

Opinion
of the
Independent Ethical Committee
established
by the European Commission
21 July 2020

Subject: Request for an opinion on former Commissioner Oettinger’s envisaged post term of office activity as member of the Advisory Council (‘Beirat’) of Deloitte Deutschland GmbH

On request of the President of the European Commission, the Independent Ethical Committee, composed of Ms Dagmar Roth-Behrendt, Mr Allan Rosas and Mr Heinz Zourek, delivers the present opinion:

Procedure

1. On 6 May 2020, the Secretary-General of the Commission asked the Committee, on behalf of the President of the Commission, to deliver an opinion on the compatibility of former Commissioner Oettinger’s envisaged activity as member of the Advisory Council of Deloitte Deutschland GmbH with Article 245 of the Treaty on the Functioning of the European Union.
2. By letter of 3 July 2020 to the Secretary-General of the Commission, the Committee sought additional information from former Commissioner Oettinger. The Committee received Mr Oettinger’s reply to this request on 17 July 2020.

Facts

General information on Deloitte Global and Deloitte Deutschland GmbH

3. Deloitte’s Global Impact Report 2019 describes Deloitte as a global company providing services in the fields of audit and assurance, consulting, financial advisory, risk advisory, tax, legal and other related services. It employs around 310 000 people in 150 countries and territories. Its headquarters are located in London, United Kingdom. Deloitte is one of the four major global networks for professional services (Ernst & Young, KPMG, PwC).

4. Deloitte comprises Deloitte Touche Tohmatsu Limited (Deloitte Global), a UK private company limited by guarantee, Deloitte member firms and each of their related entities in more than 150 countries and territories. It has governance and management structures at both the global and member firm levels. Deloitte Global itself does not provide services to clients. Deloitte member firm partners are generally the sole owners of their respective firms. The member firms are primarily organised on an individual country or regional basis, and each firm operates within the legal and regulatory framework of its particular jurisdiction. They are separate and independent firms that come together under a common brand, shared methodologies, standards, protocols and guidelines. The member firm structure reflects the fact that the member firms are not subsidiaries or branch offices of a global parent, but separate and distinct legal entities.
5. One of those entities is the German Deloitte Group. According to its Annual Report 2018/2019, the group is composed of ‘Deloitte Deutschland GmbH Wirtschaftsprüfung’ and its subsidiaries as well as ‘Deloitte Legal, Rechtsanwalts-gesellschaft mbH’. It provides services in the areas of auditing, risk advisory, tax advice, financial advisory and consulting for companies and institutions from all sectors of the economy. Legal advice is provided by Deloitte Legal. It has more than 8 000 employees.

The organisation of Deloitte Deutschland GmbH

6. The Group is managed by a Chief Executive Officer who chairs the company’s Executive Committee. The Committee is responsible for the strategic and operational management of Deloitte Deutschland. The management is supervised by a Supervisory Board in line with Section 52 of the German Federal Limited Liability Companies Act.
7. The Advisory Council is not part of the formal governance structure of the company. Its role is to support the management in identifying future challenges, in finding adequate and strategic solutions, in developing the business model of Deloitte and in optimising the company’s presentation on the market. The membership of the Advisory Council includes former office holders in public institutions and companies.

Former Commissioner Oettinger’s position

8. Former Commissioner Oettinger informed the Commission that he was invited to join the above-mentioned Advisory Council of Deloitte Deutschland GmbH. He would be expected to attend around four meetings per year and would receive a compensation for those meetings.

Links of Deloitte Deutschland GmbH with the Commission

9. Former Commissioner Oettinger met Deloitte Germany (Deloitte GmbH Wirtschaftsprüfung) twice in January and April 2016 in his capacity as Member of the Commission in charge of Digital Economy and Society in order to discuss issues related to the Digital Single Market.
10. The company declared in its entry in the Transparency Register of 13 January 2020 that it had not received any funding from the EU institutions during the last closed financial year. According to the information publicly available from the Commission's Financial Transparency Register, they received a small amount in 2017 for participation in an expert group of the Directorate-General for Taxation and Customs Union.
11. Deloitte member firms in other countries, notably in Belgium, had or have substantial business relations with the Commission, in various policy fields and with various Commission services. In 2018, the total value of Commission commitments towards Deloitte member firms amounted to €27 million of which approximately €4 million fell under the responsibility of Commission services under the political authority of Commissioner Oettinger. The commitments of the Commission in relation to the three other major global networks for professional services are of approximately the same level or higher (according to the Commission's Financial Transparency System, commitments in 2018 in relation to the three other major global professional services networks amounted to respectively €46 million, €35 million and €25 million).
12. In his reply of 17 July 2020 to the Secretary-General, Former Commissioner Oettinger assured the Commission that during his term of office, he had not been involved in any activity, neither directly nor indirectly, which might have concerned any legal relationship between Deloitte and the European Commission. He underlined, in particular, that he had not been involved in any manner, neither directly nor indirectly, in the preparation of possible financial commitments of the Commission towards Deloitte.

Legal context

13. Article 245 of the Treaty on the Functioning of the European Union (TFEU) provides:

The Members of the Commission shall refrain from any action incompatible with their duties. Member States shall respect their independence and shall not seek to influence them in the performance of their tasks.

The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they

have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 or deprived of his right to a pension or other benefits in its stead.

14. Article 339 of the of the Treaty on the Functioning of the European Union (TFEU) provides:

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

15. Article 15(1) and (2) of the Charter of Fundamental Rights of the European Union provides:

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

16. Article 2(7) of the Code of Conduct for the Members of the European Commission (hereafter the ‘Code of Conduct’) provides:

Former Members shall respect the obligations arising from their duties that continue to have an effect after their term, in particular the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits in line with Article 245 of the Treaty on the Functioning of the European Union, and the obligations specified in this Code of Conduct.

17. Article 5 of the Code of Conduct provides:

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

2. Members shall refrain from disclosing what is said at meetings of the Commission.

3. Without prejudice to the disciplinary provisions applicable to officials and other agents, Members are responsible for the proper handling and any external transmission by members of their Cabinets of classified documents, of sensitive information or of confidential documents submitted to the College for adoption or information.

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

18. Article 11 of the Code of Conduct provides:

1. After ceasing to hold office, former Members shall continue to be bound by their duty of integrity and discretion pursuant to Article 245 of the Treaty on the Functioning of the European Union. They shall continue to be bound by the duties of collegiality and discretion, as laid down in Article 5, with respect to the Commission's decisions and activities during their term of office.

2. Former Members shall inform the Commission with a minimum of two months' notice of their intention to engage in a professional activity during a period of two years after they have ceased to hold office. For the purposes of the present Code, 'professional activity' means any professional activity, whether gainful or not, other than any unpaid activity which has no link with the activities of the European Union and which does not give rise to lobbying or advocacy vis-à-vis the Commission and its services such as:

(a) charitable or humanitarian activities;

(b) activities deriving from political, trade unionist and/or philosophical or religious convictions;

(c) cultural activities;

(d) the mere management of assets or holdings or personal or family fortune, in a private capacity;

(e) or comparable activities.

3. The Commission shall examine the information provided in order to determine whether the nature of the planned activity is compatible with Article 245 of the Treaty on the Functioning of the European Union, and if the planned activity is related to the portfolio of the former Member, it shall decide only after having consulted the Independent Ethical Committee.

Without prejudice to the possibility for the President to seek its opinion in cases of doubt, the Independent Ethical Committee does not need to be consulted where former Members intend to:

(a) continue to serve the European interest in an Institution or Body of the European Union;

(b) take up functions in the national civil service of a Member State (at national, regional or local level)

(c) engage with international organisations or other international bodies dealing with public interests and in which either the EU or one or several of its Member States are represented;

(d) engage in academic activities;

(e) engage in one-off activities for a short duration (1 or 2 working days);

(f) accept honorary appointments.

4. Former Members shall not lobby Members or their staff on behalf of their own business, that of their employer or client, on matters for which they were responsible within their portfolio for a period of two years after ceasing to hold office.

5. In the case of a former President, the periods set out in paragraphs (2) and (4) shall be three years.

6. The duties set out in paragraphs (2) and (4) shall not apply where the former Member is engaging in public office.

7. Decisions taken under paragraph (3) determining compatibility with Article 245 of the Treaty on the Functioning of the European Union and related opinions of the Independent Ethical Committee shall be made public with due consideration to the protection of personal data.

Opinion

19. The Committee notes that Members of the Commission have a right to engage in work and to pursue a freely chosen or accepted occupation after the term of their office. This right needs to be balanced with the obligations set out in Article 245 TFEU and the Code of Conduct for the Members of the European Commission, which develops these obligations in more detail.

20. The role of the Advisory Council of Deloitte Deutschland GmbH consists of supporting the management of Deloitte Germany with regard to strategic issues. The Advisory Council and its members are not involved in the actual operations and day-to-day management of the company, but provide rather high-level advice and serve, according to information of the company, as a think tank. Moreover, the actual duties linked to the membership in the Advisory Council seem to be moderate given the usually limited number of meetings of the Council per year.

21. As regards financial commitments of the Commission in previous years towards Deloitte Germany, which is the entity for which Mr Oettinger intends to perform the

activity, these are negligible and did not fall under the responsibility of the services under the political authority of former Commissioner Oettinger.

22. The commitments of the Commission towards Deloitte member firms in other countries than Germany, notably in Belgium, are however significant. This includes commitments made by services, which fell within the portfolio responsibility of former Commissioner Oettinger during his term of office. The question is if the envisaged activity of former Commissioner Oettinger for Deloitte Germany could create retroactively doubts with regard to the independent and impartial handling, by the Commission and its services, of the files and procedures, which resulted in those commitments towards Deloitte member firms other than Deloitte Germany.
23. In this regard, the Committee takes note of the fact that the member firms of Deloitte Global are formally separate and distinct legal entities with their proper management and decision-making structures.
24. It also notes that the amounts awarded to Deloitte member firms in general, have to be put in perspective with regard to other commitments signed by the Commission in the area of professional services. In this regard, the committed amounts are not significantly different compared to commitments towards other major companies in this business sector, and often lower.
25. The Committee is also aware that financial commitments of the Commission, like decisions to award a contract, are normally the result of competitive procedures managed and decided at the different decentralised management levels of the Commission departments. The Commission's Communication on Governance in the European Commission (C(2020) 4240 final) of 24 June 2020¹ explains in this regard: "The accountability chain in the European Commission is clearly defined in the Financial Regulation. The Authorising Officer of the European Commission is the College of Commissioners. The College delegates financial management tasks to the Directors-General or Heads of Service who thereby become Authorising Officers by Delegation. These tasks can further be delegated by the Authorising Officer by Delegation to Directors, Heads of Unit and others, who thereby become Authorising Officers by Sub-Delegation." The Authorising Officers by Delegation are therefore responsible towards the College of Commissioners as a whole.
26. The Committee has taken note of former Commissioner Oettinger's general assurance provided on 17 July 2020 that he had neither been involved in any activity, neither directly nor indirectly, which might have concerned any legal relationship between Deloitte and the European Commission, nor in any manner, neither directly nor indirectly, in the preparation of possible financial commitments of the Commission towards Deloitte. The Committee relies on this assurance for the present opinion.

¹ https://ec.europa.eu/info/sites/info/files/c_2020_4240_en.pdf

27. The Committee has also taken note that former Commissioner Oettinger believes that “upon thorough and objective consideration, no risk and no conflict of interest is perceptible in view of my activity for the Advisory Council of Deloitte”. This seems to imply that there is no link between his meetings with Deloitte Germany in 2016 and the present envisaged activity in the Advisory Council of Deloitte Germany. The Committee regrets in this regard that former Commissioner Oettinger’s statement does not contain any specific considerations in relation to the fact that services under his political authority have made financial commitments towards Deloitte Global’s member firms other than Deloitte Germany - even if he himself was not involved in these commitments -, in relation to his meetings with Deloitte Germany in 2016 and in relation to the political advisability to engage in the present activity shortly after leaving office.
28. Taking into account the different elements set out above, notably the limited character of the envisaged activity and former Commissioner Oettinger’s assurances provided on 17 July 2020, the Committee does not consider that there is such a close link between the envisaged activity and previous activities of Mr Oettinger that this could create retroactively doubts with regard to the independent and impartial handling of those commitments by the responsible Commission departments under the former Commissioner’s responsibility. The Committee does therefore not see sufficient grounds to conclude that the activity of member of the Advisory Council of Deloitte Deutschland GmbH envisaged by Mr Oettinger would be incompatible with Article 245 of the Treaty on the Functioning of the European Union.
29. The Commission decision should recall, however, and explicitly spell out a number of restrictions in order to ensure the compatibility of the activity with the obligations applying after the end of the mandate.
30. While the membership in an advisory council to the management does usually not involve lobbying activities on behalf of the company, the decision should nevertheless recall that Article 11(4) of the Code also applies to this activity for a period of two years after the end of the term of office. It should explicitly mention that former Commissioner Oettinger should not provide any advice to Deloitte Germany on issues related to direct or indirect lobbying of the Commission by Deloitte, even on matters for which former Commissioner Oettinger was not responsible in his former portfolios.
31. Moreover, the decision should recall that former Commissioner Oettinger must strictly respect Article 339 TFEU, which provides that *‘The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.’*

32. In addition, the decision should clarify that former Commissioner Oettinger remains bound by the duties of collegiality and discretion, as laid down in Article 5, with respect to the Commission's decisions and activities during his terms of office. Consequently, he must not disclose anything, which was said at meetings of the Commission, or call into question decisions taken by the Commission during these periods.
33. The decision should underline that former Commissioner Oettinger must show in general a high sense of discretion with regard to the use of information and insights that he obtained in the performance of his duties, be it with regard to the functioning of the Commission or the Commission's relations with other institutions, Member States, third countries or third parties. He should not provide the benefit of any insights of a confidential or sensitive nature in policy, strategy or internal processes that he obtained during his terms of office, to Deloitte Germany.
34. Finally, the decision should recall that former Members must, if they have doubts with regard to the application of the Code, 'inform the President of the Commission in a timely manner and before acting on the matter relating to which the doubts arise', according to Article 13(2) of the Code.
35. Based on the above-mentioned considerations, the Committee concludes that the envisaged activity would be compatible with Article 245 TFEU on the condition that the above-mentioned conditions are set out explicitly in the Commission decision.

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