

Opinion
of the
Independent Ethical Committee
established
by the European Commission
11 May 2021

Subject: Request for an opinion on former Commissioner Hogan’s post-term of office activities as regards his activities for the start-up company ‘Proof of Trust’

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

Procedure

1. On 17 March 2021, 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 Phil Hogan’s post-term of office activity as regard his advising activities for the company ‘Proof of Trust’, in order to ensure compliance with Article 245 of the Treaty on the Functioning of the European Union.
2. On 26 April 2021, Mr Allan Rosas, member of the Independent Ethical Committee, informed the Secretary-General of the Commission and the members of the Committee about his decision to recuse himself from the consultation of the two clients - ‘Proof of Trust’ and ‘Vodafone’ - of Mr Hogan consultancy firm ‘Hogan, Strategic Advisory Services’. He referred to the fact that, one of the two clients is ‘Vodafone’ and that a member of his family is one of the senior managers of ‘Vodafone Belgium’. He declared that neither he nor his family member have any personal interest in relation to former Commissioner Hogan providing advisory services to the ‘Vodafone’. Nevertheless, his family member’s position in ‘Vodafone Belgium’ could create a risk of perception for the committee’s impartiality and independence work. Given that the ‘Vodafone’ and ‘Proof of Trust’ cases were subject of a deliberation at the same time by the Committee, Mr Rosas consequently participated neither in the deliberations on these files nor in the adoption of the present opinion.

3. On 4 May 2021, the Committee delivered an opinion on the compatibility of former Commissioner Phil Hogan's post-term of office activity as regards his consultancy company 'Hogan, Strategic Advisory Services', in order to ensure compliance with Article 245 of the Treaty on the Functioning of the European Union.
4. The Committee has taken good note that the company 'Proof of Trust' will be a client of the consultancy company of former Commissioner Hogan, 'Hogan, Strategic Advisory Services'. In this context, this opinion should be read in conjunction with the opinion of the Committee on Mr Hogan consultancy company 'Hogan, Strategic Advisory Services' delivered on 4 May 2021. Therefore, the conditions and restrictions issued in this opinion will supplement those of the opinion of 4 May 2021.

Facts

General information

5. On 1 February 2020, former Commissioner Hogan informed the Commission that he intended to establish an independent consulting company 'Hogan, Strategic Advisory Services', and have the intention to carry out consultancy projects for the company 'Proof of Trust'.
6. According to publicly available information, 'Proof of Trust' is an Irish registered start-up company interested in the European Union digital agenda, artificial intelligence, fraud detection and trade agreement assurance.
7. 'Proof of Trust' company is integrated into blockchain technology and has selected IBM company to provide services for dispute resolution and contract validation. According to publicly available information, it 'has the only globally patented protocol specifically designed to act as an assurance layer; validating data and preventing invalid or insecure smart contracts from executing.' It also 'gives businesses and governments the protection and peace of mind they need to flourish, bringing instant trust to transactions across the globe and resolving contractual disputes in a fast, fair, and cost-effective way.'
8. 'Proof of Trust' is a patented contract validation and issue resolution technology company. As regards contract validation, 'Proof of Trust' delivers an anti-collusion algorithm to enable effective and trustworthy use of blockchain technology. It does so by ensuring the authenticity of data put on the blockchain. With regard to resolution technology, it proposes services for disputes resolution that is extra judicial and extra jurisdictional across the commercial and government sectors. If a contractual dispute is triggered, the 'Proof of Trust' application selects anonymous individuals from anywhere in the world to adjudicate on disputes. The algorithm selects individuals with relevant expertise and ensures they are unable to communicate and compromise proceedings, while simultaneously shielding them from influence by either participant involved in the dispute.

9. There is no publicly available information on ‘Proof of Trust’ status and governing structure with the exception of few elements on the advisory board, the strategic partners and the executive team of this company.

Funding

10. According to the Financial Transparency System of the European Commission, ‘Proof of Trust’ company did not received EU funds directly administered by the Commission departments, its staff in the EU delegations, through executive agencies or of the European Development Fund.

Links of ‘Proof of Trust’ with the European Commission

11. ‘Proof of Trust’ is registered in the Joint Transparency Register of the European Parliament and the Commission since 10 November 2020. To date, no meeting was held with Commission’s representatives.

Former Commissioner Hogan’s position

12. Former Commissioner Hogan outlined in his notification to the European Commission that ‘Proof of Trust’ ‘is seeking advisory services (...). It is interested in understanding the working method and decision-making processes of the European institutions (...).’
13. Finally, former Commissioner Hogan specified that he ‘will be mindful of the compliance requirements of the Code of Conduct for Commissioners under article 245 of TFEU and the need to respect confidentiality on all matters relating to (his) mandates’. He has undertaken to ‘not engage with any activities on behalf of (his consulting company) that involves agriculture or any matter relating to (his) 9 months term of office as Commissioner for Trade.’

Legal context

14. 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.

15. Article 339 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.

16. 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.

17. 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.

18. 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.

19. 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

20. 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, which develops these obligations in more detail.
21. The balance must be proportionate. It can be achieved by imposing restrictions and conditions on a new professional activity where those restrictions and conditions are more proportionate than a simple prohibition or authorisation.
22. The Code of Conduct provides the framework in which the Commission has to establish this balance between the rights and obligations of its Members with regard to concrete, new activities. This balance cannot be established based on an automatic scheme and requires a case-by-case approach, which takes into account the context and particularities of each individual case.
23. In the present case, the Commission seeks an opinion on the restrictions and conditions which should apply to the activity notified by former Commissioner Hogan as regards the consulting activity he intends to accept from the company 'Proof of Trust'.
24. The Committee notes that former Commissioner Hogan will advise 'Proof of Trust' on 'the working method and decision-making processes of the European institutions'.
25. As part of the overall analysis of this file, the Committee has examined the profile of the different team's members working for 'Proof of Trust' and has come to the conclusion that some members are very knowledgeable in European Union law and have already an expertise of the working method and decision-making processes of the European institutions.
26. Therefore, the Committee is of the opinion that former Commissioner Hogan advisory functions could constitute a potential risk that specific information or insights could be relevant for business decisions of 'Proof of Trust', contrary to mere information on the decision-making process already known by the latter. This risk can concern information that former Commissioner Hogan obtained during his mandate in areas of his portfolio, but also areas in which he was involved through his collegial responsibilities.

27. In that respect, the Committee recommends that the European Commission's decision should emphasise former Commissioner Hogan commitment to respect the obligations set out in the Treaty and in the Code of Conduct. The Commission should also explicitly spell out in its decision a number of relevant provisions and restrictions in order to ensure the compatibility of the activity with the obligations applying after the end of the mandate.
28. The Commission decision should first highlight the need to have a prudent approach when providing advice to the company 'Proof of Trust'. In this regard, 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. Hence, the Commission decision should clarify that this provision is not limited in time and will apply to Mr Hogan even after the end of the two years period following the end of his mandate at the European Commission.
29. Moreover, the Commission decision should underline the importance of complying with the duties of collegiality and discretion, as laid down in Article 11(1) and Article 5 of the Code, with respect to the Commission's decisions and activities during former Commissioner Hogan's term of office. This includes not only refraining from disclosing what was said at meetings of the Commission, but also a general duty to apply a high sense of discretion with regard to the use of information and insights that former Commissioner Hogan obtained during his mandate, be it within his portfolio responsibilities or within the College. Therefore, Mr Hogan should not exploit any insights of a confidential or sensitive nature in policy, strategy or internal processes that he obtained during his term of office for the benefit of 'Proof of Trust'.
30. The Committee notes that 'Proof of Trust' has a core interested in the European Union digital agenda and artificial intelligence but also in the other domains of EU affairs¹ such as 'Agriculture and Rural Development' and 'Trade', which are topics directly linked to Mr Hogan former portfolio when he was a member of the European Commission.

¹ The Joint Transparency Register of the European Parliament and the Commission mentions that 'The organisation's fields of interests are: Agriculture and Rural Development, Banking and financial services, Borders and Security, Budget, Business and Industry, Communication, Competition, Consumers, Digital economy and society, Economy, finance and the euro, Education and training, Energy, External Relations, Foreign affairs and security policy, Fraud prevention, Humanitarian aid and civil protection, Institutional affairs, International co-operation and development, Justice and Fundamental Rights, Maritime affairs and fisheries, Migration and asylum, Public Health, Regional Policy, Research and innovation, Single market, Sport, Taxation, Trade, Trans-European Networks and Transport'.

31. Therefore, the Committee strongly advises the Commission to recall the provisions of Article 11(4) of the Code of Conduct in its decision. Indeed, this article provides that ‘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 own portfolio for a period of two years after ceasing to hold office’. The Commission decision should clarify that the term ‘lobbying’ includes indirect lobbying in the sense of influencing the Commission ‘through the use of intermediate vectors such as media, public opinion, conferences or social events, targeting the EU institutions’ as set out in paragraph 7 of the Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation and applies independently of the location of the employment. This would also cover any potential activity with a view to obtaining EU funding. The prohibition to lobby does not affect participation in public events or general exchanges of, and on, publicly available information with Members of the Commission or Commission staff.
32. As such, former Commissioner Hogan must not perform such lobbying activities towards the Commission, i.e. the Members of the current Commission and the staff of the Commission for a duration of two years after the end of his term of office, i.e. until 26 August 2022. The Committee considers that former Commissioner Hogan should not contact for ‘Proof of Trust’ the services previously under Mr Hogan’s portfolio responsibilities. This affects namely the Directorate-General for Agriculture and Rural Development and the Directorate-General for Trade.
33. In addition, the Committee recalls that, as the provisions of the Treaties are not limited in time, the general duties of integrity and discretion established by Article 245 continue to apply even after two years. The Commission should therefore recall in its decision that these duties continue to apply to any possible contacts with the European Commission and its staff on behalf of the ‘Proof of Trust’, even if Article 11(4) of the Code of Conduct does not apply anymore.
34. Finally, the decision should recall that, in case former Members have a doubt with regard to their obligations, they must 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. Therefore, based on the above-mentioned information and considerations, the Committee considers that the envisaged activity would be compatible with Article 245 TFEU, subject to the respect of the above-mentioned the conditions specified in this opinion.

Dagmar Roth-Behrendt

Heinz Zourek