

Opinion
of the
Independent Ethical Committee
established
by the European Commission
12 February 2021

Subject: Request for an opinion on former Commissioner Elżbieta Bieńkowska’s envisaged post term of office activity as ‘Commissioner’ in the ‘Commission on the Future of Mobility’ of the organisation ‘SAFE’

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 28 September 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 Elżbieta Bieńkowska’s envisaged activities as ‘Commissioner’ in the ‘Commission on the Future of Mobility’ of the organisation ‘SAFE’ with Article 245 of the Treaty on the Functioning of the European Union.
2. On 20 October 2020, the Independent Ethical Committee indicated to the Commission that, in order to be able to carry out its assessment under Article 11 of the Code, it would require additional information and details about former Commissioner Elżbieta Bieńkowska’s envisaged post-term of office activity.
3. On 26 October 2020, the Secretary-General asked former Commissioner Elżbieta Bieńkowska for such additional information, to which she replied on 24 November 2020.

Facts

General information

4. According to publicly available information, the ‘Commission on the Future of Mobility’ is a new initiative established by the organisation SAFE (Securing America’s Future Energy) aiming to address global transportation policies.

On the organisation SAFE

5. SAFE is a non-profit, non-partisan organisation founded in 2006 in the United States of America by Robbie Diamond, its current President and CEO, and acts as an independent organisation. SAFE has historically been funded primarily by foundations and individual philanthropists, with some support from companies whose values align with SAFE. Significant foundation support has come from those that want to promote advanced-fuel vehicle adoption (specifically electric vehicles) and see alignment in their environmental goals.
6. According to information made publicly available, SAFE's field of activities encompasses energy, economy, national and global security, transportation and mobility. SAFE stated goals are twofold. It aims to 'unite prominent military and business leaders to develop and advocate for policies that improve America's energy security' and to combat the country's dependency on oil. In addition, the organisation advocates for the developing of transformative transportation and mobility technologies. SAFE has already launched four initiatives related to its fields of activity and created the SAFE Energy Security Leadership Council, a group of business leaders and retired military officers dedicated to combatting the US dependency on oil. Members of this Council include CEOs of global corporations.

On the 'Commission on the Future of Mobility'

7. According to information provided by former Commissioner Elżbieta Bieńkowska, the 'Commission on the Future of Mobility' is a new research and advocacy coalition initiated by SAFE, and will be officially launched in February 2021. The 'Commission on the Future of Mobility's' general long-term goal is to 'reshape global transportation policy to improve safety, opportunity and efficiency'. The 'Commission on the Future of Mobility' will consequently work on topics related to mobility, such as security, safety, economics, environmental protection and access to transportation.
8. In order to reach these objectives, the 'Commission on the Future of Mobility' first aims to conduct 'useful research on key questions' related to the transportation and mobility sectors and, in a second phase, 'recommend common sense solutions that may be of use to industries seeking to form best practices guidelines or to inform policymakers'.
9. Former Commissioner Elżbieta Bieńkowska specified that the 'Commission's' activities would primarily focus on research over the next 24 months, in order to 'fill the gaps in existing understanding of cross-cutting transportation topics'. The 'Commission' will formally launch on February 2021, with informal virtual panels taking place through the fall 2021. According to her notification, the area of research could encompass 'the impact of goods delivery', 'the role of drones and vertical take-off and landing systems in the mobility systems', 'the intersection of land use and equity and the role of transportation', 'the economic impacts of low emission zones in urban areas', 'electric-vehicle battery and the electrification of the global fleet', 'a

reframing of transportation safety’, ‘policies and the changing business of mobility’ and ‘transportation infrastructure funding’. Only once the research phase completed, the ‘Commission’ will start ‘advocacy outreach to various levels of government globally’.

The organisational structure of SAFE and the ‘Commission on the Future of Mobility’

10. According to information made publicly available by SAFE, the organisation relies on a structure composed of a President and CEO, Robbie Diamond, a Vice-President for Operations and Finance, a Vice-President of Development, a Board and a team of ‘four-star retired military officers, companies CEOs and expert staff’.
11. Former Commissioner Elżbieta Bieńkowska notified that the ‘Commission on the Future of Mobility’ would be composed of non-corporate and corporate ‘Commissioners’. To this date, the ‘Commission’ confirmed the participation of 3 non-corporate ‘Commissioners’, who are the Chair of the California Air Resources Board, someone from the American National Academy of Sciences and someone from the Bipartisan Policy Centre. In addition, CEOs of 7 corporations will act as corporate ‘Commissioners’, namely from Ford Motor Company, TransDev, Qualcomm, FedEx, Cox Automotive Group, Hyundai Motor Company and Goodyear.
12. On the matter of staffing, in addition to an Executive Director, the ‘Commission’ plans to hire a Director of policy and Research and 5 researchers with experience relevant to the fields of studies which will compose the ‘Commission’ Research Team.
13. Former Commissioner Elżbieta Bieńkowska notified that, as the ‘Commission on the Future of Mobility’ is still in a set-up phase, the process of recruiting corporate and non-corporate ‘Commissioners’ is still ongoing.

Former Commissioner Elżbieta Bieńkowska’s position on the ‘Commission on the Future of Mobility’

14. Former Commissioner Elżbieta Bieńkowska informed the European Commission that she was invited to join the ‘Commission on the Future of Mobility’ as a non-corporate ‘Commissioner’.
15. In this position, during the first phase of the ‘Commission’s’ work, Ms Elżbieta Bieńkowska would be expected to meet with other members of this ‘Commission’ twice a year, in order to give feedback to the Executive Director and the Research Team on their ongoing research. She would be asked to provide ‘high-level feedback and insight on the proposals shared by the Research Team’ to ensure that ‘the outcome of the research is thorough and addresses issues that are of current concern’. The second phase will start once research is complete and findings are published. During this phase, ‘Commissioners’ are expected to ‘determine areas of mutually

desirable advocacy’ and to ‘support advocacy according to their own area of expertise’. However, according to information provided by Ms Elżbieta Bieńkowska, non-corporate ‘Commissioners’ are not required to engage in advocacy activities ‘if they are unable’.

16. Additionally, Ms Elżbieta Bieńkowska assured the European Commission that ‘Commissioners’ who are ‘current or former regulators are not expected to share confidential’ and sensitive information acquired during their former mandate.
17. Former Commissioner Elżbieta Bieńkowska informed the European Commission that her travel expenses would be covered in order to attend meetings occurring in person. There is no other pecuniary compensation for participating in the ‘Commission’.

Funding of SAFE and the ‘Commission on the Future of Mobility’

18. According to information provided by former Commissioner Elżbieta Bieńkowska, SAFE is funded by donations and grants from foundations and individual philanthropists, as well as individual companies whose values align with those of SAFE. Among those organisations, former Commissioner Elżbieta Bieńkowska referred in her notification to the Oak Foundation, William & Flora Hewlett Foundation, Hewlett Foundation, Energy Foundation, ClimateWorks, A Chance Fund and the Stuart Family Foundation.
19. Former Commissioner Elżbieta Bieńkowska informed the European Commission that 70% of the funding for the ‘Commission on the Future of Mobility’ would be paid by the 7 corporate ‘Commissioners’ listed above in paragraph 12 of this opinion. Foundations would pay for the remaining 30%. Former Commissioner Elżbieta Bieńkowska informed the European Commission that the process of fundraising is still ongoing.
20. According to the Financial Transparency System of the European Commission, neither SAFE nor the ‘Commission on the Future of Mobility’ received EU funds directly administered by the European Commission departments, its staff in the EU delegations, through executive agencies or of the European Development Fund.

Links of the organisation SAFE and the ‘Commission on the Future of Mobility’ with the European Commission

21. Neither SAFE nor the ‘Commission on the Future of Mobility’ are currently registered in the Joint Transparency Register of the European Parliament and European the Commission.

Legal context

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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

28. 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 of the Treaty on the Functioning of the European Union and the Code of Conduct for Members of the European Commission, which develops these obligations in more detail.
29. Former Commissioner Elżbieta Bieńkowska notified the European Commission of her intention to engage in a post-mandate activity as a non-corporate ‘Commissioner’ within the ‘Commission on the Future of Mobility’ initiated by the organisation SAFE. The role of this ‘Commission’ is in the next two years to conduct research on key questions related to mobility and transportation and to develop new best practice guidelines and policy recommendations. This research would focus on ‘the impact of goods delivery’, ‘the role of drones and vertical take-off and landing systems in the mobility systems’, ‘the intersection of land use and equity and the role of transportation’, ‘the economic impacts of low emission zones in urban areas’, ‘electric-vehicle battery and the electrification of the global fleet’, ‘a reframing of transportation safety’, ‘policies and the changing business of mobility’ and ‘transportation infrastructure funding’. In her new activity, former Commissioner Elżbieta Bieńkowska would first be expected to meet with other members of this ‘Commission’ twice a year in order to provide high-level feedback and insights on ongoing researches.
30. While Ms Elżbieta Bieńkowska’s intended activity is directly linked to her former portfolio when she was a member of the European Commission, the Committee does not consider it to represent a serious risk with regard to the interests of the Commission and the European Union. Ms Elżbieta Bieńkowska would not be remunerated for her position and would only meet twice a year with other members of the ‘Commission on the Future of Mobility’. Furthermore, the envisaged studies or field of research are not linked to a specific interest of an individual stakeholder, and seem globally in line with the European Commission’s policies and objectives.
31. However, the position of non-corporate ‘Commissioner’, through its element of ‘providing high-level feedback’, may constitute by its nature a risk that specific information or insights that former Commissioner Elżbieta Bieńkowska obtained during her mandate could be relevant to the work of the ‘Commission on the Future of Mobility’. In that respect, the Committee recommends that the European Commission’s decision should emphasise that former Commissioner Elżbieta Bieńkowska must respect the obligations set out in the Treaty and in the Code of Conduct and not share any sensitive information acquired during her term of office. The Committee would have considered it appropriate if the former Commissioner had provided assurances in this regard already in her replies to the written questions of the Committee.

32. Hence, the Committee recommends that the Commission should recall and explicitly spell out in its decision a number of restrictions in order to ensure the compatibility of Ms Elżbieta Bieńkowska post-term of office activity with the obligations applying after the end of the mandate.
33. The Commission should first ensure that former Commissioner Elżbieta Bieńkowska is fully aware of all her obligations as former Member of the Commission and recommend emphasising the need to have a prudent approach when providing ‘high-level feedback’ and advice to the ‘Commission on the Future of Mobility’ and the organisation SAFE.
34. In this regard, the Commission decision should explicitly 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 Ms Elżbieta Bieńkowska even after the end of the two years period following the end of her mandate at the European Commission.
35. Moreover, the Commission decision should underline the importance for Ms Elżbieta Bieńkowska 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 her 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 Elżbieta Bieńkowska obtained during her mandate, be it within her portfolio responsibilities or within the College.
36. Based on this information, the Committee does not see an incompatibility with Article 245 TFEU as long as former Commissioner Elżbieta Bieńkowska strictly respects the general obligations applying to former Members of the Commission.
37. As from 2023, the ‘Commission’ plans to engage in advocacy activities. These advocacy activities would occur after the end of the two years cooling-off period imposed by Article 11 of the Code of Conduct for Members of the Commission on former members of the European Commission. Moreover, Ms Elżbieta Bieńkowska guaranteed that non-corporate ‘Commissioners’ are not expected to pursue any advocacy if their former positions prevent them to do so. She declared that the ‘Commission on the Future of Mobility’ would work to ensure that the ‘Commissioners’ who are current or former government officials will respect any boundaries required by their current or former roles.
38. However the Committee strongly advises the Commission to recall the provisions of Article 11(4) of the Code 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'. 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.

39. Given that the 'Commission on the Future of Mobility' is currently not registered in the Joint Transparency Register of the European Parliament and the European Commission, the Commission decision should ask former Commissioner Elżbieta Bieńkowska to ensure the registration of this 'Commission' in the Joint Transparency Register. In addition, the Commission should insist that this registration must be concluded before starting any activity, which should be a prerequisite condition to a positive Commission decision..
40. 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 'Commission of the Future of Mobility', even if Article 11(4) of the Code of Conduct does not apply anymore.
41. Finally, the Commission 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.
42. Therefore, based on the above-mentioned information and considerations, the Committee concludes that the envisaged activity would be compatible with Article 245 TFEU, subject to the full and strict respect of the above-mentioned commitments and the conditions specified in this opinion.

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