

Opinion
of the
Independent Ethical Committee
established
by the European Commission
27 November 2019

Subject: Request for an opinion on Commissioner Moedas' envisaged post term of office activity as Member of the Board of Trustees of the Gulbenkian Foundation

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 4 October 2019, 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 Commissioner Moedas' envisaged activity as member of the Board of Trustees of the Gulbenkian Foundation with Article 245 of the Treaty on the Functioning of the European Union.

Facts

The Gulbenkian Foundation

2. The Calouste Gulbenkian Foundation is a perpetual Portuguese institution of public utility with charitable, artistic, educational and scientific statutory objectives. It is a renowned major player within the Portuguese cultural and scientific landscape. It was created in 1956 by the testament of Calouste Gulbenkian ¹.

¹ Mr Gulbenkian was a philanthropist of Armenian origin who lived in Lisbon between 1942 and the year of his death, 1955. During around two decades, as from 1912, Mr Gulbenkian was given a shareholding of 15%, and afterwards 5%, of the Turkish Petroleum Company, set up by the Turkish Government in 1912 to exploit the oil fields in Al-Jazeera (Iraq).

3. The Gulbenkian Foundation is, according to its statements, committed to full independence and preservation of its heritage, and its main priority is defined as the development of a sustainable society that provides equal opportunities.
4. The Foundation's declared main purpose is to improve the quality of life through art, charity, science and education. The Foundation directs its activities from its headquarters in Lisbon and delegations in Paris and London.
5. The Foundation has a museum, which houses the founder's private collection, alongside a collection of modern and contemporary art; an orchestra and a choir; an art library and archive; a scientific research institute; and a garden, in a central area of the city of Lisbon, where educational activities also take place.
6. In conjunction with cultural activities, the Foundation fulfils its mission through programmes that develop pilot projects and by providing scholarships and grants for other institutions and social organisations.
7. According to the Foundation's Annual Report 2018, its assets amounted to €2,772.1 million. The Foundation's Capital Fund amounted to €2,272 million (corresponding to 81.96% of the value of the assets). The investment portfolio includes shares, bonds, money market accounts and certificates of deposit managed by specialised financial intermediaries. Well over 90% of its yearly budget is funded by returns of this endowment. The Foundation is therefore not dependent on external sources of financing.

The Gulbenkian Foundation's Institute of Science

8. A significant part of the Gulbenkian Foundation is its Institute of Science (*'Instituto Gulbenkian de Ciência'*), a research institute devoted to biological and biomedical research, innovative training and to transforming society through science. The values that the Gulbenkian Institute of Science thrives to and aims to spread to society are, according to its own statements, scientific excellence, originality, communication, tolerance and cooperation.
9. Its declared mission is to meet science global challenges by making ground-breaking discoveries in Life Sciences, innovating in training, incubating the next generation of future leaders and placing science at the heart of society.
10. According to the institute's description, small and independent research groups work in an environment designed to encourage interactions and exploit synergies, with minimal hierarchical structure. The Gulbenkian Institute of Science's research programmes cover a wide range of domains and are at the interface of different disciplines. These include cell and developmental biology, evolutionary biology,

immunology and host-microbe interactions, plant biology, socio-biology, computational biology and biophysics.

11. The Gulbenkian Institute of Science supports its scientists to apply for competitive funding, from national and international sources, including the Howard Hughes Medical Institute, the Human Frontiers Science Programme, the Bill & Melinda Gates Foundation and the European Research Council.
12. The whole science programme, including the Institute, represent around 6% of the overall budget of Gulbenkian.

Links between the Commission and the Foundation

13. The Commission's Financial Transparency System² shows that in 2017 and 2018 the Foundation received approximately €4 million from the EU budget via the Commission's Executive Agencies (European Research Council Executive Agency and Education, Audiovisual and Culture Executive Agency). Executive Agencies are legally independent bodies that are supervised by the Commission. In 2016, the Foundation received approximately €3 million from the Research Executive Agency including a small grant of €120,000 from the Directorate-General for Research and Innovation). In 2015, it received approximately €3.5 million including small amounts of funding from the Directorate-General.
14. The Commission signed on 19 December 2014 a Memorandum of Understanding with the Calouste Gulbenkian Foundation (CGF). The aim of the Memorandum is to collaborate strategically and to identify and support opportunities for common global health research and innovation objectives and have an impact on health outcomes and poverty reduction in resource-constrained developing countries; to provide mutual support and technical assistance to one another; to encourage European, African and health research institutions and businesses from other parts of the world to address the need for knowledge and technologies of developing countries; to maximize the impact of their funding through coordination and partnership and minimize duplication. No financial commitments and no legal obligations incur from the Memorandum.
15. Commissioner Moedas signed the Memorandum on behalf of the Commission on 19 December 2014. The authorisation to sign the Memorandum was adopted by the Commission on 5 August 2014, i.e. before Commissioner Moedas became a Member of the Commission.

² http://ec.europa.eu/budget/fts/index_en.htm.

Commissioner Moedas' position and responsibility at the Foundation

16. The Committee was informed by Commissioner Moedas about his envisaged future tasks as Member of the Board of the Gulbenkian Foundation, first on 28 October 2019 and, after the Committee had sought additional information, on 12 November 2019. On the basis of the information thus received, the envisaged future tasks of Commissioner Moedas can be described as follows:
17. Commissioner Moedas has the possibility to become an executive member of the Board of Trustees of the Foundation after the end of his mandate as Commissioner. The Board of Trustees is a collegial body that presides over the Foundation, with a maximum of nine members.
18. In its 'plenary' format, which meets six times a year, the board currently includes four executive members and four non-executive members and approves the overall strategy, budget and activity plan. In its "executive" format, the executive members meet weekly to oversee the day-to-day management and implementation of the approved activity plan and budget.
19. In the Board of Trustees, it is the practice to divide the various tasks and programmes among the different executive members, taking into consideration the estimated workload and the variety of areas involved. Commissioner Moedas envisaged responsibilities would be to oversee programmes related to cohesion and sustainable development, health, education and scholarships, reflection and prospective activities.
20. This entails to supervise the heads of the departments that run the programmes, to coordinate the organisation of conferences, to make hiring decisions in accordance with the needs of the Foundation and to decide on what is the best way of implementing a goal contained in the activity plan and budget.
21. With regard to the Foundation's endowment, the Board is responsible for approving the strategic asset allocation based on recommendations of the Investment Committee (fully composed of external members), supported by the expert opinion of the external advisor. Investment decisions are proposed by the external advisor and subject to the Boards approval after screening by the internal investment team.
22. Implementation of investment decisions is done through the allocation of asset portfolios to specialized external portfolio managers. Performance analysis is done both by the external advisor and by the internal investment team. One of the Board members has oversight over the whole process and reports to the Board on all endowment issues. Commissioner Moedas would therefore have no capacity to take individually decisions on the allocation of funds.

23. Furthermore, the Board is not involved in exploring other sources of revenue. In the course of the Foundation's Institute of Science, scientists affiliated with the Institute are responsible themselves for applying to competitive funding through various sources. The Board does not get involved in the effort carried out by hosted scientists or other programme officers that participate in calls for EU grants.
24. Yet, the Board has the ultimate oversight of the Institute of Science, meaning that is ultimately responsible to ensure the good functioning of the institution and the compliance with the Foundations' rules and regulations. Commissioner Moedas has however agreed with the institute that he would take neither the science nor the investment tasks within the board.

Legal context

25. Article 17(3), third subparagraph, of the Treaty on European Union (TEU) provides that:

In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

26. 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.

27. 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.

28. Article 2(7) of the Code of Conduct for the Members of the European Commission (hereafter the 'Code of Conduct') provides:

7. 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.

29. 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 (17) 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

'Would the envisaged activity be compatible with Article 245 of the Treaty on the Functioning of the European Union?'

30. 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 17(3) TEU, Article 245 TFEU and the Code of Conduct, which develops these obligations in more detail.
31. The activity for which the Commissioner applied is an activity, which falls under the obligation of Article 11(2) of the Code of Conduct to inform the Commission.
32. The Gulbenkian Foundation is an institution of public utility pursuing objectives of general interest, which are largely in line with objectives of the European Union and the Commission.
33. Due to the activities of the Foundation and the funding received by the Foundation from the EU budget in recent years, the portfolio related to research, science and innovation would have a particular link with the activities of the Foundation. Yet, as mentioned under point 23, the Foundation and Commissioner Moedas have agreed that his precise assignment would not directly concern the Institute of Science or investment responsibilities.
34. The Committee does therefore not see any legal or ethical impediments to accepting the function of executive member of the Board of Trustees after the term of office.
35. However, a number of restrictions should be either recalled or set out explicitly in the Commission decision based on Article 11(3) of the Code of Conduct to ensure the compatibility of the activity with the obligations applying after the end of the mandate. This applies in particular to future decisions of the Commission on the allocation of funds.
36. In this regard, it seems appropriate to recall the general prohibition resulting from Article 11(4) of the Code of Conduct to lobby Members of the Commission or their staff on behalf of the Gulbenkian Foundation, on matters for which the Commissioner was responsible, for a period of two years after ceasing to hold office applies. In view of the close link between the Commission and the Executive Agencies, this prohibition should be extended in the present case to the staff of the Executive Agencies for which the Directorate-General for Research and Innovation (DG RTD) is a 'parent DG' (Executive Agency for SMEs - EASME, European

Research Council Executive Agency - ERCEA, Innovation and Networks Executive Agency - INEA and Research Executive Agency - REA).

37. This prohibition to lobby (i.e. the promotion of certain interests with the objective to influence the formulation or implementation of policy or legislation, or the decision-making process of the Commission directly or indirectly) does not affect any encounters at public events or general exchanges of, and on, publicly available information with Members of the Commission or Commission staff.
38. Moreover, the Commission decision should recall that, according to Article 339 TFEU, Members of the Commission are 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.
39. Should any activity of the Foundation be related to such protected information and the Commissioner be involved in this activity, he should recuse himself from the decision and document his decision. This applies in particular with regard to the investments of the Foundation.
40. Moreover, the decision should recall that, according to Article 11(1), second sentence of the Code of Conduct, a former Member continues to be bound by the duties of collegiality and discretion, as laid down in Article 5 of the Code, with respect to the Commission's decisions and activities during his or her term of office.
41. The Committee concludes that the envisaged activity would be compatible with Article 245 TFEU under the above-mentioned conditions.

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