‘misleading’ and ‘distortion’:

“23. Although headed “Accuracy”, Clause 1 actually concerns itself with three forms of error: statements of fact may breach by being either inaccurate, misleading, or distorted. The forms of remedy available if Clause 1 is breached are: correction, clarification, and apology. It is implicit in both the distinction between ‘inaccurate’ and ‘misleading’, and in the distinction between a ‘correction’ and a ‘clarification’ that a statement of fact may be entirely correct, and yet still breach Clause 1.

24. Whether a statement is ‘inaccurate’ (in the narrow sense of factually wrong, and requiring a correction) can be judged by comparing the published information to a provably true version of the information. If they differ, and the difference is ‘significant’, a correction will be directed.

⁴ https://ip-about-us.cdn.prismic.io/ip-about-us/f55b6c78-5a61-41e2-8116-cob099deacb6_2015-01-28_matt-berkley-adjudication.pdf

⁵ https://ip-about-us.cdn.prismic.io/ip-about-us/829a5ae2-1b74-44d2-b719-8716a4283ba2_2015-05-11_ferguson-adjudication-with-ps.pdf

25. A statement will be ‘misleading’ where the objective reasonable reader of the FT would take away an erroneous belief about the subject of that statement, even though the statement was true. The words “John Doe has been caught in bed with woman who isn’t his wife” may be perfectly true because John Doe has never married, but if a reasonable reader would take away that John Doe is both married and having an extra-marital affair, the statement is misleading. Significant misleading statements will require clarification, not correction, given that the information is not intrinsically inaccurate.

26. What then of ‘distorted’? It clearly is intended to mean something distinct from ‘misleading’. My provisional view is that whereas a misleading statement misinforms the reasonable reader about the factual content of that statement, a ‘distortion’ is an assembly of statements that are neither inaccurate, nor misleading, but collectively give an impression that a reasonable and fair-minded person in possession of all the facts would not have. To say of Adolf Hitler that he was a vegetarian, liked dogs, painted watercolours, and never cheated on his wife might not be inaccurate or misleading in any of the specifics, but would give the most grossly distorted view of his character.

27. An alleged distortion therefore requires me to find the limits of fair and reasonable views of an article’s subject matter, to see if the article (although the facts are true) is a distortion of the picture generally. Partly for the reasons discussed above, I will be much more wary of doing so where the complaint is about an OpEd (where readers should expect a columnist to be giving a particular, subjective view on ‘the truth’) than in the news sections (where there is a reasonable presumption of objectivity and fairness).”

14. There has since been some refinement of the third form of error in Clause 1, most-recently in the *Issa Adjudication*⁶ at [70]-[71]:

“70. What then of ‘distorted’? I had occasion in the *Libi Adjudication* to reconsider the [Portes Adjudication] definition of ‘distortion’ based on submissions from the FT Senior Legal Counsel, Nigel Hanson, which I accepted had some force:

⁶ https://ip-about-us.cdn.prismic.io/ip-about-us/63444947-a6cf-43f4-9bb2-7c5d87b69a59_Issa+Adjudication.pdf

“The further objection is that my definition of ‘distorted’ requires the ‘reasonable reader’ to be in possession of ‘all the facts’, which is itself a subjective definition (what are ‘all’ the facts? Who decides what facts must be included in the mix?) and cuts against editorial judgment and freedom. I can appreciate the concern, but this may be a matter of infelicitous phrasing, rather than a real obstacle to adjudication.

The FT’s submission is that ‘distortion’ means “a statement or series of statements that, when a publication is read and considered in its entirety, bear(s) for the ordinary and reasonable FT reader in possession of important relevant facts pertaining to the particular matter in question and in-existence and available prepublication, a meaning that significantly and insupportably twists or misrepresents the true position or state of affairs”. This represents that ‘distortion’ is still (being in Clause 1) a species of ‘inaccurate’ or ‘misleading’ information. I accept this submission.

It is important to recognise that while the latitude afforded editorial will be at its greatest in opinion pieces, there is also a wide discretion afforded to editorial as to the picture painted with true facts. Where there are not many or major elements of a story that are false, it will be very rare that a news article will be outside the bounds of that editorial discretion. It is not for me to substitute my view for that of the editor.”

71. It should be clear from the earlier Adjudications on this issue that ‘distortion’ does not mean merely ‘something with which a complainant disagrees’. It has a much more extreme meaning more akin to ‘something with which no fair-minded and objective person would agree’.

Determination of ‘Meaning’

15. The dispute between the FT and CFE primarily concerns the ‘meaning’ of the First Article. The FT says that in its proper meaning, there is no inaccuracy; if CFE’s meaning was the proper meaning, there would be inaccuracy at least in respect of the Criminality Implication, because nobody seeks to assert that CFE is in any way involved or had knowledge of the links to criminality. That is not

a meaning the FT has sought to convey, and the FT says it has not conveyed it. There is no dispute of fact about that to resolve. This Adjudication concerns, as so many Clause 1 adjudications do, the true single ‘meaning’ of the First Article.

16. There is no binding framework by which I must determine the meaning of the First Article, but the following general principles suggest themselves. What is important is what the FT has said, not what it intended to say; the meaning should be ascertained from the perspective of the FT readership, but the FT readership is diverse and heterogenous, and it would be unreasonable to hold the FT responsible (even under its Code) for strained or unreasonable meanings just because a handful of FT readers might have taken them.
17. In the *Wessendorff Adjudication*⁷, at [11]-[15], I first incorporated into my reasoning some of the helpful principles of English defamation law concerning the ‘single meaning rule’ (derived, without evidence, from an objective assessment of the words/images published as they would appear to an ‘ordinary and reasonable reader of the FT’ read in context).
18. Those principles, most clearly re-articulated by Nicklin J in *Koutsogiannis v The Random House Group* [20120] 4 WLR 25 at [10]-[15] esp. [12], are helpful even though I am Adjudicating a complaint under the IPSO Code on appeal, not acting as the arbitrator of a libel action. They provide legal certainty to both the FT and complainants; where Code complaints overlap with private law causes of action, they ensure the harmony of cost-free complaints under a system of self-regulation as an alternative to litigation. Given that there has to be *somehow* a resolution of disputed questions of meaning, it is appropriate to use the same principles as operate in private law claims wherever possible⁸:

“i) *The governing principle is reasonableness.*

ii) *The intention of the publisher is irrelevant.*

⁷ https://ip-about-us.cdn.prismic.io/ip-about-us/8e9b1bc7-b305-44e6-a64c-327788c74f33_wessendorff_adjudication.pdf

⁸ See, for example, the borrowing by Warby J (as he then was) of the principles of meaning and their application in an ‘inaccuracy’ claim brought in data protection: *NT1 & NT2 v Google LLC* [2018] EWHC 799 (QB) at [79]-[87].

iii) *The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.*

iv) *Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.*

v) *Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.*

vi) *Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.*

vii) *It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.*

viii) *The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).*

ix) *In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.*

x) *No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.*

xi) *The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.*

xii) *Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.*

xiii) *In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the*

parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning)."

(I shall refer to these as Principles (i) to (xiii) below)

An exception: Dee v Telegraph Media Group

19. However, it can be dangerous to simply or unthinkingly read over the law of defamation into Code complaints and appeals. There can be some exceptions to the application of defamation principles to the meaning of words in Code complaints:

- (a) In the *Chandler Adjudication*⁹ at [42]-[47], I rejected a submission by the FT that a headline was not in breach of Clause 1 because of the 'Rule in *Charleston v News Group Newspapers* [1995] 2 AC 65, which requires headlines to be read as part of the article as a whole. That is correct, and applicable to Clause 1 complaints on the meaning *of the article generally*, but there is an additional stipulation in Clause 1.1 ("*including headlines not supported by the text*") which seeks to prevent abuse of the Rule in *Charleston*, and so sets a higher standard than the general law.
- (b) In the *Valbury Capital Adjudication*¹⁰ at [28]-[58] (discussed below) I decided that the rather extreme circumstances meant the justice of the case required me to depart from the operation of the Single Meaning Rule in a complaint under Clause 1.2.

20. In the present case, one issue (not urged upon me by either party) which has troubled me arises from the final line of the First Article (annotated above as paragraph [17]): "*This article is part of a forthcoming FT Weekend Magazine investigation*". This is potentially highly-relevant in circumstances where the complainant accepts that the Second Article accurately set-out the true position in respect of it, and that the Second Article was not in breach of Clause 1.

⁹ https://ip-about-us.cdn.prismic.io/ip-about-us/92daf861-309d-4d6d-b3d4-c5e09b7631b9_chandler_adjudication.pdf

¹⁰ https://ip-about-us.cdn.prismic.io/ip-about-us/744df439-6b6d-4c94-bd85-03c7dc43b2ad_valbury_adjudication.pdf

21. Principle (viii) from *Koutsogiannis* requires that the ‘publication be read as a whole’. However, we know from the decision of Sharp J (as she then was) in *Dee v Telegraph Media Group* [2010] EMLR 20; [2010] EWHC 924 (QB) at [17]-[32] – a case in which, incidentally, I note Addleshaw Goddard acted for the Claimant – that defining ‘the publication’ can vary from case-to-case, certainly encompassing (as in *Dee* itself) two articles in the same newspaper on the same subject.
22. The test as a matter of defamation law (per *Dee* at [29]) is whether the two articles are “*sufficiently closely connected as to be regarded as a single publication*”, even though in reality many readers will only have read one of the articles. Sharp J in *Dee* at [32] decided the point summarily in favour of the defendant largely on the grounds that the articles were in the same edition of the newspaper and:
- “[t]here was a very clear cross reference in the front page article itself in bold type to the “full story” and the reader was told where to find it. There was an obvious and clear link between the two. It would also have been obvious to all readers of the front page article, that read alone, it did not constitute or purport to be the full story.”*
23. I note with interest that the most recent application of this principle – on 23 July 2021, Saini J handing down his judgment in *Ashley v Times Newspapers Ltd* [2021] EWHC 2082 (QB) at [46]-[50] – it was held that the first and second hardcopy articles in the same edition were to be read together, although that the third hardcopy article in a different day’s edition was to be read separately, but that (as was agreed by the parties) all three online versions of the articles were to be read as a single publication.
24. Whatever one thinks of the rule that articles should be read together when sufficiently closely connected (by time, subject matter, and direct cross-reference), its operation will, in my view, usually favour libel defendants by permitting reliance on the ‘antidote’ in one to nullify the ‘bane’ in another (per Principle (viii)). That might be relatively easy to justify where the law of defamation imposes the risk of court-ordered damages awards and injunctive relief against repetition: it is less easy to justify in the case of a newspaper being held to its own Code which requires it not to be inaccurate (including post-publication, when inaccuracies are drawn to its attention).

25. If the rule *Dee v Telegraph Media Group* was to be applied to meaning in Clause 1 Adjudications in the same way as it applies in defamation claims, I consider it would be very finely-balanced on the facts of this case.

- a. There is a direct reference to the forthcoming investigation to be published in what would become the Second Article (although, initially, there would have been no hyperlink as the Second Article was not yet published). Paragraph 17 says the First Article is “*part of*” that forthcoming investigation.
- b. The subject-matter of the First and Second Articles is essentially identical. Indeed, the complainant’s letter to the FT Editor on 25 March 2021 said in terms at paragraph 1.2: “*We understand that the Second Article represented the real fruit of the FT’s investigation into the matters being discussed and that the First Article was intended as a short trailer for the Second Article.*”
- c. As against those factors, the two articles were published some 36 hours apart¹¹, and not in the same print edition of the newspaper.

26. While I am not sure a Court in litigation would necessarily come to the same conclusion, I have decided that – to the extent Clause 1 Adjudications should incorporate without modification the rule in *Dee v Telegraph Media Group* for the ascertainment of meaning at all (which I assume, but have not had to decide definitively) – that in borderline cases the complainant in a Code complaint should be given the benefit of the doubt. This reflects the less serious consequences for freedom of expression of a newspaper being held to its own high standards than to the strictures of the law.

27. Accordingly, in respect of each of the three facets of the complaint, I shall apply the Principles (i) to (xiii) in respect of the First Article as a freestanding publication,

¹¹ I am calculating this based on the official @FT Twitter account tweets. The First Article was tweeted at 18:03pm, 7 July 2020 (<https://twitter.com/FT/status/1280548055536861184>); the Second Article was tweeted at 05:35am, 9 July 2020 (<https://twitter.com/FT/status/1281084540472131585>).

without considering any antidote effect which might arise from the Second Article. Given that this is how both the FT and CFE have framed their respective cases on the meaning of the First Article in correspondence, it also has the pragmatic benefit of not needing to seek further written submissions.

The Complaint on Appeal

28. The complainant's meaning of the First Article, in paragraph 2.5 of Addleshaw Goddard's letter of 25 March 2021, is as I have set out at paragraph 8 above. It is not in dispute that CFE was unaware of the organised-crime origin of some of the invoices that were bundles.

29. The crux of the complaint can be found in paragraphs 2.9-2.14:

“2.9 The first half of the First Article clearly implies that the companies involved in trading these bonds (including our client) were aware of their criminal provenance, or at the very least were acting on the fringes of morality and legality. This impression is reinforced by the sensationalist reference in the headline to "Italian mafia bonds" and the reference in the article to the fact that the bonds were traded by way of "private deals not rated by any credit rating agency or traded in financial markets" (and thus, by implication, were inherently suspect).¹ This means that by the time the reader reaches the paragraphs setting out our client's position, they will be understood as a rote denial by a company which has been caught red-handed. Therefore, on reading the whole article, the reasonable reader will be left with the impression that our client is guilty, at the very least, of some form of wrongdoing.

2.10 The scale of the issue is also seriously misrepresented. The statement "About €1bn of these private bonds were sold to international investors between 2015 and 2019, according to market participants" suggests that €1bn bonds derived from criminal proceeds have entered the global market.

2.11 [Examples from other media outlets are given, and the complainant disputes the FT's denial it would be liable for re-publication by others]

2.12 In fact, the size of the Italian healthcare debt market is much larger than this but the value of tainted bonds is much smaller. Only a very small proportion of the c.€1bn of healthcare bonds issued by our client were potentially linked to organised crime (about 0.07% of the total

bonds issued by the company at the relevant time). By failing to provide actual figures, the First Article fails properly to contextualise our client's involvement. The qualifying statement that "some of the bonds were linked to assets later revealed to be created by front companies for the 'Ndrangheta" gives the reader no indication of the true scale of the problem. Nor does it make clear that in fact only a tiny fraction of the bonds were affected.

2.13 Further, the First Article fails to make clear that CFE did not have any legal or other responsibility to conduct due diligence on the entities selling the debt which ultimately formed part of the bonds. This responsibility lay with the intermediaries who introduced CFE to the relevant companies. Very significantly, the affected assets which made up the 0.07% of bonds referred to above had been confirmed as clean by the relevant intermediary at the time they were acquired by CFE.

2.14 [Gives details of the intermediary who conducted the anti-money laundering ("AML") and know-your-customer ("KYC") checks and confirmed to CFE that the assets were eligible]"

30. The letter of appeal dated 30 April 2021 makes the further submissions, based on the rejection by the Editor of the complaint:

- “1. In rejecting the Complaint, the FT adopts an excessively granular approach to its analysis of the words complained of, and fails adequately to consider the overall impression which will be conveyed to readers, i.e. that the companies involved in trading the assets (including our client) were aware of, or at least turned a blind eye to, their criminal provenance. This is reinforced by the sensationalist headline referring to "Italian mafia bonds". We refer in this regard to paragraph 2.9 of the Complaint.*
- 2. In order to justify its assertion that the First Article is accurate, the FT relies heavily on the paragraphs in the First Article which set out our client's position. However, as explained in the Complaint, the fact that CFE's position is set out in the First Article does not automatically mean that the meaning conveyed by the article as a whole is accurate. For example, as is clear from the widespread reporting of the First Article, numerous other publications have derived an inaccurate meaning from the article and have reported that to their readers.*

In its Response, the FT attempts to abdicate any responsibility for the republication of these inaccuracies, and fails to acknowledge that the significant harm caused to our client by these further publications has

been brought about as a direct result of the breaches of the Code in the First Article.

3. *The FT also relies on the statement in the First Article that "some of the bonds were linked to assets later revealed to be created by front companies for the 'Ndrangheta" to rebut our client's complaint that the article fails properly to contextualise our client's very limited involvement. As set out in paragraph 2.12 of the Complaint, this wording gives the reader no indication whatsoever of the true scale of the problem. Contrary to the assertion in the Response, it is not the case that CFE did not "use any other form of quantification of the amount of tainted invoices as a proportion of their overall business in any precise terms".*

In fact, CFE informed the FT prior to publication that the exposed assets were worth around EUR 2 million against a total portfolio worth hundreds of millions of Euros. We invite you to read the relevant pre-publication correspondence at Annex 3, pages 4, 12 and 18. The FT therefore had sufficient information to provide far more contextualisation than it ultimately chose to provide. It has since been established by our client that in fact the EUR 2 million figure was an overestimate and that in fact bonds worth only EUR 793,000 were affected by the issue (around 0.07% of the total bonds issued).

4. *The FT denies that the reference in the First Article to the fact that the bonds were traded by way of "private deals not rated by any credit rating agency or traded in financial markets" implies that they were inherently suspect. We respectfully disagree.*

As set out in the Complaint, the bonds were tradable, had an ISIN code, and could have been traded on a secondary market or stock exchange. They were not so traded due to lack of demand. We maintain that in the First Article, the FT misleadingly invites readers to draw an adverse inference from the fact that the bonds were privately placed."

DISCUSSION

31. Of the three species of error to which Clause 1 is directed – 'inaccuracy' in the strict sense, 'misleading' and 'distorted' – I do not consider there is any of the first species of error alleged. There is no erroneous statistic, or incorrect fact that could be 'corrected'.

32. The way the complaint is put is that, if the complainant's meaning is made out, that in spite of the individual facts being correct, the article as a whole is 'misleading' (requiring clarification) or 'distorted'. If that meaning is not made out, it is not.

Criminality or Wilful Blindness

33. The complainant's meaning of the articles (in full at paragraph 8 above) has three parts, the third of which concerns "*recklessly or negligently failing*" to identify the criminal provenance of some of the invoices. I shall deal with the third imputation and 'negligently' separately below. However, 'recklessly' (where subjective recklessness is sufficient for *mens rea* in crimes and torts of malice) falls more easily to be considered with the first two imputations:

- *that our client is knowingly engaged in marketing so-called "mafia bonds" (i.e. bonds derived from assets comprising the proceeds of crime) and that in doing so it knowingly facilitates the activities of organised criminals; or*
- *that our client turned a blind eye to the involvement of organised crime in the asset class in which it was dealing, and in doing so, tacitly condoned criminal conduct; or*

34. What is the basis of the argument for the imputation of CFE's criminality? The complainant draws the contradistinction between the Second Article (which several times says 'unwittingly' in relation to CFE) and the First Article which does not do so. The sentence in that these were "*private deals not rated by any credit rating agency or traded in financial markets*" (paragraph [11]) is said to render the bond issues "*inherently suspect*". It is said the impression is reinforced by the "*sensationalist headline*" referring to Italian mafia bonds.

35. As with all determinations of meaning, following Principle (xii) and the guidance of specialist judges who apply the *Koutsogiannis* principles regularly¹², I first read

¹² See, most recently, Collins Rice J in *Miller v Turner* [2021] EWHC 2135 (QB) at [7]-[11] referring to "*the standard preparatory approach*".

the Articles (both the First and Second Article, not appreciating at the time I conducted the exercise that the Second Article was not subject to complaint under Clause 1) to gain a freestanding impression of the meaning, before reading the detailed exegesis of either the complainant or the FT. I have subsequently sense-checked my initial and instinctive response as to the meaning of the First Article (of which complaint is made alone) by reference to the underlying materials and the detailed submissions of the parties. I did not know if the parties would raise the *Dee v Telegraph Media Group* point that I have discussed above, so I decided to come to a provisional view of the impressionistic meaning on the two Articles separately, and only then re-read them together. As it transpired, (i) neither party took the *Dee* point; (ii) I have decided they had to be read separately for the purposes of Clause 1; and (iii) reading the Articles together ultimately would have made no material difference to my conclusions on meaning of the First Article.

36. On the basis of that impressionistic reading I did not impute the suggestion that CFE or Banca Generali or EY were *knowingly* involved or were in any way *criminally reckless* in their involvement with these bonds. I did, however, take away the possibility that some or all of these financial institutions might have been *negligent* in failing to uncover the links between the invoices and organised crime. But there was nothing that positively indicated to me anything about the state of knowledge or wilful blindness on the part of the intermediaries.

37. I have then considered whether my view has substantially changed as a result of the material and submissions I have read (noting that Principles (iv) and (v) of *Koutsogiannis* are, at this second stage, routinely more honoured in the breach than in the observance). I can record that it has not, principally because the complainant's case on meaning at paragraph 2.9 of the letter of 25 March 2021 requires a reading of the First Article which is inconsistent, in particular, with Principle (viii) of *Koutsogiannis*, namely that a publication should be read as a whole, with 'bane' and 'antidote' taken together.

38. Principle (viii) does not allow for analysis which relies on a reading of the "first half" of the First Article (the alleged 'bane') and then a complaint that the reader will have already ingested a more serious defamatory meaning "*by the time the reader reaches the paragraphs setting out our client's position, they will be*

understood as a rote denial by a company which has been caught red-handed". Even if it were correct (which I do not accept) that readers will automatically dismiss the antidote because it comes towards the end, this approach is antithetical to taking bane and antidote together: indeed, it suggests that in order to be effective, the antidote must come before the bane.

39. CFE's position – clearly expressed in paragraphs [14] and [15], and consistent with the pre-publication correspondence – comes between equally robust denials of knowledge from Banca Generali at paragraphs [12] and [13], and a recitation at paragraph [16] that EY declined to comment. But even absent those rebuttals, I don't accept that the first half of the First Article "*clearly implies that the companies involved in trading these bonds (including our client) were aware of their criminal provenance, or at the very least were acting on the fringes of morality and legality*" at all.
40. Taking just paragraphs [1]-[11] of the First Article, it is clear even from the standfirst that the organised crime groups are using front companies (a form of subterfuge) and that bonds backed by invoices from these front companies have been sold to 'international investors'. There is no suggestion that all involved were cognisant of this: the reference to major and reputable institutions in paragraph [2] strongly suggests the opposite. Paragraph [3] refers to the link between bonds and tainted assets being "*later revealed to be created by front companies*", suggesting that the concealment was successful for some time. Paragraph [6] confirms that there was a wide range of investors (pension funds, hedge funds, family offices) drawn by the high returns, not out of a desire to help the mafia.
41. Even by the end of paragraph 6, there is a clear distinction between the criminality of the 'Ndrangheta and their front companies, and the duped members of the financial system, including investors chasing fat profits. This is reinforced by paragraph [9] – most assets were legitimate, but some "*managed to evade anti-money laundering checks*". It is therefore clear that there is a covert attempt by organised crime to evade or circumvent the anti-money laundering checks that financial companies have to conduct in order to securitise assets into bonds.

42. Is the position materially changed by the first sentence of paragraph [11]? This says “*Almost all were private deals not rated by any credit rating agency or traded in financial markets*”. The complainant’s case is that this suggests that the activity was ‘inherently suspect’, such as to cast aspersions of criminality on the financial firms involved.

43. Before turning to that issue, there was some dispute over this sentence as an ‘inaccuracy’ in the strict sense.

a. A footnote to paragraph 2.9 of the complaint on 25 March 2021 said of this sentence: “*This is in any event incorrect. The bonds in question were publicly listed, tradeable on the stock exchange or secondary market and have an ISIN code.*”;

b. The FT Editor’s response of 19 April 2021 replied to this as follows:

“*We found no evidence of any active secondary market in these securities. The bonds were not "publicly listed", and they do not trade on an exchange. They were sold in private placements, and the fact that they had an ISIN is irrelevant.*”

c. The letter of appeal dated 30 April 2021 responded to say:

“*As set out in the Complaint, the bonds were tradable, had an ISIN code, and could have been traded on a secondary market or stock exchange. They were not so traded due to lack of demand. We maintain that in the First Article, the FT misleadingly invites readers to draw an adverse inference from the fact that the bonds were privately placed.*”

44. I cannot find an ‘inaccuracy’ in the strict sense here. The sentence says that almost all deals were ‘private deals’ (which I take to mean not traded on a public stock exchange or secondary market). While this is attributed by the complainant to a “*lack of demand*”, the fact of the actual sales not taking place in a stock exchange or secondary market appears to be accepted by the complainant. This means the sentence is not ‘inaccurate’ (in the strict sense) in saying that they were “*not traded in financial markets*” but instead were sold privately. This is a distinction between potentially ‘tradeable’ and actually ‘traded’: the disputed sentence refers expressly

to the latter. There has been no suggestion that the bonds were in fact rated by a credit rating agency.

45. I also did not read this sentence as suggesting that the bonds were ‘inherently suspect’, or that it raised questions about the *criminality* of CFE or the other banks and financial institutions involved. In circumstances where the meaning I took was one of negligently failing to discover the link to organised crime, this sentence emphasised that there were fewer organisations involved in reviewing the bonds than there might have been if they had also been rated by a credit rating agency, or indeed exposed to the glare of a public stock exchange or secondary market. I took the sentence as explaining how the covert criminality had gone unnoticed, rather than inherently connoting that the financial institutions must have known or had been wilfully blind to the provenance of the assets.
46. Treating Principle (xi) with all due caution, FT readers are generally aware of the onerous and important nature of AML and KYC checks in the financial services industries, and the incredibly grave consequences of breaching those obligations. They would not too readily assume – in the absence of a positive, express allegation – wilful or reckless breach of those obligations done to assist organised crime, especially not by properly-run financial institutions. The strongest point that was made was the contra-distinction between the repetition of ‘unwitting’ in the Second Article with its absence in the First Article, but that is not a point that will have been apparent to the ordinary and reasonable reader of the First Article read alone. That omission cannot generally connote that things must have been ‘witting’.
47. Even taking the ‘bane’ in paragraphs [1]-[11] of the First Article in isolation from the later ‘antidote’, I do not consider there is anything like enough for the ordinary and reasonable reader of the FT to draw an imputation of criminality or acquiescence with money laundering by well-regulated European financial institutions such as CFE, Banca Generali or EY, unless that reader was indeed ‘avid for scandal’ (per Principle (ii)). Once the first half of the First Article is read together with the categorical denials of knowledge by CFE and Banca Generali, and the fact that both firms reported the legal issues to the authorities, there is no room for a reasonable reader to infer criminality.

48. I also do not consider that the headline suggests anything whatsoever about the knowledge or awareness of financial intermediaries. Whether or not it is ‘sensationalised’, the rule in *Charleston* requires the meaning to be derived from the reading of the First Article as a whole (including the headline) and I don’t consider the headline itself conveys the complainant’s meaning.
49. Having had regard to the rule in *Charleston*, I have further considered whether there is any freestanding breach of the final part of Clause 1.1, prohibiting “*headlines not supported by the text*”. There could be no complaint about, for example, a headline that said ‘Bonds linked to Italian mafia are sold to global investors’, which would accurately reflect the text of the First Article. Making that ‘Italian mafia bonds’ instead of ‘Bonds linked to Italian mafia’ strikes me as falling well-within the generally-accepted conventions for headlines¹³, which readers understand will somewhat constrict and condense the subject of an article.
50. It follows that I do not accept that the First Article bears the first two of the complainant’s three imputations, or the third insofar as it is premised on CFE acting ‘recklessly’. It follows that it cannot be ‘misleading’ or a ‘distortion’ in conveying that meaning, which all agree is not the true state of affairs. Applying Principles (i) to (xiii) to ascertain the true single meaning, I cannot find imputations of criminality being made against CFE in the First Article.

Negligent Oversight

51. I do however, agree that the First Article raises suggestions –not at *Chase* Level 1 (outright guilt), but either at *Chase* Level 3 (grounds to investigate) or perhaps *Chase* Level 2 (grounds to suspect) – that the financial institutions had perhaps been negligent in failing to discover the link of the invoices to organised crime. This is akin to the third imputation of the complainant (absent the words “*recklessly or*” which I have dismissed above):

“that our client [...] negligently failed to identify that the assets in which it was dealing were tainted by criminality and in doing so fell below the standard of a competent financial services provider.”

¹³ As to which, see the *Chandler Adjudication* op. cit. at [42]-[60].

52. As a preliminary step in adjudicating on this aspect of the complaint, it is necessary to deal with the submissions I have received on a specific element, namely the scale of the problem (of organised-crime front company invoices presented to Italian health authorities being pooled and used as collateral for bonds) and how that scale of problem was presented in the First Article.
53. The First Article does successfully convey that not all of the bonds in question were tainted by illegality, in the following ways (emphasis added):
- a. At paragraph [3]: “Some of the bonds were linked to assets later revealed to be created by front companies for the ‘Ndragheta’”;
 - b. At paragraph [9]: “Most of the assets securitised in the deals were legitimate but some were from companies later revealed to be controlled by certain ‘Ndragheta clans...’”;
 - c. At paragraph [15]: “CFE said that the total amount of invoices later revealed to be linked to organised crime made up a very small proportion of the total amount of assets it had handled connected to the Italian health systems.”
54. A major feature of the complainant’s complaint is that the First Article fails to convey the scale of the problem it says it subsequently ascertained (see paragraphs 2.10-2.12 of the complaint letter of 25 March 2021). If there had been any suggestion in the First Article that all (or even most) of the invoices bundled into the bonds were mafia-related, then the negligence meaning would be made out (indeed, if it had been suggested *all* the bonds were mafia-linked, that might have been a building block for the criminality imputations I have rejected). But it did not. The First Article says in terms that only “*some*” were illegitimate, that “*most ... were legitimate*”, and records CFE commenting that they “*made up a very small proportion*”.
55. CFE says it has ascertained that, of its entire €1bn portfolio of bonds, only between €793,000 and €2m could potentially have been invoices tendered by a mafia front company to the Italian healthcare authority. Taking its entire portfolio of Italian healthcare bonds (approximately €1bn), thus it says at paragraph 2.10 of the complaint letter of 25 March 2021 that “*Only a very small proportion of the c.€1bn*

of healthcare bonds issued by our client were potentially linked to organised crime (about 0.07% of the total bonds issued by the company at the relevant time)". This is the basis for the complaint about the First Article being misleading by omission of the 'true scale' of the problem.

56. The letter of appeal of 30 April 2021 therefore says:

"In fact, CFE informed the FT prior to publication that the exposed assets were worth around EUR 2 million against a total portfolio worth hundreds of millions of Euros. We invite you to read the relevant pre-publication correspondence at Annex 3, pages 4, 12 and 18. The FT therefore had sufficient information to provide far more contextualisation than it ultimately chose to provide. It has since been established by our client that in fact the EUR 2 million figure was an overestimate and that in fact bonds worth only EUR 793,000 were affected by the issue (around 0.07% of the total bonds issued)."

57. There are some difficulties in accepting CFE's factual analysis as being conclusive, and the FT does not accept it as being definitive as to the factual position:

- a. First, a distinction needs to be drawn between the value of the 'tainted' invoices as a proportion of the total value of all assets which were securitized in the bonds (e.g. €2 out of €1bn total invoices would be 0.2%), versus the proportion of *bonds* which were linked to tainted invoices. Hypothetically, a full 100% of the bonds would be tainted (to a very small degree) if there was only a single pool of invoices; it would be only a fraction of that where there were multiple pools of invoices; it would fall right down to 0.2% of bonds if there was no pooling and a separate bond was issued for each invoice. Therefore, even on the (contested) basis that only 0.2% of the *value of the invoices* were linked to organised crime, the percentage of *bonds* linked to organised crime (and thus the value of such bonds) could be very much higher, depending on how the bundling of the pools was constructed.
- b. Second, the pre-publication correspondence at p.4 records that *"There were originally some very limited exposures (about 2 million euro) vis-à-vis the ASP of Catanzaro..."* and at p.12 records similarly that *"in the past, some limited exposures (around two million euros against portfolios of*

hundreds of millions) vis-à-vis ASP Catanzaro were purchased from three different sellers which were subsequently subject to criminal charges.” But the FT’s questions also related to the local Italian health authorities being placed in emergency administration because of the risk of mafia-infiltration, to which CFE answered: *“With respect to the debtors (i.e. the ASP), obviously they are at the receiving end of the process. So, if an ASP is subject to some form of investigation with respect to alleged criminal activities, that of course does not imply or suggest that all the receivables owed by that ASP are affected by the investigation itself. It is rather obvious that the large majority of the receivables due by the ASP in question will be due on the basis of legitimate and genuine health services provided by the relevant provider and such receivables are therefore not affected by the investigation itself.”* That may well be strictly correct, but it does raise the spectre that the total number of invoices affected by mafia infiltration in Calabria might be somewhat higher than the 0.07%-0.2% which CFE has definitely established were linked to suppliers who have since been made the subject of formal criminal investigation.

58. In these circumstances, I am not – cannot be – satisfied that any party to this complaint – not the FT, and not CFE – can define with real confidence the extent of the problem as it affects the Italian healthcare authorities in Calabria, or the proportion of factored invoices affected, or the number of bonds which are linked to such pools of invoices. I accept that CFE’s own best-estimate currently stands at a fraction of 1%, but this is already reflected in the First Article at [15] where it is said they *“made up a very small proportion”*, and the First Article itself says at paragraph [9] that *“most of the assets ... were legitimate”*.

59. The €2m estimate was indeed provided pre-publication, whereas CFE’s 0.07% estimate (based on only €793,000) came only later in the complaint letter of 25 March 2021. For the reasons above, I do not agree that the FT was obliged to accept CFE’s €2m estimate as definitive or conclusive of the factual situation.

60. I have considered whether the FT should have included CFE’s quantification of 0.2% in the First Article, instead of merely saying *“a very small proportion”*.

However, I note that the final mention of a precise figure (€2m) was on 3 July 2020, and that Miles Johnson chased for on-the-record comment twice on Monday 6 July 2020; the substantive response on 7 July 2020 referred only in passing to the fact that “*in absolute value these particular transactions are almost insignificant*”; Miles Johnson’s reply of the same day expanded the comment he was attributing to CFE to say “*1) you consider the amounts of mafia-connected assets in your transactions were of a small monetary size and therefore you do not consider them important*”. In the circumstances, the ultimate phrasing of paragraph [15] was perfectly reflective of the position CFE had taken. Even if the 0.2% was definitive fact, I don’t think a reasonable FT reader would be materially misled by reference to “*a very small proportion*”.

61. It does appear that certain other news outlets ran with headlines or stories that suggested that all €1bn worth of bonds were mafia-linked. These are referred to at paragraph 2.11 of the complaint. I am not the Editorial Complaints Commissioner for those media outlets¹⁴: their accuracy does not concern me. Principle (x) provides that extrinsic evidence (such as how other media outlets, including those writing other than in English, understood the article) is irrelevant to meaning, just as much as Principle (ii) provides that the FT’s intended meaning is irrelevant.
62. Parenthetically, I consider that while the complainant is right to assert that in libel any damage consequent on a defamatory publication (including repetition by others) is recoverable from the original publisher, the FT is correct that it is only liable for the consequences of what it publishes in the *meaning* that the words *it has published* convey, and not for glosses or changes to meaning introduced by subsequent republication by other parties: see the *Valbury Capital Adjudication*¹⁵ at [31]-[33] citing *Baturina v Times Newspapers Ltd* [2010] EWHC 696 (QB).
63. I have therefore considered whether the first sentence of paragraph [3] of the First Article is misleading on its face insofar as it includes the word “*these*”, because read-alone it reads as suggesting that all €1bn bonds were mafia-linked (i.e. the

¹⁴ Although it is a matter of public record that I have previously acted as a barrister (independently of my role at the *Financial Times*) for the company that publishes one of these publications: see *Napag Trading Ltd & ors v (1) Gedi Gruppo Editoriale SpA (2) Societa Editoriale Il Fatto SpA* [2020] EWHC 3034 (QB).

¹⁵ https://ip-about-us.cdn.prismic.io/ip-about-us/744df439-6b6d-4c94-bd85-03c7dc43b2ad_valbury_adjudication.pdf

criminal ‘bonds’ described in paragraphs [1] and [2]), when (as the second sentence makes clear) the true proportion is only “some” of the €1bn bonds. On balance, I think the word “these” is imprecise and infelicitous, and risks confusion if paragraph [3] is not read with sufficient care.

64. I don’t consider that the inclusion of the inapposite “these” constitutes a failure to take care under Clause 1.1, but I do consider that – CFE having raised in the complaint, albeit almost 9 months after publication – the issue of whether readers could be misled specifically as to the scale of the problem, that this potentially engaged Clause 1.2 (the post-publication duty to correct or clarify inaccuracies).
65. The difficulty is that reading the First Article as a whole, there are three separate occasions where it is made clear that not all the bonds were tainted by illegality: see paragraphs [3], [9], and [15]. Applying Principle (i) – ‘reasonableness’ – and Principle (vii) – it is not enough to say it *might* be understood that way – I am unable to find a breach of Clause 1.2 based on the true meaning of the First Article.
66. I have once – in the *Valbury Capital Adjudication* at [28] to [58] – departed from the single meaning rule under Clause 1.2 where the consequences for the complainant (an ambiguity that suggested that they were at risk of insolvency) was so serious that justice demanded that the genuine ambiguity (causing a “strong subsidiary meaning”) be clarified under Clause 1.2.
67. I do think it would be better if the word ‘these’ had been excluded from paragraph [3] once the complaint was received, but in my judgment the FT was not in breach of Clause 1.2 in failing to do so. This is not a case where the single word ‘these’ causes a real ambiguity given the three express references in the First Article to not all bonds being affected by the mafia-linked invoices.
68. Even assuming the infelicitous ‘these’ surpassed the threshold of being a ‘significant’ inaccuracy which obtains under Clause 1.2 (but not Clause 1.1), I rather doubt whether a subsidiary meaning of ‘all the bonds were affected’ is even *capable* of being taken from the First Article. It is certainly not a “strong subsidiary meaning” in the sense I used the term in *Valbury Capital*.

69. Where does that leave the third imputation of which the complainant complains?

I continue to think that the First Article bears a meaning of grounds to investigate/suspect that some or all of the financial institutions (including the complainant) were negligent in failing to spot the mafia-links to the assets underlying some of their bonds. That meaning is derived from the First Article as a whole, but in particular paragraphs [12]-[16] which are the responses to the FT's questions:

- a. Banca Generali were only just learning of the news and had relied on other intermediaries for AML checks on the underlying portfolios;
- b. CFE said that it had “*conducted significant due diligence on all the healthcare assets that it handled as a financial intermediary, and that it also relied on the checks of other regulated professionals who handled the invoices after their creation in Calabria*”;
- c. EY declined to comment, but was apparently not engaged as one of the third-parties who conducted due diligence.

70. This aspect is only lightly touched upon in the complaint, primarily at paragraphs 2.13 and 2.14 of the letter of 25 March 2021:

2.13 Further, the First Article fails to make clear that CFE did not have any legal or other responsibility to conduct due diligence on the entities selling the debt which ultimately formed part of the bonds. This responsibility lay with the intermediaries who introduced CFE to the relevant companies. Very significantly, the affected assets which made up the 0.07% of bonds referred to above had been confirmed as clean by the relevant intermediary at the time they were acquired by CFE.

2.14 That intermediary [Company X] is under the supervision of Banca d'Italia, pursuant to the system of self-regulation which applies to all credit brokers in Italy. [Company X] had undertaken the requisite AML and KYC procedures in relation to the assets and confirmed to CFE that they met the relevant requirements. Only after the assets had been acquired and the bonds had been issued did it emerge that the underlying company in question was under investigation. This is crucial context which underlines even further CFE's complete lack of awareness that a very small percentage of the assets in which it was dealing had some connection to criminality. However, the First Article fails to draw out this point and leaves readers with a misleading and damaging impression of CFE's involvement.”

(emphasis original)

71. It is unfair to suggest that the FT did not draw out the temporal point that the investigation only emerged after the assets had been acquired. Paragraph [15] makes express that *“Both companies said that any legal issues that emerged after the invoices had been acquired were immediately reported to the Italian authorities. CFE said that the total amount of invoices later revealed to be linked to organised crime made up a very small proportion...”* (emphasis added).
72. I can accept that there are others in the transaction who may have greater or more specific legal responsibilities for AML and KYC, and that CFE was legally entitled to rely on third-party evaluations, such as that by Company X that the assets *“met the relevant requirements”* (e.g. the eligibility criteria for the assets excludes receivables where the seller has been sentenced or is exposed to criminal charges). But CFE also told the FT that – while *“not under any duty to carry on specific AML checks”* – *“We would also agree with you that we carry out extensive and thorough due diligence”*. The First Article faithfully recounts at paragraph [14] that – whether or not a legal duty subsisted – CFE had conducted *“significant due diligence”*.
73. If the proportion of invoices affected by this issue was definitively proven to be no greater than 0.2% of the total value of healthcare invoices, there would be a good defence for any financial institution accused of negligence in conducting due diligence. But even if entirely exonerated because the proportion was so very small, that still might not render unjustified the grounds for investigation or suspicion at the outset.
74. However, in circumstances where there is no clear definitive factual conclusion about the extent to which invoices issued to Italian healthcare authorities in Calabria are linked to mafia-infiltration, and the FT is not prepared to agree that CFE’s estimate is definitive, I cannot possibly determine whether or not there has been any negligence by any financial institution in its AML checks, let alone decide whether it is inaccurate to say that there are indeed grounds for investigation and/or suspicion of such failings. I therefore cannot find a breach of Clause 1 on the basis of grounds to investigate/suspect negligence.

CONCLUSION

75. In summary, I find that the first two imputations of the complainant’s meaning – namely that it was either knowingly or recklessly involved in, or wilfully blind to, the inclusion of mafia-linked invoices in bond issues – are not the true single meaning of the First Article. The appeal against the Editor’s resolution of that complaint under Clause 1 on that basis is dismissed.

76. I also dismiss the appeal in respect of the third imputation. While I do consider that the First Article bears a single meaning which connotes that there are grounds to investigate (or grounds to suspect) some or all of the financial institutions involved in these bonds of negligence in carrying out their AML, KYC and other due diligence, I am not able – at least not without an investigation and fact-finding exercise which goes well beyond the confines of my role – to find a breach of Clause 1 on the basis of the First Article conveying that meaning.

77. Accordingly, this appeal is dismissed. I should record have some sympathy with the complainant in respect of the word ‘these’ in paragraph [3], but I hope that they are somewhat reassured that the categorical statements as to the true factual position – including their conclusions as to the scale of the problem, and that there is no such assertion of any criminal knowledge on their part by the FT – will become and remain public when this Adjudication is published online.

GREG CALLUS
Editorial Complaints Commissioner
Financial Times
9 August 2021

